Americans with Disabilities Act (ADA) Information

Materials can be provided in alternative formats by calling the ADA Compliance Manager at 360-705-7097. Persons who are deaf or hard of hearing may contact that number via the Washington Relay Service at 7-1-1.

Title VI Notice to the Public

It is Washington State Department of Transportation (WSDOT) policy to ensure no person shall, on the grounds of race, color, national origin, or sex, as provided by Title VI of the Civil Rights Act of 1964, be excluded from participation in, be denied the benefits of, or be otherwise discriminated against under any of its federally funded programs and activities. Any person who believes his/her Title VI protection has been violated may file a complaint with WSDOT’s Office of Equal Opportunity (OEO). For Title VI complaint forms and advice, please contact OEO’s Title VI Coordinator at 360-705-7098 or 509-324-6018.

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Foreword

The Consultant Services Manual was developed by the Washington State Department of Transportation (WSDOT) to provide guidance in the acquisition of architectural and engineering (A&E) and other professional services in support of project and program delivery when those services are not available from public resources.

The policies and procedures covered herein are applicable to WSDOT project and program managers and their support personnel. This manual is also applicable to those subagencies of the state, such as cities, counties, and ports, that receive federal-aid highway and other United States Department of Transportation funding from WSDOT.

The procedures in this manual are mandatory for all WSDOT offices regardless of circumstances or the critical nature of the services required. The policies and procedures are based on state and federal regulations, which are covered herein. Adherence to these policies and procedures is necessary to ensure compliance with state and federal laws and to maintain the public trust. The HQ Consultant Services Office (CSO) will seek AG written advice when considering policies or procedures that may conflict with state or federal requirements.

The manual includes the approved Disadvantaged Business Enterprise (DBE) participation plan and implementation process developed jointly with the Federal Highway Administration (FHWA), CSO, and the WSDOT Office of Equal Opportunity (OEO). The DBE plan and implementation process ensures an opportunity for minority-owned, women-owned, and veteran-owned businesses to obtain an equitable share of the work for which consultants are engaged.

WSDOT adheres to the requirements of 49 CFR 18 known as the “Common Grant Rule.” This manual serves as the delegation of authority by FHWA to WSDOT under the approved procedures outlined in 23 CFR 172 for those consultant contracts that include federal funding. All records for federally funded projects are available for FHWA review at any time.

The following types of contracts or agreements are NOT covered by this manual:

- Administrative or purchased services
- Attorney General agreements
- Finance and administration services contracts/MIS agreements
- Research agreements using public universities
- Information technology (IT) agreements
- Staff development/training contracts

Contact the appropriate office or department for assistance in those areas. If you are in doubt as to which office may be responsible for the type of services you need, contact the CSO before talking with any consultant, vendor, or contractor.

Revising and updating the Consultant Services Manual is an ongoing process. Please report errors, omissions, or suggestions to the CSO: www.wsdot.wa.gov/business/consulting

/s/ Pasco Bakotich III
Pasco Bakotich III, P.E.
State Design Engineer
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Chapter 100 WSDOT Consultant Services Manual

100.01 Introduction

This Consultant Services Manual establishes policy for acquiring consultant services that support all phases of transportation project delivery. The manual is intended to provide direction and guidance to those who seek to acquire consultant services and those who have a role in managing and administering consultant services agreements and contracts.

The policies contained herein are governed by the WSDOT Assistant Secretary Engineering & Regional Operations Chief Engineer. Any deviations or variances must be approved by the Assistant Secretary Engineering & Regional Operations Chief Engineer.

The policies outlined in this manual are mandatory for WSDOT staff and are based on federal and state laws and regulations. The most significant components of the legal framework are:

- 23 CFR, Highways
- 48 CFR 31, Federal Acquisition Regulations System – Contract cost
- 49 CFR 18, Federal-aid highways – Common grant rule
- 49 CFR 26, Disadvantaged Business Enterprise (DBE)
- 40 USC 1101–1104, Brooks Act
- Chapter 39.26 RCW, Professional Service contracts
- Chapter 39.80 RCW, Contracts for architectural and engineering services

The manual contains the policies and procedures for architectural and engineering (A & E) and related consultant services acquisition as prescribed in 23 CFR 172 (see Appendix A) and 49 CFR 18.36(g)(3). Approval by the Federal Highway Administration (FHWA) of these procedures is required in order to receive, or continue to receive, participating federal-aid highway funds in design efforts that lead to participating construction projects. These are the same procedures followed by WSDOT in acquiring consultant services when federal-aid funds are not involved.

WSDOT is subject to FHWA approvals for the following procedures:

- Competitive negotiation (23 CFR 172.5(a)(1))
- Simplified acquisition (23 CFR 172.5(a)(2))
- Noncompetitive negotiation (23 CFR 172.5(a)(3))
- Disadvantaged Business Enterprise (DBE) (23 CFR 172.5(b))

Individual project approvals are required from FHWA for the following:

- All major projects (as defined in 23 USC 106(h)).
- Federally funded projects where consultants are in a management role (23 CFR 172.7(b)(5)).
The HQ Consultant Services Office (CSO) is responsible for the application of the policies and procedures contained in this manual. The CSO is also responsible for keeping the manual current with state and federal regulations, providing training to those who use it, and answering questions pertaining to its content.

The federal regulations cited above and throughout the manual are equally applicable to WSDOT and its subagencies, including the cities, counties, ports, and other subagencies that are recipients of United States Department of Transportation funds through WSDOT. Local Programs (LP) administers, oversees, and provides guidance to those entities through the LP Office and the *Local Agency Guidelines* (LAG) manual.

### 100.02 Understanding Consultant Services Agreements

The CSO administers all agreements classified as “Y” agreements (see Chapter 800). These agreements are typically related to project delivery and can be categorized as either Professional Services (see Chapter 200) or A&E services (see Chapter 400).

A fundamental difference between the two types of agreements is:

- When advertising for and selecting Professional Services consultants, cost may be a consideration during the competitive selection process.
- For A&E agreements, cost is not considered until the negotiation phase. At that point, cost becomes part of the negotiation process.

The Department of Enterprise Services (DES) reviews and approves Professional Services agreements and provides input on the specific types of services that fit within that classification.

Consultant services may be obtained through several different procurement processes. Processes include various competitive selection procedures for project specific agreements and task orders for specific scopes of work, and sole source requests.

The CSO, located at WSDOT’s Headquarters, is the hub for management and administration of the consultant services agreements process. The office is supported by Area Consultant Liaisons who operate in the regions and HQ divisional programs to provide support throughout the contracting process.
110.01 Introduction

The Washington State Department of Transportation adheres to the statutory intent established in Chapter 39.26 RCW when acquiring and managing agreements for Professional Services provided by consultants. The department follows a policy of open competition for all Professional Services agreements unless exempted by law. In addition, the department provides all required information and follows filing and reporting rules established by the Department of Enterprise Services in order to ensure there is opportunity for legislative, executive, and public review of all Professional Services agreements, as well as an appropriate accounting of expenditures.

The WSDOT also adheres to the statutory intent of Chapter 39.80 RCW and 23 CFR 172 when acquiring and managing agreements for A&E services provided by consultants. The WSDOT retains and develops the organizational capacity and resources to provide oversight and other services related to the procurement, management and administration of these contracts. It is WSDOT’s policy to solicit for and secure the services of professionals for both Professional Services contracts and A&E contracts, whenever needed, to the best and most efficient operation of the state. Consultant services acquisition will be in accordance with state and federal law and applicable regulations, as found in the Appendices A (23 CFR 172), C (USC Title 40, the Brooks Act), D (Chapter 39.80 RCW) and E (Chapter 39.26 RCW).

The WSDOT will also administer federal sub-awards in accord with State laws and as specified under 2 CFR part 1201, under the Local Programs section of the WSDOT and providing their own manual for such administration.

110.02 Open Competition

WSDOT will publicly announce, in advance, the department’s requirement for Architectural and Engineering and Professional Services contracts. WSDOT will negotiate with consultants for Professional Services and A&E contracts on the basis of demonstrated competence and qualifications for the type of services required at fair and reasonable prices to the state, in accordance with Chapters 39.26 RCW and 39.80 RCW.

It is WSDOT’s policy to fully comply with and meet the intent of Chapters 39.26 and 39.80 RCW as well as the federal rules and regulations for open competition in the acquisition of Professional Services and A&E contracts. The circumstances under which a contract may be awarded by noncompetitive negotiations are limited to the following:

• The service is available from a single source only (see Chapter 440).
• There is an emergency that will not permit the time necessary to conduct competitive negotiations (see Chapter 600).
• After solicitation of a number of sources, it is determined that competition is inadequate (see Chapter 440).
For the purposes of this policy statement, the contracting authority referred to in the Revised Code of Washington is the WSDOT Assistant Secretary Engineering & Regional Operations Chief Engineer.

110.03 Fair and Open Competition
WSDOT will provide for fair and open competition among consultants to the highest degree possible, on the basis of their qualifications and demonstrated past performance. WSDOT will establish processes that ensure all firms have the full, unhindered opportunity to compete for and potentially be awarded contracts in accordance with state and federal laws, some of which are quoted in full in Appendices A, C, D, and E.

110.04 Policy and Procedures Manual
WSDOT will establish a policy and procedures manual, owned and maintained by the CSO, which clearly describes the processes and criteria to acquire consultant services by WSDOT; administer the contracts awarded for consultant services; close out and evaluate the work performed by the consultant; and maintain the required documentation of contracts for consultant services in accordance with federal and state law and with state and department guidelines.

110.05 Debriefing
For firms that respond to Requests for Qualifications or Requests for Proposals related to specific work or specific projects, WSDOT will provide a debriefing to the extent required by federal and/or state law. See Appendix K for debriefing and protest procedures and disclosure of consultant information.

110.06 Fair and Impartial Treatment
WSDOT will administer the contracts for services in a professional and efficient manner, providing fair and impartial treatment to all vendors while maintaining the best interests of the state. Consultants and subconsultants will be paid promptly in accordance with RCW 39.76.011. Consultants will be fairly evaluated for the work they perform and provided meaningful feedback and the opportunity to redress any issues. WSDOT will close out contracts in a timely manner, protecting all appropriate records and documentation. WSDOT will seek to avoid contract claims through strong change management processes and will ensure all contractor claims are addressed quickly and fairly.

110.07 Measurable Evaluations
WSDOT will perform measurable evaluations of the work of consultants who enter into A&E contracts and Professional Services contracts directly related to projects with the department. These evaluations will be in accordance with state and federal regulations.

Evaluations will be performed for each A&E or Professional Services contract entered into between a consultant and the state. Evaluations will be performed in a manner that provides meaningful feedback to the consultants, while providing WSDOT with documented performance measurements, which will aid in future determinations of a firm’s qualifications to perform under similar circumstances. The CSO will retain all
final performance evaluations for each consultant for a minimum of three years after the date of the completed evaluation.

110.08 Emergencies

In the event of an emergency, those within WSDOT with the authority to do so will act in the best interests of the state. An “emergency” is defined by state law as a set of unforeseen circumstances beyond the control of the agency that either (1) present a real, immediate threat to the proper performance of essential functions, or (2) may result in material loss or damage to property, bodily injury, or loss of life if immediate action is not taken. This policy statement will not relieve anyone acting in accordance with this policy from complying with applicable laws limiting emergency expenditures. See Chapter 600.

110.09 Nondiscrimination

WSDOT will not tolerate discrimination in any form in its hiring and contracting practices. When contracting for A&E or Professional Services, WSDOT will not exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract on the basis of race, color, sex, or national origin. Further, in administering its Disadvantaged Business Enterprises program, WSDOT will not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, sex, or national origin.

In addition, WSDOT will not accept any form of discrimination in the hiring or contracting practices of its contractors. WSDOT has specific language in its contracts regarding the department’s (1) nondiscrimination policy, (2) expectation that any contractor hired by WSDOT will attest to and affirm having a policy of nondiscrimination on the basis of race, color, sex, or national origin, and (3) ability to verify said policy through random interviews with individual employees or subcontractors of the contractor.

110.10 Ethical Standards and Behavior

Throughout the process of acquiring and managing consultant services, those performing the services on behalf of WSDOT will adhere to, and comply with, the ethical standards set forth in state and federal law. It is the department’s expectation that both its employees and its contractors will follow a code of ethical behavior in professional and business activities. In addition, WSDOT has the responsibility to determine whether a potential organizational conflict of interest exists in a contracting process and will take necessary action to avoid, neutralize, or mitigate such conflicts. See Appendices M and P.

110.11 Public Access to Proposals

All requests for disclosure of procurement documents shall be done on appropriate “Request for Public Disclosure” forms and submitted to the WSDOT Records and Information Services Office. For additional information, see 550.02.02 RCW.
Chapter 120

Roles and Responsibilities

120.01 Introduction

Several distinct sets of responsibilities are involved in operating a complex, high-risk government contracting program such as the consultant services program managed by the HQ Consultant Services Office (CSO). The primary functional areas of the CSO include:

1. **Agreement procurement**: The process of acquiring services under contract, including solicitation, selection, negotiation, and execution of new agreements.

2. **Agreement administration**: The process of filing, tracking, and supplementing agreements; applying internal controls; managing documentation; providing technical assistance and support to internal and external customers; and ensuring compliance with contractual terms and conditions for the duration of a project through the contract’s closeout or termination.

3. **Agreement management**: Managing the contractual agreement and the relationship with the contractor throughout the duration of a project, and solving problems.

120.02 CSO Responsibilities and Functions

In fulfilling its responsibilities, the CSO performs the following functions:

- Policy management.
- Training and communications.
- Compliance reviews and audit liaison.
- Disadvantaged Business Enterprise program management and reporting.
- American Council of Engineering Companies/WSDOT committee representation.
- Contract solicitation, acquisition, final assembly, and administration.
- Rate-setting and negotiation.
- Technical review of engineering-related contract elements.
- Debriefing and dispute resolution.
- Establishment and monitoring of operational procedures.
- Development/management of contract tracking and information systems.
- Legislative analysis.

In the role of chief contracting officer, the CSO manager:

- Under delegated authority from the Assistant Secretary Engineering & Regional Operations Chief Engineer, oversees and provides all CSO functions listed above.
- Implements the *Consultant Services Manual* and all CSO operations.
- Signs and executes all agreements acquired and administered by the CSO.
- Represents the CSO in consultant selection and approves final recommendations from selection teams.
• Serves in a decision-making role in resolving disputes, claims, conflicts of interest, and protests.
• Directs the day-to-day operations of the CSO, ensuring the administrative support and guidance in the acquisition and management of consultant services agreements is of high quality, is timely, and meets customers’ needs.
• Monitors and promotes adherence to federal and state statutes and rules that govern consultant services agreements.
• Coordinates and ensures training is provided to the area consultant liaisons and other internal customer groups regarding agreement processing, including selection, negotiation, agreement management, internal controls, and ethical standards.
• Provides program information and reports to the WSDOT Secretary of Transportation, the Assistant Secretary, Engineering and Regional Operations, and other WSDOT executive staff; the Office of Equal Opportunity; the Federal Highway Administration and other federal agencies; the Washington State legislature; other state agencies; and the general public regarding WSDOT’s use of consultant agreements.
• Communicates and collaborates with the consultant community, primarily through activities related to the American Council of Engineering Companies – Washington.

120.03 Responsibilities and Functions of Area Consultant Liaisons

In the regions and programs, the Area Consultant Liaisons (ACLs) carry out duties related to agreement administration and management. The ACLs have a matrix relationship1 with the CSO. They are the point of contact for the CSO to ensure agreement processes are followed. They perform critical functions in scoping and estimating agreements, and they facilitate agreement management steps from beginning to end. ACLs serve as key resources in the field, providing and interpreting policies and procedures and providing direct assistance to project managers and end users of agreements in their respective organizations. In this role, ACLs:
• Handle requests for consultant services agreements and supplements.
• Provide guidance to project managers regarding potential contracting options available to them.
• Negotiate agreements.
• Initiate and process task orders, which includes guiding the development of the Second Tier Competition Process and managing the task order consultant selections.
• Develop and maintain supporting documentation.
• Monitor compliance with internal controls.
• Facilitate contract management, payment, and closeout.
• Route agreement documents to the CSO to obtain necessary approvals, meet filing requirements, and set up accounting records.

1ACLs are employees of the region or program, with an indirect reporting relationship with the CSO. (They do not officially report to the CSO, but their duties relate to the CSO on a daily basis.)
• Provide program data and information to the CSO as needed.
• Facilitate Disadvantaged Business Enterprise reporting and completion of consultant performance evaluations.
• Manage certain types of agreements (such as some of the current on-call agreements).

ACLs are the point of contact for WSDOT with the consultant community. In that capacity, they:
• Provide information on upcoming projects and consultant needs.
• Respond to questions regarding current advertisements (typically concerning scopes of work).
• Coordinate the Second Tier Competition Process.
• Provide information on upcoming meetings and negotiation sessions.
• Keep consultants updated on the status of their agreements and/or supplements.
• Provide notices to proceed.
• Respond to questions regarding agreement terms and conditions.
• Clarify scopes of work.
• Provide information regarding payment status.
• Handle other requests as necessary and refer requests to the CSO as appropriate.
• Provide consultant contract administration services under the CSO.
Chapter 130

Glossary of Acronyms

Following are the acronyms used throughout the Consultant Services Manual:

- **ACEC**: American Council of Engineering Companies
- **A&E**: architectural and engineering
- **ACL**: Area Consultant Liaison
- **ADA**: Americans with Disabilities Act
- **AGO**: Attorney General’s Office
- **AIA**: American Institute of Architects
- **ASCO**: Administrative Services Contracts Office
- **BAFO**: Best and Final Offer
- **BLM**: Bureau of Land Management
- **CECW**: Consultant Engineer’s Council of Washington
- **CEVP**: cost estimate validation process
- **CFR**: Code of Federal Regulations
- **CPFF**: cost-plus-fixed-fee
- **CRA**: cost risk assessment (or analysis)
- **CSO**: HQ Consultant Services Office
- **DBE**: Disadvantaged Business Enterprise
- **DES**: Department of Enterprise Services
- **DRB**: Disputes Review Board
- **EA**: Environmental Analysis
- **EIS**: Environmental Impact Statement
- **FAA**: Federal Aviation Administration
- **FAR**: Federal Acquisition Regulation
- **FHWA**: Federal Highway Administration
- **FOIA**: Freedom of Information Act
- **FRA**: Federal Railroad Administration
- **FTA**: Federal Transit Administration
- **FTE**: full-time employee
- **FY**: fiscal year
- **G&A**: General and Administrative
- **GEC**: General Engineering Consultant
- **GS**: General Schedule
- **GSP**: General Special Provision
- **HQ**: WSDOT Headquarters in Olympia
- **IDC**: Indirect Quantity Contract
- **LNTP**: limited notice to proceed
- **LS**: lump sum
- **MPD**: managing project (or program) delivery
- **NAICS**: North American Industry Classification System
- **NEPA**: National Environmental Policy Act
- **NHR**: negotiated hourly rate
- **NTP**: notice to proceed
- **OCOI**: organizational conflict of interest
OEO  Office of Equal Opportunity
OH  overhead
OMWBE  Office of Minority and Women’s Business Enterprises
PDF  portable document format
PIN  personal identification number
PM  project manager
PS&E  plans, specifications, and estimates
Q&A  question and answer
RCW  Revised Code of Washington
RFP  Request for Proposal
RFQ  Request for Qualifications
SAAM  State Administrative and Accounting Manual
SAM  System for Award Management
SCE  State Construction Engineer
SDE  State Design Engineer
SEPA  State Environmental Policy Act
SNAME  Society for Naval Architects and Marine Engineers
SOQ  Statement of Qualifications
SOW  statement of work
TAA  task assignment amendment
TAC  task assignment contract
TOD  task order document
TONHR  task order negotiated hourly rate
TRAINS  Transportation Reporting and Accounting Information System
USACE  United States Army Corps of Engineers
USC  United States Code
USDA  United States Department of Agriculture
USDI  United States Department of the Interior
USDOT  United States Department of Transportation
WAC  Washington Administrative Code
WBS  Work Breakdown Structure
WEBS  Washington’s Electronic Business Solution
WSDOT  Washington State Department of Transportation
WSF  WSDOT Ferries Division
Chapter 140
Definitions

acquisition The acquiring by contract, with appropriated funds, services (including construction) by and for the use of the government through purchase, whether the services are already in existence or must be created, developed, demonstrated, and evaluated. Acquisition begins at the point when agency needs are established and includes the description of requirements to satisfy agency needs; solicitation and selection of sources; award of contracts; contract financing; contract performance; contract administration; and those technical and management functions directly related to the process of fulfilling agency needs by contract.

acquisition planning The process by which the efforts of all personnel responsible for an acquisition are coordinated and integrated through a comprehensive plan for fulfilling the agency’s need in a timely manner and at a reasonable cost. It includes developing the overall strategy for managing the acquisition.

advance payment Amount paid to WSDOT in advance for work to be performed under a reimbursable (receivable) agreement.

Agency Head or Head of the Agency The Secretary, Attorney General, Administrator, Governor, Chairperson, or other chief official of an executive agency, unless otherwise indicated, including any deputy or assistant chief official of an executive agency.

agreement (see contract) A meeting of minds with the understanding and acceptance of reciprocal legal rights and duties regarding particular actions or obligations the parties intend to exchange; a mutual assent to do or refrain from doing something; or under certain circumstances, a contract. The writing or document that records the meeting of the minds of the parties.

An agreement is not always synonymous with a contract because it might lack an essential element of a contract, such as consideration. An on-call (task order) agreement is not a contract. An on-call agreement lacks both an offer and consideration (see FAR 16.7). It is only after a task order document is executed for specific work and consideration that a binding contract exists.

Where the term contract is meant, contract should be used. Within this manual, occasionally the terms agreement and contract will be used interchangeably.

agreement cancellation Any discontinuance of the agreement process prior to it becoming a contract.

agreement (contract) closure The process for closing a contract at WSDOT, including closure in WSDOT’s financial system. (See Chapter 500 for further information.)

agreement (contract) manager The person normally responsible for setting up any needed work orders, monitoring the progress of work and costs, and closing the contract, in accord with state and federal regulations.

agreement supplement See supplement.
agreement termination  Terms that specify how and when an executed agreement will expire and when the parties are no longer obligated under the agreement. This is usually triggered by an agreed-upon end date, completion of work, expenditures reaching certain funding limits, or at the discretion of one or both parties. Note that an on-call agreement can terminate without any work having been authorized, thus without the agreement leading to a contract.

agreement writer  The person responsible for developing the agreement language, coordinating required reviews, and providing to the parties a final agreement that is ready for execution.

amendment  A written document used to modify the contents of an existing task order document previously issued under a master on-call agreement. An amendment may be used to add new elements, make up for a deficiency, or extend or strengthen the task order.

application  A completed Statement of Qualifications together with a request to be considered for the award of one or more contracts for professional services (RCW 39.80.020).

architect-engineer services  For the purposes of federal regulation, architect-engineer services are defined in 48 CFR 36.601-4 as follows:

1. Professional (A&E) services of an architectural or engineering nature, as defined by applicable state law, which the state law requires to be performed or approved by a registered architect or engineer.

2. Professional (A&E) services of an architectural or engineering nature associated with design or construction of real property.

3. Other professional (A&E) services of an architectural or engineering nature or services incidental thereto, 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 that logically or justifiably require performance by registered architects or engineers or their employees.

4. Professional (A&E) surveying and mapping services of an architectural or engineering nature. Surveying is considered to be an architectural and engineering service and will be procured pursuant to Section 36.601 from registered surveyors or architects and engineers. Mapping associated with the research, planning, development, design, construction, or alteration of real property is considered to be an architectural and engineering service and is to be procured pursuant to Section 36.601. However, mapping services that are not connected to traditionally understood or accepted architectural and engineering activities, are not incidental to such architectural and engineering activities, or have not in themselves traditionally been considered architectural and engineering services will be procured pursuant to provisions in Parts 13, 14, and 15.
In the Brooks Act, 40 USC 1102, the term “architectural and engineering services” means:

1. Professional (A&E) 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;

2. Professional (A&E) 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

3. Other professional (A&E) services of an architectural or engineering nature, or incidental services that 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.

**architectural and engineering services** or **Professional Services**  Professional services, including A&E 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 Chapter 18 RCW.

**audit**  A formal examination, in accordance with professional standards, of a consultant’s accounting systems, incurred cost records, and other cost presentations to test the reasonableness, allowability, and allocability of costs in accordance with the Federal Cost Principles as specified in 48 CFR Part 31.

**Best Value**  A measure of short term and long term usefulness, quality, expandability, richness of function, customer support structure and options and confidence that the consultant will continue to aggressively support and enhance the product or service offered. This aspect is part of the advertisement for services, and requires the consultant or vendor to describe in detail what value its product and/or service will provide to WSDOT. Examples include robustness, supportability, flexibility, and extensibility of the proposed solution, compliance with industry standards, and ease of use of the proposed solution. Best Value is often used in Professional Services selection processes.

**certification**  A formal release of the state’s jurisdiction over a state highway designated to become part of a local agency road or street network to a county, city, or town. The certification process for abandoned state highways may be the result of legislative changes to route designations, or because a section of state highway has been replaced or relocated during construction, or a frontage road or other modification to a local road or street is relinquished to the local jurisdiction (commonly called a turnback).

**Code of Federal Regulations (CFR)**  The CFR is the codification of the general and permanent rules published in the Federal Register by the executive departments and agencies of the federal government. It is divided into 50 titles that represent broad areas subject to federal regulation. Each volume of the CFR is updated once each calendar year and is issued on a quarterly basis.
Each title is divided into chapters, which usually bear the name of the issuing agency. Each chapter is further subdivided into parts that cover specific regulatory areas. Large parts may be subdivided into subparts. All parts are organized in sections, and most citations in the CFR are provided at the section level.

**cognizant agency** Any governmental agency that, on behalf of all state agencies, has performed an audit in accordance with auditing standards to establish final indirect cost rates (ICR) and forward pricing rates, if applicable, and administering cost accounting standards for a firm’s particular business unit. This can be either a Federal agency or a State transportation agency, as outlined in 23 CFR 172.11.

**commercially useful function** A term used to describe whether a contractor or subcontractor, most often a disadvantaged business that is certified in the Disadvantaged Business Enterprise program, is actually doing the work identified in a WSDOT contract as work to be performed by that firm.

**competitive negotiations** Refers to the process of A&E consultant acquisition as specified in federal law 23 CFR 172, which utilizes the qualifications-based procedures delineated in federal law Title 40 USC 1101-1104 and Washington State law RCW 39.80.

**compliance** When a recipient has correctly implemented the requirements of a contract or an agreement.

**computer database or database** A collection of recorded information in a form capable of, and for the purpose of, being stored in, processed, and operated on by a computer. The term does not include computer software.

**consultant** Any person providing expert services or advice who is not an employee of the agency for which the services are provided.

**Continued Portion of the Contract** The portion of a contract that the contractor must continue to work on following a partial termination.

**contract** A legally binding agreement with specific terms between two or more persons or entities in which there is a promise to do something in return for a valuable benefit known as consideration. The existence of a contract requires finding the following factual elements: an offer; an acceptance of that offer that results in a meeting of the minds; a promise to perform; a valuable consideration (which can be a promise or payment in some form); performance; a time or event when performance must be accomplished (meet commitments); and terms and conditions for performance, including fulfilling promises.

- A **unilateral contract** is one in which there is a promise to pay or give other consideration in return for actual performance. (For example, I will pay you $500 to fix my car by Thursday; the performance is fixing the car by that date.)
- A **bilateral contract** is one in which a promise is exchanged for a promise. (For example, I promise to fix your car by Thursday and you promise to pay $500 on Thursday.)
**Contract administration**  The process of handling the administrative functions of the contract, such as invoice documentation, verification, and authorization for payment. It also includes the contractual functions such as change management documentation, funding and programmatic administration, and verification of contract terms such as insurance coverage, payroll documentation, and reporting requirements. The contract terms, references to state and federal regulations, policy manuals, and budgetary exhibits govern contract administration.

**contract closure**  The process for closing a contract in TRAINS, WSDOT’s financial system. (See Chapter 530 for further information.)

**contract management**  The process of managing the contract based on the negotiated statement of work and project schedule. Contract management may include providing verification and approval of the monthly progress reports and earned value calculations prior to approving the invoice, and includes project meetings with the consultant project manager. Contract management includes the responsibility to be aware of any changes which may require supplements or task order amendments, and requesting the closure of an agreement or task order prior to closing the contract in the WSDOT’s financial system.

**contract (agreement) manager**  The person normally responsible for setting up any needed work orders, monitoring the progress of work and costs, and closing the contract.

**contract supplement**  A contract that modifies the provisions of another contract. It adds to, subtracts from, clarifies the intent of, or modifies the original contract in some manner without stepping outside the scope of the original contract.

**contractor**  One who participates, through a contract or subcontract (at any tier), in a DOT-assisted highway, transit, or airport program.

**conveyance**  A legal document, such as a quitclaim deed, supporting a relinquishment or certification of real property, which WSDOT conveys to a local agency.

**cost estimate**  The estimated cost of work to be performed based on the most current information available at the time the agreement is prepared.

**cost factors**  All the costs associated with a contract, including direct labor, indirect costs or overhead, and fixed fee. Cost factors are regulated under the Federal Acquisition Regulation, or FARs.

**Disadvantaged Business Enterprise (DBE)**  A for-profit small business concern:

- That is at least 51% owned and controlled by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51% of the stock is owned by one or more such individuals; and
- Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

**DOT (USDOT)**  The United States Department of Transportation.

**DOT-assisted contract**  Any contract between a recipient and a contractor (at any tier) funded in whole or in part with DOT financial assistance, including letters of credit or loan guarantees, except a contract solely for the purchase of land.
**DUNS number** Data Universal Numbering System – a unique numeric identifier for credit checking businesses, which was developed and regulated by Dun & Bradstreet on a proprietary basis, and which is available to any business worldwide. This number is required by WSDOT to ensure a business is not debarred.

**EBASE (Estimates and Bid Analysis System)** WSDOT’s system for developing project cost estimates.

**fixed fee** The sum expressed in US dollars which covers the consultant’s profit and other business expenses not allowable or included as a direct or indirect cost.

**Force Majeure** Language that provides for assignment of liability in the event that agreement obligations cannot be performed due to causes that are outside the control of the parties and could not be avoided by the exercise of due care, such as “acts of God,” which include adverse weather, earthquakes, fires, floods and other natural disasters; or such as acts of war and strikes.

**good faith efforts** The efforts taken to achieve a DBE goal or other requirement of a contract/agreement, which, by their scope, intensity, and appropriateness to the objective, can be reasonably expected to fulfill the program goal or requirement.

**HQ** The WSDOT Headquarters in Olympia.

**indirect cost rate** The overhead percentage rate applied to the total cost of work performed by WSDOT for another entity under a reimbursable agreement. (See the *Accounting Manual* for more information.)

**local agency** A non-State governmental agency or other eligible entity allowed/authorized to receive federal funds through WSDOT.

**Management Reserve Fund** Additional funds set aside in the contract/agreement at the request of management. This fund is limited to Cost Plus Fixed Fee agreements.

**master agreement** Provides all the necessary general terms and conditions for a general type of work and an overall beginning and ending date. It will not contain specifics for individual elements of work (tasks). This information will be in each individually executed task order (see *task order*). Between the master agreement and the task order, the task’s statement of work, beginning and ending dates, and estimate for the work must be completely defined.

**Memorandum of Understanding (MOU)** A written document executed between two or more parties that establishes each party’s intent, objectives, and/or requirements regarding some future action. An MOU is also known as a Letter of Understanding (LOU). MOUs and LOUs differ from agreements in that they do not create a legally binding commitment.

**noncompetitive** The method of procurement of services when it is not feasible to award a contract using competitive negotiations or small purchase procurement methods.

**noncompliance** When a recipient has not correctly implemented the requirements of a contract/agreement.
Non-Operating Property  Waste sites, pit sites, stockpile sites, maintenance sites, and other such lands required or used in support of the construction and/or operation of a highway.

nonstandard agreement  Any agreement that is not a WSDOT standard form. Any revision to a standard form will constitute a nonstandard agreement.

operation of law  A change or transfer that occurs automatically due to existing laws and not due to an agreement or court order. For example, WSDOT buys right of way for a project on a managed access state highway within a city. After construction is complete, the city will automatically own the purchased right of way in accordance with RCW 47.24.020(15).

organizational conflict of interest (OCOI)  OCOI means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the government, or the person’s objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage (FAR 2.101).

overtime  Time worked by a contractor’s employee in excess of the employee’s normal work week.

overtime premium  The difference between the contractor’s regular rate of pay to an employee for the shift involved and the higher rate paid for overtime. It does not include shift premium (the difference between the contractor’s regular rate of pay to an employee and the higher rate paid for extra-pay shift work).

payable agreement  An agreement where WSDOT agrees to pay for goods and/or services provided by another entity.

payable cost  The estimated or lump sum dollar amount WSDOT will pay under the terms of an agreement.

person  Any individual, organization, group, association, partnership, firm, joint venture, corporation, or any combination thereof (RCW 39.80.020).

Primary Industry Classification  The North American Industrial Classification System (NAICS) designation, which best describes the primary business of a firm. The NAICS is described in the North American Industry Classification Manual, United States, 1997.

Primary Recipient  A recipient who receives DOT financial assistance and passes some or all of it on to another recipient.

principal place of business  The business location where the individuals who manage the firm’s day-to-day operations spend most working hours and where top management’s business records are kept. If the management offices and the offices where business records are kept are in different locations, the recipient will determine the principal place of business for DBE program purposes.

private party agreement  An agreement between WSDOT and a non-public entity or individual.
public agencies  Any agency, political subdivision, or unit of local government of this state, including, but not limited to, municipal corporations, quasi-municipal corporations, special-purpose districts, and local service districts; any agency of the state government; any agency of the United States; any Indian tribe recognized as such by the federal government; and any political subdivision of another state (see RCW 39.34.020).

race-conscious  A measure or program that is focused specifically on assisting only DBEs, including women-owned DBEs.

race-neutral  A measure or program that is, or can be, used to assist all small businesses. For the purposes of this part, race-neutral includes gender neutrality.

recipient  Any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the Federal Aviation Administration, the Federal Highway Administration, or the Federal Transit Administration, or an entity that has applied for such assistance.

reciprocal overhead agreement  An agreement between a local governmental agency (city, town, or county) and WSDOT where each agree not to charge an indirect cost rate (see indirect cost rate) when performing work or services for the other party.

reimbursable agreement  An agreement under which WSDOT receives payment from another entity for goods and/or services provided by the department.

reimbursable cost  The total estimated or lump sum gross dollar amount a party will pay WSDOT under the terms of an agreement. This amount is entered on the Agreement Edit Information form (WSDOT Form 130-005).

relinquishment  The turning back to a county, city, or town that portion of a facility constructed by WSDOT and designated by agreement to become the property of the local agency upon completion of construction (see certification).

Revised Code of Washington (RCW)  The law of the state as enacted by the Washington State Legislature.

SBA-Certified Firm  A firm that has a current, valid certification from or is recognized by the SBA under the 8(a) BD or SDB programs.

scope of work  All services, work activities and actions required of the consultant by the obligations of the contract.

simplified acquisition (small purchase)  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 USC 403(11).

Small Business Administration (SBA)  The United States Small Business Administration.

small business concern  With respect to firms seeking to participate as Disadvantaged Business Enterprises in USDOT-assisted contracts, a small business concern is defined pursuant to Section 3 of the Small Business Act (Public Law 85536) and Small Business Administration regulations implementing it (13 CFR 121) that also does not exceed the cap on average annual gross receipts specified in 49 CFR 26.65(b).
socially and economically disadvantaged individual  Any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is:

1. Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis.

2. Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:
   a. “Black Americans,” which includes persons having origins in any of the Black racial groups of Africa.
   b. “Hispanic Americans,” which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race.
   c. “Native Americans,” which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians.
   d. “Asian-Pacific Americans,” which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kirbati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong.
   e. “Subcontinent Asian Americans,” which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal, or Sri Lanka.
   f. Women.
   g. Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

standard form agreement  A preapproved agreement format that contains a form number assigned by WSDOT forms management. Any revision to a standard form agreement will constitute a nonstandard agreement and will require further review (see nonstandard agreement).

state-generated funds  Revenues that are collected and dispensed by the state, such as cash receipts and receivables derived from taxes and other sources.

Statutory Authority  The specific law or rule, resolution, or ordinance that authorizes an entity to enter into an agreement to perform an action, take on an obligation, and/or make payment for services and/or products received.

subconsultant  The individual or firm contracted by a consultant to provide a portion of the services for which the consultant is responsible in its contract with WSDOT.
**System for Award Management (SAM)**  Per federal regulations, CSO is required to ensure, to the best of its knowledge and belief, that none of the principals, affiliates, third party Contractors and subcontractors selected for work by the State are suspended, debarred, ineligible or voluntarily excluded from participation in federally assisted transactions or procurements. Federal regulations require CSO to review records of excluded parties in the federal System for Award Management (SAM) before entering into any third party Contracts exceeding $25,000.00. This system combines several existing registries and agency lists into one search engine that is updated on a regular basis to ensure that companies selected for work are not excluded.

**task order document**  A contract that is a derivative document, from a master agreement, containing all the elements that make it a contract, including a statement of work, beginning and ending dates of the work, and a specific dollar amount for the work to be completed. A task order cannot be used to make changes or additions to the terms of the master agreement. Task orders are executed and monitored individually (see **master agreement**).

**tribally-owned concern**  Any concern at least 51% owned by a Native American tribe as defined in this section.

**United States Code (USC)**  The USC is the codification by subject matter of the general and permanent laws of the United States based on what is printed in the Statutes at Large. It is divided by broad subjects into 50 titles and published by the Office of the Law Revision Counsel of the U.S. House of Representatives.

Since 1926, the USC has been published every six years. Between editions, annual cumulative supplements are published in order to present the most current information.

**uneconomic remainder**  Due to a WSDOT acquisition, the portion of real property, lying outside the right of way, left in such shape or condition as to be of little value to its owner. WSDOT may acquire an uneconomic remainder if its value does not exceed its potential severance claims or damages.

**Veteran Business Enterprise (VBE)**  A business which is at least 51% owned by a veteran of foreign wars.

**Washington Administrative Code (WAC)**  Rules and regulations that apply to individual state agencies that are developed by each agency according to the Administrative Procedures Act.

**Work Order Authorization (WOA)**  An accounting system document used to authorize, set up, and revise a work order. (See the Accounting Manual for details.)

**work order**  An account set up as the central collection point for recording all WSDOT payments or receivables associated with a particular project or activity. (See the Accounting Manual for details.)

**WSDOT**  Washington State Department of Transportation.
200.01 Introduction

Professional Services (as a technical term for a particular type of agreement for these services) are professional and/or technical services not related to architectural and engineering (A&E) services which are acquired by Washington State agencies under RCW 39.26.050. They require expertise provided by a consultant to accomplish a specific study, project, task, or other work statement. Professional Services agreements may be awarded to individuals, joint ventures, partnerships, corporations, or nonprofit organizations.

Examples of Professional Services typically acquired through the WSDOT HQ Consultant Services Office (CSO) include, but are not limited to:

- Financial and economic analyses
- Environmental planning—as opposed to environmental engineering (see architectural and engineering definitions in Chapter 140)
- Legal services
- Management consulting not related to A&E projects
- Media and public involvement; marketing services
- Research
- Scientific studies
- Expert witness services for litigation

In addition to differences in the specific categories of work, Professional Services are distinguished from A&E services as follows:

1. Department of Enterprise Services (DES) filing and approval is required for sole source Professional Services agreements and supplements.
2. Solicitations for Professional Services must be advertised through Washington’s Electronic Business Solution (see Section 210.04), the state’s online business portal.
3. Cost and/or Best Value may be a consideration during the competitive selection process.

The CSO will determine the appropriate classification for the agreement when the initial request for an agreement is processed.

**Note:** If a Professional Service is a small portion of a larger A&E agreement or project, then the latter takes precedence. For a more complete listing of Professional Services agreement categories, see Appendix S.
200.02 Legal References

Following are the state and federal laws and regulations upon which this chapter is based.

49 CFR 18 – Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments

Chapter 39.26 RCW – Legal authority for Professional Services contracts

Acquisition of Professional Services is governed by state statute (Chapter 39.26 RCW). The general policies and procedures to be followed by state agencies, as well as reporting and accountability requirements, are the responsibility of the Department of Enterprise Services.

In general, Professional Services are procured only to resolve a particular agency problem or issue or to expedite a project that is temporary in nature. The agency must document that the service is mission-critical or mandated/authorized by the Legislature and that there are no public resources available to perform the service.

In accordance with RCW 39.26.110, agency employees responsible for executing and/or managing Professional Services agreements are required to complete training provided by the Department of Enterprise Services. Training includes webinars and/or e-learning on Contract Management (required), Executive Management of Purchasing and Procurement, and Purchasing and Procurement Ethics (required).

200.03 Responsibility for Administering Professional Services Agreements at WSDOT

The HQ Consultant Services Office (CSO) and the HQ Administrative Contracts Office (ACO) are the only offices within WSDOT that have the responsibility and authority to process and administer Professional Services agreements. Professional Services agreements are administered in several categories. When it is unclear which office should be administering a specific Professional Services agreement, the two offices collaborate to determine the appropriate owner in order to avoid customer confusion.
Chapter 210  Competitive Solicitation Process

210.01 Introduction

All Professional Services agreements are to be competitively procured in accordance with Chapter 39.26 RCW. The statute provides a comprehensive framework for procuring Professional Services to ensure fair and open competition, leading to the selection of the most qualified consultant at the most reasonable price.

This chapter pertains to the competitive acquisition of consultant services for a specific non-architectural and engineering (A&E) project with a defined scope and time frame. Sole source Professional Services agreements are covered in Chapter 240. On-call Professional Services agreements are covered in Chapter 260.

210.02 Initiation and Request Memo

The first steps in planning for a new project-specific Professional Services agreement are to determine:

1. The need for the service or the problem to be solved.
2. The general scope of work of the services to be acquired, the project time frame, and the anticipated project deliverables and outcomes.
3. Why the services are critical or essential to agency responsibilities or operations.
4. Whether the services:
   • Are of an emergent nature related to public safety (for example, would prevent injury or loss of life, or material loss to property).
   • Stem from court orders or are required under the law.
   • Would secure receipt of federal funds or other funds.
   • Are an integral part of a revenue-generating enterprise.
5. Whether the project is mandated or authorized by the Legislature.
6. Why sufficient staffing or expertise is not available within the agency to perform the service, and whether or not there are other government resources (local, state, or federal) available outside WSDOT to perform the services.
7. The funding source(s) and a breakdown of the proposed project costs.

After a plan is in place, it is necessary to work with the CSO and/or the Area Consultant Liaison to initiate activity on the procurement. The first step is completion of the “Request for Consultant Services – Competitive Selection” memo, located on the CSO’s intranet website (wwwi.wsdot.wa.gov/consulting). This memo serves as the initial planning and request document for Professional Services agreements procured through the CSO. At this point in the process, the CSO makes an official determination regarding the category of agreement (Professional Services or Architectural and Engineering) and the type(s) of payment method(s) to be negotiated.
210.03 Determine Solicitation Method

Solicitations are determined and managed by the CSO. The methods of solicitation most commonly used for project-specific Professional Services agreements are the Request for Proposal (RFP) or the Request for Qualifications (RFQ). The CSO collaborates with the customer to determine and develop the most appropriate solicitation method.

The RFP provides: background on the project; the scope of work; the project schedule; funding information; a description of the consultant services needed and the minimum qualifications required; and directions for preparing a proposal in response to the solicitation. There are three major components included in the proposal for Professional Services agreements:

1. **Technical**: How the consultant plans to successfully complete the work elements.
2. **Management**: The consultant’s organization, experience, expertise, and past performance.
3. **Cost**: Total and detailed project costs, rates, subcontractor costs, and reimbursable expenses (see Appendix L).

Best Value may also be considered when selecting a Professional Services firm. If this is part of the selection process, the RFP must include it.

The RFQ, in contrast, is used when the project scope and associated work elements are well defined and the goal is to select the most qualified firm at the most competitive price. This process does not require a technical proposal or work plan from the proposer. Selection is based on an evaluation of the consultant’s qualifications, experience, and ability to perform the services, and the proposed costs for the services.

CSO solicitations require the proposer to complete the Consultant Information form for the prime consultant and any subconsultants that are to be used on the project. This form contains information about the consultants’ business structure; Tax ID; Statewide Vendor Codes; business licenses and certifications; annual gross receipts; NAICS codes; DUNS numbers; Fiscal Year End date; and areas of expertise.

The solicitation documents include the evaluation process and scoring criteria to be used in making the final selection. At a minimum, the following evaluation criteria must be used for all Professional Services solicitations:

- Consultant firm’s experience, ability, and capacity.
- Staff qualifications and experience.
- Fees or costs.
- Responsiveness to schedule.
- Quality of previous performance and reputation.
- Compliance with statutes and rules related to contracts or services.
- System for Award Management Excluded Parties Records notice.
For solicitations using an RFP format, the additional following criteria are also mandatory:

- Consultant firm’s understanding of the project and the proposed methodology.
- Project management, internal controls, and team structure (for multiple staff).
- Proposed work plan and description of deliverables.

An additional criteria for scoring the proposals is Best Value, which only the firm which provides the overall best proposal can receive.

Weighting of the criteria will be determined based on the importance of the factors to the successful completion of the agreement.

### 210.04 Advertisement

Advertisement of the solicitation is managed by the CSO. At a minimum, the advertisement must include a brief description of the project or services required; the proposed project schedule; a request for the consultant’s qualifications/experience; a request for costs and/or fees to be charged; and the method and format of the submittal, due date, and time. The CSO typically places a brief advertisement with directions and links to its public website, where the full RFP or RFQ is posted.

The length of time an ad will be open will be determined by the CSO manager based on the needs of the requesting party and input from management. For competitive solicitations, a minimum of fourteen (14) calendar days for the advertisement is required.

State agencies are now required to post all solicitations for Professional Services on the online contractor registration and bid system: Washington’s Electronic Business Solution (WEBS) resource center (www.ga.wa.gov/webs), which is operated by the Washington State Department of Enterprise Services. WEBS serves as a central location for bid information on multiple types of purchases for all parties participating in state contracting. It includes the names of certified minority-, women-owned, and veteran-owned businesses that are encouraged to participate in the solicitation process.

In addition to the required posting on WEBS, the CSO generally advertises open solicitations in at least two other locations: its public website (www.wsdot.wa.gov/business/consulting) and the Seattle Daily Journal of Commerce. This approach provides the most comprehensive advertising to reach the broadest audience of interested consultants, and it complies with statutory and regulatory requirements for competitive solicitation. The costs associated with advertising in published journals will be covered by the customer. The CSO will process the invoice and ensure the appropriate customer organization is charged. The affidavit of publication will remain in the CSO contract files.

Other publications and websites may be used to advertise more specialized services. Usually these notices outline the services needed, and furnish a link to the Consultant Services public website for the full project solicitation.

The CSO’s public website provides up-to-date tracking information on the status of advertisements, listing those that are currently open and those that are closed, and whether they are in the interview or scoring stage.
210.05 Pre-proposal Conference and Dissemination of Information

Pre-proposal conferences are not mandatory, but may be useful when the project is complex and/or when interest from a large number of consultants is anticipated. Pre-proposal conference information must be included in the solicitation document and advertisement.

A pre-proposal conference provides an opportunity for WSDOT to clarify requirements and respond to questions about the solicitation in a public setting. Questions raised at the pre-proposal conference or submitted in writing to the CSO solicitation coordinator must be responded to officially, in writing, and documented in an amendment to the RFP or RFQ. Amendments will be posted on WEBS (www.ga.wa.gov/webs) and the CSO’s public website (www.wsdot.wa.gov/business/consulting) so that all interested consultants will have access to the same information.

210.06 Proposal Receipt and Processing

A reasonable amount of time will be provided between issuing the solicitation document and the due date for responses. This time period typically ranges from four to eight weeks after publication of the advertisement, depending upon the complexity of the project and the urgency to begin work.

The CSO is currently using an electronic process for submittal of proposals. Proposals, requested in Adobe PDF format, are submitted via email to the CSOSubmittals@wsdot.wa.gov address with attached files in specific formats by specific dates and times.

Proposals are reviewed for responsiveness (that is, meeting the minimum requirements of the RFP or RFQ). Only proposals considered responsive are forwarded to the evaluation team for scoring. If a proposal is deemed nonresponsive, it may be rejected. This determination is communicated to the proposer and documented for the solicitation file.
220.01 Scoring of Proposals

After the consultant proposals have been screened for responsiveness, the HQ Consultant Services Office (CSO) or its designee prepares them for transmittal to members of an independent evaluation team for scoring. The members of the evaluation team are usually selected by the CSO manager. All scoring team members must fill out and submit to the CSO a Confidentiality/Conflict of Interest statement prior to joining the scoring team. A scoring sheet is then prepared by the CSO or its designee that includes:

- Name(s) of responding consultant(s)
- Criteria used to rank the consultants (based on the solicitation document)
- Points for each scoring criterion

The CSO or its designee manages the scoring process (collects and compiles the scores). Included in the process is the collection of performance evaluations for the prime consultant. Evaluations are used for ensuring the consultant meets minimum standards for performance. The performance evaluations are required to be submitted during each advertisement.

WSDOT reviewers serving on scoring teams are expected to possess the overall knowledge and expertise to evaluate the proposals effectively and objectively. They are to be unbiased and able to maintain confidentiality during the evaluation process. At least three evaluators are used, representing the skills, knowledge, and experience applicable to the proposed solicitation.

Prior to finalizing selection of the consultant, as required by federal regulations, WSDOT will review the records found in the System for Award Management (SAM) Excluded Parties Records to ensure that none of the principals, affiliates, third party Contractors and subcontractors are suspended, debarred, ineligible or voluntarily excluded from participation in federally assisted transactions or procurements. A record of this search will be included in the WSDOT contract files.

220.02 Interviewing

There will be times when several top-ranked consultants are short-listed, and an interview must be held to make a final selection. In that situation, the CSO or its designee will work with the customer and the Area Consultant Liaison (ACL) to schedule interviews and establish a selection board, which typically includes executive management, project management, and technical representatives. All selected board members will fill out a Conflict of Interest Statement and submit it to the CSO prior to the scheduled interview. Each interview must be conducted in the same format, and it may have time limits for proposer presentations and questions from the evaluation team.

The CSO or its designee will attend the interviews to ensure WSDOT remains compliant with the state procurement requirements. If the interview process does not meet those requirements, the CSO or its designee may act on behalf of the CSO manager to make necessary changes.
220.03 Final Selection

When all the interviews are complete, the CSO or its designee compiles the consultant selection board’s cumulative scores and submits them to the CSO manager for approval.

The interview may be the final determining factor in the selection of an apparently successful contractor, or the interview scores may be combined with the scores for the written proposal in order to make a final determination. The original solicitation must outline which of these options for scoring will be used for the selection of the consultant.

After the CSO manager has approved the selected consultant, the CSO will report the outcome, in writing, to all participating firms (both successful and unsuccessful). This will be done promptly in order to allow time for the protest period and potential debriefing conferences, as set forth in the solicitation document.
Chapter 230  Negotiation and Execution of Agreement

230.01 Negotiations

Proposed fees and/or costs are included in the consultant’s proposal for Professional Services agreements. Therefore, they are part of the scoring and selection criteria, and they carry a specified weight in contributing to the final selection and award. In addition, the selection process may include the assignment of a Best Value score to a firm which may lead to final selection of that firm. After the selection is made, contract negotiations are conducted by the WSDOT project manager and the Area Consultant Liaison (ACL) with the apparently successful contractor.

Negotiations for Professional Services agreements should focus on refining the proposed project deliverables, scope of work, work plan, and costs (direct salary, overhead, fixed fee, direct non-salary costs, and subconsultants). The agreement will typically fall within one of the three basic consultant agreement payment types used by the HQ Consultant Services Office (CSO):

1. Lump Sum
2. Cost-Plus-Fixed-Fee
3. Hourly Rate (approved “not to exceed” billing rates)

For more detail on these payment types, see Appendix H, Contract Payment Methods. To determine cost factors, see Appendix L, Determining Cost Factors.

It may take several iterations to negotiate a complete agreement. The CSO will be available to assist the ACL and the project manager throughout the process. If the request for a Best and Final Offer (BAFO) from the apparently successful consultant proves that negotiations have been unsuccessful, the second-highest rated firm may be invited to participate in contract negotiations. If those are unsuccessful, the third-highest ranked firm may be invited. If negotiations fail after the third-highest, the CSO manager has the option to cancel the process and start over with a new solicitation.

The WSDOT project manager and ACL are responsible for preparing a summary of consultant financial negotiations and forwarding it to the CSO section which manages Professional Services agreements. The ACL will verify that the summary agrees with the ACL’s negotiation notes and will submit the full documentation package to the CSO. This documentation will be retained in the official agreement file maintained by the CSO. At a minimum, documentation should include:

1. The selected payment type and the rationale for the selection.
2. A summary of consultant direct salary cost, escalation (if any), overhead, fixed fee, direct non-salary costs, and total multiplier (see Appendix L).
3. A summary for each subconsultant, including name, DBE status, services provided, not-to-exceed dollar amount, percentage of total agreement, direct salary cost, escalation (if any), overhead, fixed fee, direct non-salary costs, and total multiplier.

1 Disadvantaged Business Enterprise status, as determined by the Office of Minority and Women’s Business Enterprises.
4. Project deliverables.

5. Comparison of total hours and costs included in the WSDOT request memo, the consultant’s successful proposal, and the final negotiated agreement.

6. Date(s) of negotiation meeting(s).

**230.02 Final Agreement Execution**

After the agreement has been negotiated with the consultant, the CSO will obtain consultant signatures for two original documents, including the certification exhibits, which are included in the agreement boilerplate package. The consultant will return both signed originals, including the certification exhibits, to the CSO.

After the consultant signs and returns the agreement, the CSO will:

- Follow the administrative procedures outlined in Chapter 800 for managing the contract documents themselves (signatures, storage of originals, etc.).
- Review the agreement to ensure applicable statutory and regulatory requirements have been met.
- Ensure the cost exhibit supports the proposed scope of work, and ensure any applicable DBE or SBE goals are supported by the cost exhibits.
- Obtain approval from the Attorney General’s Office in cases where the agreement is not a previously approved boilerplate.

The CSO manager retains the delegated authority to sign all consultant services agreements on behalf of WSDOT. At this point in the process, the CSO manager determines and obtains any further review or approval necessary from WSDOT executive management, reviews the due diligence and documentation, and signs the agreement.

When applicable, the CSO will use the DES automated filing system to obtain review and approval. Both the consultant and the project manager should be aware of waiting period requirements for DES approval for specific types of agreements. No agreement may be executed until the DES approval process is completed and DES has notified the WSDOT that the agreement is approved for execution.

The WSDOT project office is responsible for project management of the work the consultant completes, as outlined in Chapter 500.
Chapter 240 Sole Source Professional Services Agreements

240.01 Justifying Sole Source Professional Services Agreements

A sole source agreement is one that is awarded without competition because the consultant providing the professional or technical service has expertise, knowledge, and abilities of such a unique and significant nature that the sole source selection is clearly and completely justifiable. The consultant must be the most feasible source to provide the service.

Justification for a sole source determination will include the following:

1. A clear statement of the problem or need that the agreement is intended to address.
2. Demonstration of why the services are critical and essential to departmental responsibilities or operations and/or mandated or authorized by legislation.
3. Documentation of the efforts made to determine the availability of staff or expertise within the department as well as availability of other governmental resources external to the department.
4. An explanation of how the department concluded that the negotiated costs, fees, or rates are fair and reasonable (see Appendix L).

Specific sole source criteria include the following:

• Unique characteristics of the consultant, such as qualifications, abilities, or expertise to provide the unique services required. Past performance and cost-effectiveness (for example, no learning curve) may also be factors.
• Special circumstances such as confidential investigations or copyright restrictions.
• Time constraints, including how long the department was on notice about the need for the services, who imposed the time constraints, and an explanation of the timelines for the work to be accomplished.
• Geographic availability of consultants and the rationale for limiting the size of the geographical area for selection.

This information should be fully provided in the request memo. It is important to note that the sole source option cannot be used for the administrative convenience of the department.

Sole source Professional Services agreements are considered an exception to competitive procurement, as outlined in 36.26 RCW and in DES policies. When a sole source process is used, there are still advertising, negotiation, agreement execution, and filing requirements, as outlined in Chapter 230. However, the interim steps of the competitive process are eliminated.

240.02 Initiation and Request Memo

When a new Professional Services agreement is needed using the sole source selection process, a “Request for Consultant Services – Sole Source” memo (wwwi.wsdot.wa.gov/consulting) must be completed and submitted to the CSO. This may be
completed by the requester and processed through the Area Consultant Liaison (ACL), or completed by the ACL, as appropriate. As in the case of competitive solicitation for Professional Services, this request memo serves as the initial planning and request document for procurement. At this point in the process, the CSO makes an official determination regarding the category of agreement (Professional Services or Architectural and Engineering), as well as the type(s) of payment method(s) to be negotiated.

Prior to proceeding with the advertising requirements, the CSO reviews the request memo to ensure all required information is included.

Note: Executive management review and approval are required prior to proceeding with a sole source agreement. The CSO will facilitate the review and approval process.

### 240.03 Posting and Advertising

Prior to award (RCW 39.26), sole source Professional Services agreements of $10,000 or more ($13,000 or more if a DBE firm or small business concern is the prime) are required to be posted on WEBS, Washington State’s Electronic Business Solution resource center, operated by the Department of Enterprise Services (www.ga.wa.gov/webs), for at least five (5) working days. In addition, the WSDOT will post the agreement in the WSDOT Sole Source and Emergency Contracts Database and may elect to advertise the sole source agreement in either a statewide or regional newspaper in Washington State. The CSO typically advertises in the Seattle Daily Journal of Commerce and posts the advertisement on the CSO’s public website (www.wsdot.wa.gov/business/consulting). This process provides a public announcement of the potential sole source agreement and helps ensure no other firms are available or interested in providing the service.

If advertised, the advertisement must include:

- The name of the department.
- A description of the services contemplated for the sole source award.
- The proposed time frame of the sole source agreement.
- Information on how an interested consultant may contact the department to challenge the proposed sole source agreement.
- The deadline for the challenge.

It is not required to include the name of the proposed contractor.

The costs associated with advertising in published journals will be covered by the customer. The CSO will process the invoice and ensure the appropriate customer organization is charged. The affidavit of publication will remain in the CSO’s contract files.

If another consultant challenges the sole source agreement, and WSDOT believes that the firm is qualified, then a competitive selection process must be used (see Chapter 210). If WSDOT can demonstrate that the proposed sole source consultant is the only qualified candidate, the final negotiated agreement will be filed with the Department of Enterprise Services (DES), with an explanation about how the sole source decision was made. The filing must allow for at least ten (10) working days for the DES approval process, and the contract cannot be executed or begin until DES
issues an approval, which may take longer than the minimum ten (10) working day filing period. Additional time may be needed if questions arise from DES. Sufficient time must be allowed by the Project Manager and ACL for this process. Professional Services agreements which will not exceed $10,000 (under $13,000 for a qualified DBE or SBE consultant) are considered Direct Buys and are not subject to posting and advertisement.

For information on negotiation and final execution of the agreement, see Chapter 230.

240.04 DES Filing Requirements

At least ten (10) working days prior to the anticipated agreement start date, sole source Professional Services agreements of $10,000 or more ($13,000 or more if the prime is a qualified DBE or SBE) are required to be filed with DES. They are then made available for public inspection for a period of not less than ten (10) working days to enable DES to process sole source contract filings. Any sole source contract set to begin any time prior to or during the DES processing period will be flagged as a “late filing” and will not receive approval even if all other sole source criteria have been satisfied. The sole source agreement cannot be executed until official DES approval of the agreement has been given, no matter how long that process takes.

All sole source contract amendments must be filed with DES and receive prior approval except where changes are minor or technical in nature. Amendments will not need to be posted on WEBS or require a ten (10) day public inspection period but work on the amendment cannot begin until approval is received from DES.

The CSO is responsible for filing the assembled agreement with DES using the Sole Source Contract Database on the DES website. The CSO will inform the customer and the Area Consultant Liaison of filing dates; wait time requirements; any specific issues raised by DES in the review or approval process; and when work may begin.

240.05 Justification for Amendments to Sole Source Professional Services Agreements

The “Request for Consultant Services – Supplement Original Agreement” memo (wwwi.wsdot.wa.gov/consulting) is to be used to request amendments to sole source agreements. Special justification is required, including:

• The rationale for supplementing the agreement rather than competitively procuring the services and awarding a new agreement, along with an explanation of how this request can most effectively achieve the department’s purpose(s).

• An explanation of why the services in the proposed supplement were not included in the original agreement and whether they are within the scope of services of the original agreement.

• An explanation of any changed conditions since the award of the agreement that would justify the supplement.

• Whether the rates are the same as those negotiated under the original agreement; any increases must be explained.

Unless the amendment is for minor or technical changes, the amendment must be filed with DES. See Section 240.04 above. For further information regarding necessary documentation and justification, refer to Section 210.02 and Chapter 250.
Supplements to Chapter 250
Professional Services Agreements

250.01 Request for Supplement

There are various reasons for requesting a supplement to an existing Professional Services agreement. It may be necessary to increase the scope of work and/or the dollar amount of the agreement, or a time extension may be required. When a supplement to increase scope and/or dollar amount is needed, a “Request for Consultant Services – Supplement Original Agreement” memo must be completed and submitted to the HQ Consultant Services Office (CSO). The form is located on the CSO’s intranet website (wwwi.wsdot.wa.gov/consulting). This memo serves as the official request document for supplements to personal services agreements that have been competitively procured.

If a time extension is needed, without any net increase to the scope or terms of the agreement, a “Request for Consultant Services – Time Extension” memo is required.

For additional information on supplements to sole source Professional Services agreements, refer to Chapter 240.

250.02 Justification for Professional Services Agreement Supplements

In addition to the justification criteria used for the initial agreement, requests for supplements should address the following:

- A description of the specific problem, requirement, or need that the supplement is intended to address and that makes the services necessary.
- The rationale for executing a supplement to the existing agreement rather than competitively procuring the services and awarding a new agreement.
- Whether the new services are within the scope of services of the original agreement.
- Whether the option to extend the agreement was included in the solicitation and for what additional period(s) of time.
- An explanation of any changed conditions since the agreement was awarded and any other applicable information that clearly justifies the decision to supplement the agreement.
- Whether the rates are the same as those negotiated under the original agreement, explaining any increases.

The next step in the process is for the CSO manager to approve or disapprove the request for the supplement. If approved, the project manager and/or area consultant liaison may move forward with negotiation of the supplemental agreement.

For negotiation and final execution of the supplement, follow the same process outlined in Chapter 230.

Note: Executive management review and approval are required prior to proceeding for all supplements to Professional Services agreements, other than simple time extensions. The CSO will facilitate the review and approval process.
250.03 DES Filing Requirements for Supplements

If a supplement is awarded to a competitive Professional Services agreement the following additional justification is needed and should be included in the request memo for a supplement to the agreement:

- Specific problem or need
- Other public resources
- Contractor qualifications
- Reasonableness of costs (see Appendix L)

Significant changes in quantity, duration, nature, or cost of the work are considered “substantial” in relation to executing agreement supplements. These supplements require DES approval and must be filed at least ten working days prior to the proposed start date. Final execution of the amendment requires prior official approval from DES.

Examples of substantial changes that would impact filing requirements are:

- A statement of work that is executed in phases (in accordance with the agreement or the solicitation document), where approval of additional phases is subject to satisfactory completion of a previous phase.
- An amendment that exercises the option to extend the work for significant time periods at the discretion of the agency (such as adding a third year to a two-year agreement).
Chapter 260  On-Call Professional Services Agreements

260.01  On-Call Agreements for Professional Services

In addition to competitive and sole source project-specific agreements, consultants may be obtained through statewide on-call services advertising. On-call agreements for Professional Services are considered “convenience contracts”, which are competitively awarded for use by a specific state agency. Typically, they are awarded to multiple firms in order to provide quick access to Professional Services on an as-needed or on-call basis.

Master Professional Services on-call agreements are established through the competitive solicitation process, as are the task orders approved under these master agreements. Under normal conditions, services under these agreements are obtained through the Second Tier Competition Process (see Appendix Y). The CSO will determine whether exceptions to this process are approved for a particular project. When a consultant is selected, the HQ Consultant Services Office (CSO) or its designee issues task orders under the on-call agreements to authorize a specific scope of work, for an agreed-upon cost and period of performance (see Chapter 270).

The master Professional Services on-call agreements require filing with and approval by the Department of Enterprise Services (DES) prior to activation, but the task orders do not.

260.02  Initiation and Request Memo

When a WSDOT project manager or other internal customer identifies a category of Professional Services requiring an on-call agreements roster, the first step is to complete a “Request for Consultant Services – Competitive Selection” memo, which is available on the CSO’s intranet website (wwwi.wsdot.wa.gov/consulting). In general, the same planning steps used in the competitive selection process for project-specific Professional Services agreements are followed (see Section 210.01). This includes justification required by OFM regarding why the services are critical or essential, as well as a general description of the scope of services, funding sources, and so on.

Additional planning information required for master on-call Professional Services agreements includes:

• The potential extent of need for services to help determine the number of on-call master agreements to be established and the dollar thresholds for those agreements.
• The length of time the master agreements should be in effect.
• The specific types of services required.
• The specific qualifications, abilities, and experience required for consultants to successfully perform the work.
260.03 Solicitation Method

The Request for Statement of Qualifications (RFQ) solicitation method is used to establish master on-call agreements with consultants for Professional Services. The CSO develops the solicitation document, in collaboration with the customer, so that it best describes the consultant services the customer is seeking.

The RFQ contains the following information:

- Intent and scope of the solicitation (how qualified firms will be scored and ranked and time frames and dollar thresholds for agreements).
- Project description.
- Categories of services needed.
- Capabilities and experience of consultants, including licensure requirements.
- Method and limits for soliciting, negotiating, and executing task orders.
- Evaluation criteria to be used in selection.
- Directions for submittal of the Statement of Qualifications.
- Protest procedures, System for Award Management and Public Records, ADA and Title VI notices.

The CSO manages the advertisement of master on-call Professional Services solicitations in the same manner as competitive, project-specific Professional Services solicitations (see Section 210.03). In addition to posting on WEBS (see Section 210.04), the solicitations are advertised on the CSO’s public website (www.wsdot.wa.gov/business/consulting) and in the Seattle Daily Journal of Commerce.

Submittals are received and processed as described in Section 210.05.

260.04 Evaluation and Selection Process

The qualifications-based selection process is used to select consultants for master on-call agreements. Generally, the following information and criteria are used to evaluate and rank the responses to the RFQ:

1. Qualifications/expertise of firm(s) on consultant’s team.
2. Qualifications of proposed project manager(s).
3. Key team members’ qualifications (prime consultant and subconsultants).
4. Firm’s project management system (prime consultant only).
5. Experience specific to the type of tasks proposed in the RFQ (prime consultant only).
6. References/past performance (prime consultant only).
7. Cost analysis and best value (prime consultant only).

Further definitions and details regarding the evaluation criteria, and the weight given to each criterion in the scoring process, are published with the solicitation document. Consultants are instructed to review requirements for and/or limitations on the information requested prior to completing their submittals.
The scoring and interviewing of consultants follows the same process described in Chapter 220.

When the evaluation process is complete, the CSO or its designee compiles the consultant selection board’s scores and places the consultants in rank order, highest to lowest. Award of the master agreements will accord with the procedures outlined in the advertisement and may include all firms which exceed a certain percentage, or may be limited in total number of agreements. The number of awarded agreements is based on an estimate of the extent of anticipated work and funding available during the time frame of the agreements, as well as the need for rapid access to available consultants in order to facilitate project delivery.

After the roster is complete, the CSO manager approves the master on-call agreements. The CSO then reports the outcome to the firms (both successful and unsuccessful) that participated in the process.

260.05 Negotiation of Master On-Call Agreements

For on-call Professional Services agreements, the proposed fees and/or costs are included in the consultant’s response to the RFQ. The cost factors are analyzed and scored as a determining factor in qualification for a master agreement. If the consultant is deemed qualified, the rates are reviewed and approved formally by the CSO and established as Exhibits D and E to the master agreement.

260.06 Final Agreement Execution and DES Filing

For each master on-call agreement, the CSO will assign the Y number, assemble the agreements, and obtain consultant signatures for two original documents, including the certification exhibits in the boilerplate package. The consultant will return both signed originals, including the certification exhibits, to the CSO.

After the consultant signs and returns the agreement, the CSO will:

• Follow the administrative procedures outlined in Chapter 800.
• Review the agreement to ensure applicable statutory and regulatory requirements have been met.
• Obtain approval from the Attorney General’s Office in cases where the agreement is not a previously approved boilerplate.

The CSO manager retains the delegated authority to sign all consultant services agreements on behalf of WSDOT after DES approval. At this point in the process, the manager determines and obtains any further review or approval necessary from WSDOT executive management, reviews the due diligence and documentation, and signs the agreement.

For master on-call Professional Services agreements, WSDOT proposes what is deemed prudent and necessary for each agreement, and provides justification to DES. The CSO monitors activity on each master agreement through its contract management database to ensure the dollar thresholds are not exceeded on any given agreement.

The CSO establishes an on-call roster and posts it on the CSO’s public website (www.wsdot.wa.gov/business/consulting) for customer reference as consultant services in specific categories are needed.
260.07 Supplements to Master On-Call Professional Services Agreements

Master on-call agreements will be supplemented using the process provided in Chapter 250.
Chapter 270  

Professional Services Task Orders

270.01  Task Order Development

Written task order documents are required for work to be performed under Professional Services master on-call agreements. The task order is an agreement contract between WSDOT and the consultant that contains a contract statement of work, schedule, negotiated cost(s), and funding information. It is directly linked to and governed by the provisions, terms, and conditions of the master on-call agreement.

Current on-call Professional Services agreement rosters are posted by category of service under “Available On-Call Agreements” on the HQ Consultant Services Office’s (CSO’s) public website (www.wsdot.wa.gov/business/consulting).

When a customer has a scope of work requiring a task to be developed under a master on-call agreement, the steps are:

1. Consult the website to see if an appropriate roster is available.
2. Develop the proposed scope of work for the project, schedule, and cost.
3. Work through the area consultant liaison (ACL) or the CSO to select a consultant from the roster using the Second Tier Competition Process (see Appendix Y).
4. Obtain and execute a task order.

Official task order documents are controlled by the CSO through its contracts database. These documents are automatically generated, sequentially, as needed. The CSO limits administrative and user rights to the database to CSO staff, ACLs, and selected individuals who have demonstrated a need for such access. Therefore, project managers in the field seeking to establish a new task order must request assistance from the CSO or their ACL in obtaining and executing task orders.

The task order form requires the following information:
- Agreement manager
- Project manager
- Project title and location
- Task schedule (start and end dates)
- Task cost (work order, organization code, amount, and federal-aid information)
- Consultant information (name, contact information, federal I.D. number, and subconsultants)
- Project scope (detail regarding the task, including work schedule and estimate)

The majority of this information, except for the consultant and specific cost(s), must be determined prior to selecting a consultant from the on-call roster.
270.02 Consultant Selection From On-Call Roster

The ACL or CSO will facilitate use of the roster to obtain the most appropriate consultant. Consultants are not ranked on the roster; they are listed in alphabetical order.

The option most frequently used by the CSO to select a consultant at the task order level is to develop a Second Tier selection process which includes at least sending a scope of work (via email) to all of the consultants on the roster, and then evaluate and select the best response. The Second Tier Competition Process is described in Appendix Y. For the process where Professional Services are desired, cost and Best Value can be selection factors. Therefore, the better the statement of work provided, the more accurate the proposal and cost estimate for the services will be.

If the project office requiring the services is using an ACL to help with this process, the CSO needs to be included in the process. The ACL will request permission to use the Second Tier Competition for any given roster of consultants. The ACL will also copy to CSO on all documents provided the consultants during the process. If there are specific restrictions on the level of funding for any given task order, the CSO assigns those restrictions, and will inform the project office/ACL of these restrictions. If the total amount of the task to be assigned is expected to exceed these restrictions, then the consultant services must be advertised for a single project agreement instead of using the roster (see Chapter 210).

Several factors impact the selection process:

1. Consultant interest and availability (time, expertise, and geographic location).
2. Time and cost estimates compared to consultant rates established in the master agreement.
3. Whether the consultant possesses the special expertise (if any is required) to successfully perform the work.
4. The amount of unused funding available under the approved master agreement dollar threshold for a specific consultant.
5. The total expected funding amount of the project to be offered to the consultants, including all potential added work.

After the selection process is completed and documented for the file, the customer and the ACL/CSO work together to finalize and execute the task order.

270.03 Task Order Negotiation and Execution

The task order is negotiated in the field by the project manager and the ACL with the consultant selected, starting with the proposed cost provided by the selected consultant in the selection process. Rates previously established in the master on-call agreement will be used for negotiating the task order. The negotiation is based on the level of effort defined in the task order scope (for example, which classifications of consultants for how many hours). It is in the best interests of the state to negotiate the best price/rate possible for services. Consultants are free to bill WSDOT at a rate lower than that established in the master agreement, but they cannot exceed the established rates.
For on-call Professional Services agreements, the CSO or their designee manages the task order approval process and notifies the customer of the outcome. The CSO then has the responsibility to obtain signed copies of the task orders and ensure they are entered in the WSDOT accounting system.

Task orders are signed by the consultant first, then by WSDOT. Signature authority for task orders is held by the CSO Manager or as delegated in writing to an authorized authority.

270.04 Task Order Amendment

On-call Professional Services agreement task orders may be amended in the areas of project scope, schedule, and estimated budget. Amendments for any purpose other than a simple time extension are subject to review and approval by WSDOT executive management. Therefore, they must be requested, justified, and processed through the ACL and the CSO.

The project manager, through the ACL, must submit a request to the CSO to amend the task order in order to verify that there is sufficient uncommitted funding capacity remaining under the master agreement cap. Also, additional justification for the changes must be provided to the CSO at this time.

270.05 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 manager is satisfied that all terms of the task order, including amendments, have been met, the task order should be formally closed out following the process described in Section 500.04, the agreement closeout section. Each task order should be treated like a self-contained agreement whose terms are governed by the terms of the master on-call agreement.

Under the terms of the task order, the consultant submits a letter to the project manager and the ACL notifying WSDOT that the consultant believes all terms of the task order have been met. After confirmation from the project manager and the ACL, the consultant submits a final invoice stating that upon payment of the invoice, there are no outstanding claims or remaining charges on the task order. If the project manager agrees, it is time to notify the CSO that the task order has been completed and can be accepted and closed.

If there is a balance of unspent project funds in the task order after the final invoice is paid, the ACL initiates a task order amendment that reduces the task order to actual dollars spent and requests execution from the consultant. The CSO manager, or a designee, then sends a letter notifying the consultant that all terms have been met and the task order is closed. The letter should include a reminder that acceptance of the work does not relieve the consultant of responsibility for undiscovered errors or omissions.

The CSO manager should verify that the consultant evaluation form has been completed and all signatures have been obtained.

For a flow chart of the task orders for on-call Professional Services agreements, see Exhibit 270-1.
Chapter 400

400.01 Introduction

The HQ Consultant Services Office (CSO) is the delegated authority for acquisition and administration of Architectural and Engineering (A&E) services for WSDOT. The CSO ensures the appropriate legal processes are followed, protects the rights of outside funding sources, and maintains uniformity of treatment within the department and to the consultant firms. All WSDOT contracts that fall under the category of A&E work are subject to review and approval by the CSO. Certain exceptions exist for agreements executed for specific situations where non-competitive selection is appropriate and in emergency situations. (See Chapter 440 and Chapter 600 for details.)

A&E contracts are used for professional services that are specialized in nature. A&E work requires the oversight of those licensed by a state to practice the professions of architecture, engineering, surveying, and/or certain other specialized services, specifically those governed by statute. State and federal regulations covering A&E contracts are different than those covering Professional Service contracts in Chapter 200.

The sections herein cover the various processes involved in A&E contract acquisition, amendment and closure, from determination of need for a contract to the distribution of the executed contracts to contract managers and area consultant liaisons (ACLs) for management and administration (see Chapter 500). Also included are Task Orders (see Chapter 450) which are acquired under Task Order Master Agreements usually through the Second Tier Competitive Selection process outlined in Appendix Y.

This part of the manual covers the various methods of acquisition WSDOT uses for project specific A&E services including Task Orders under Task Order Master Agreements that are compliant with the requirements of 23 CFR 172:

- Competitive negotiation
- Small purchases (simplified acquisition)
- Noncompetitive negotiations
- Task orders
- Emergencies

Most of the contracts for A&E work will occur through the competitive negotiation process. Both project-specific contracts and Task Order Master contracts are procured under this process. See Chapters 410 and 420 for procurement and negotiations. For the Task Order Second Tier procurement process under the Task Order Master Agreements, see Appendix Y.

Small purchases (simplified acquisitions) retain open competition, but restrict the maximum amount of the contract awarded to the amount allowed in 41 USC 403(11). It also streamlines the solicitation/selection process to provide efficiency in these smaller work efforts.
Smaller project-specific contracts and Task Order contracts may both be awarded using the simplified acquisition process, provided the dollar caps and any other restrictions are maintained. The differences between the competitive negotiation process and the simplified acquisition process and the selection processes are covered in Chapter 410.

Noncompetitive negotiations are covered in Chapters 440 and 600 for those circumstances when noncompetitive negotiations and emergencies cannot be avoided.

400.02 Additional Approvals and Concurrence

There are a number of circumstances that require concurrence or additional approval from sources outside the normal processing by the CSO and the WSDOT approval chain. The ACL and project personnel need to be aware of these circumstances because they usually involve at least partial funding sources. Funding from federal sources may be part of a project indirectly, through another state or local agency who are the recipients of the funds. It is the responsibility of the Project Office to inform the ACL and CSO if funds for the project are federal (and from which USDOT agency) but not awarded to WSDOT directly.

Approvals include:

1. **FHWA, 23 USC 106(h):** Specifies that recipients of federal-aid highway funds get FHWA approval of design contracts (and any modifications or supplements) for projects that are defined as “Major Projects.”

2. **Other USDOT Resources:** Similar approvals (to FHWA) may be required where funding sources are from other agencies, such as the Federal Aviation Administration, Federal Rail Authority, or Federal Transit Authority.

3. **Office of Equal Opportunity (OEO):** The OEO’s concurrence is required for all contracts and supplements to determine goals establishment and/or changes. This includes task order documents issued on Task Order Master agreements.
Chapter 410

Acquisition Process

410.01.01 Introduction

When the Project Office determines that there is a need for a consultant on a project, the responsible requesting manager (the requester) needs to contact the appropriate Area Consultant Liaison (ACL) and the WSDOT HQ Consultant Services Office (CSO) as soon as possible. The process for selecting the consultant, and for handling the contractual issues that follow, is the responsibility of the CSO.

The following sections describe the steps involved in the acquisition of consultant contracts, including Project Specific Agreements, Master Task Order Agreements, and Simplified Acquisitions, using a competitive process. The steps necessary to assign work under existing master Task Order agreements will involve the Second Tier Competition Process between firms holding those types of contracts. (The Second Tier process is discussed in Section 410.02.04 below with details in Appendix Y.) The simplified acquisition process is in Section 410.04, below. For non-competitive processes, including sole source and emergency contracts, see Chapters 440 and 600 respectively. For application and determination of DBE, SBE (federal or state), MBE, WBE or Veteran Business Enterprise goals, refer to Chapter 700.

410.01.02 Legal Basis for Consultant Acquisition

410.01.02.01 A&E Federal Regulations for Consultant Acquisition

The Brooks Act, as codified in 40 USC 1101–1104, is 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.

In addition to the Brooks Act, other federal laws apply to state departments of transportation and their subrecipients that receive federal-aid highway funds. 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) (see Appendix C)
23 CFR 172 Administration of engineering and design related service contracts (see Appendix A)
49 CFR 26 Participation by disadvantaged business enterprises in department of transportation financial assistance programs
410.01.02.02  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 provides 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.

As with the federal regulations related to A&E services, state law distinguishes architectural and engineering services from all other professional services contracting. 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.

For A&E contracting, this manual follows the federal regulations, as outlined above, in the requirements described in the chapter below and in subsequent chapters.

410.02  Request Memos

410.02.01  Introduction

Whenever a project manager determines that consultant services are required, and the need is for a single project agreement, one or more Task Order Master Agreements, or a small purchase contract, a request memo must be written and submitted to the HQ Consultant Services Office (CSO) as the first step. This memo provides the initial basis for the documentation of the process as a “audit trail”. The memo will be initiated by the project manager responsible for the agreement(s) and will need to pass through an approval process with the responsible funding manager, such as the regional Program Manager, Regional Administrator, or other designated person who can vouch for the need and the appropriate funds’ availability. The memo itself is designed to cover pertinent issues related to consultant selection.

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.

410.02.02  Required Memo Items

The CSO maintains ownership of and responsibility for the formal request memo format. A copy of the formal request memo is available for download as a template from the CSO’s intranet website (wwwi.wsdot.wa.gov/consulting). The memo has a number of questions that need to be answered and requires the attachment of proposed statements of work, estimates of cost, materials to be shared during the advertisement, and other information pertinent to the selection of a consultant.

Pre-planning by the project office managing the project or Task Order masters is critical to obtaining the consultant services in a timely manner. 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 four months or more, depending on
workloads at the CSO, the complexity of the proposed work, the type of agreement needed, 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.

As part of the request memo, the project office must include a draft scope of work that details as much as possible the extent of the services that will be required of the consultant during the entire project. In addition, the project office must include a draft estimate of cost of both the consultant services, and the internal staff time expected to provide guidance or services (including WSDOT resources from other sections of WSDOT, such as Environmental Services or Real Estate Services) for the project.

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). All requests for consultant services, whether federally or state funded or combined funding, will be reviewed for the assignment of either Disadvantaged Business Enterprise (DBE) or Small Business Enterprise (federal SBE) goals (federal funds) or Minority, Small (state SBE), Veteran and Women Owned Business (MSVWBE) goals. Federal SBE and state MSVWBE goals are voluntary.
- Duration of the anticipated work.
- Official 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; for this element, any reports and concept plans, maps and photos are helpful to include with the advertisement.
- Attached draft scope of work and the state’s independent estimate.

Unanswered or unexplained items may delay the process.

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.

Additional 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 (for example, key personnel experience and/or project manager experience).
- Any incentives or disincentives that might be included.
- Anticipation of short list interviews and additional evaluation factors to use for interviews.
- Scoring panel and interview panel make-up.
• If the project is federally funded, what coordination with the Assistant Secretary, Engineering and Regional Operations Chief Engineer and the Federal Highway Administration (FHWA) or other federal agency funding the project is required.

• If the total project is anticipated to exceed $500,000,000, coordination is required with the Assistant Secretary, Engineering and Regional Operations Chief Engineer and FHWA (see Section 410.02.06).

• Other factors that could affect the outcome.

The CSO will assign the type of agreement (see Contract Types in Appendix I) to be used for the project specific agreements. As part of the process, the CSO will consider input from the requesting office and the appropriate ACL. In addition, the DBE, SBE, or MSVWBE goals will be assigned based on the scope and type of funding.

410.02.03 Task Order Master Agreements Request Memos

In most cases where consultants are needed to provide work efforts in specific categories of work, a category-specific competitive selection process to establish one or more Task Order Master Agreements in a specific category of work can be used. Category-specific project support solicitation and selection can be used for different elements of projects, especially when specialized State forces are not available.

Category-Specific agreements are requested and advertised in a similar fashion to the project specific agreements noted above, and could be specific to a region, or statewide. Request memos will cover the same items as required by project specific request memos, outlining the need for a selection of consultants able to provide the specific services over a maximum of five years to support the WSDOT program. These request memos are developed by the ACL or CSO manager for the specific types of agreements. Funding for master agreements is not an issue, though the maximum amount for the master agreements must be noted in the request. A general scope of work for the items expected to be covered by the Master Task Order Agreement is required to be presented with the request memo, and considerations noted in the project specific memo section may be requested of the initiator of the category-specific master agreements.

For larger projects which will use a project specific Task Order Agreement, or to establish regional or divisional Master Task Order Agreements, a formal request memo from the region or division is needed by the CSO. Under certain circumstances, if the CSO manager determines there is a statewide need for a particular category, the CSO manager may generate the request memo and submit it to the WSDOT Assistant Secretary Engineering and Regional Operations Chief Engineer for approval.

410.02.04 Task Order Request Procedures

For smaller efforts (short-term, category-specific, or small design efforts), or immediate efforts where time is short and the work may be category-specific, consideration should be given to either task orders or letting small contracts in accordance with the WSDOT plan for encouraging small business participation. It is assumed that, to obtain a task order, the Master Agreements for that category of services needed are already established and active, and a list of firms is posted showing which firms are available.

For task orders, Appendix Y covers the Second Tier Competition Process which is required for most task orders. The main exception is a Project Specific Master Task
Order Agreement with a single competitively selected consultant team, which is used to manage work for only one project or corridor.

One or more Master Task Order Agreements must exist to use the Second Tier Selection Process to obtain a task. For services needed that are short term and in a specific category, such as surveying or geotechnical, then a statewide Task Order contract may exist from which the services can be obtained. The project office will need to coordinate with the contract manager responsible for the particular type of Task Orders needed. That contract manager will want a request based on a format they have developed. If the CSO manages the Task Order contracts, a request in the form of an email with details regarding scope, state’s estimate, and services sought to the CSO manager. It is recommended that the project office coordinate these requests with their ACL as well as with the specific contract manager. The appropriate ACL or division support office will know what is available, and will be able to manage the appropriate process, including the Second Tier Competition process (Appendix Y), for obtaining a task order.

It is noted that DBE, SBE, or MSVWBE goals may be set on specific task orders, so funding source(s) will be a required item in the request document, and a determination will be made prior to the start of the Second Tier process.

With the exception of the project-specific Master Task Order Agreement tasks, the total amount of the project elements on a task cannot exceed the amount established for the particular type of on-call service. For the general engineering lists, the tasks on the list with an allowance of $500,000 are not to exceed $150,000. For the statewide on call lists, the tasks on the list with an allowance of $5,000,000 or more cannot exceed $1,500,000. Other lists have maximum task amounts between this range. If a task or multiple tasks on a project are expected, in total, to exceed the list threshold, or $1,500,000, whichever applies, the project office must advertise for a project specific agreement.

**410.02.05 Small Purchase Request Procedures**

For all small purchase acquisitions, a request memo that specifies the small purchase, simplified acquisition process is required. The request should certify that the simplified acquisition threshold, currently $150,000, will not be exceeded. The total amount of the threshold includes all small purchase agreements for a specific project, whether with one firm or multiple firms. Thus, if a project office needs surveying, geotechnical and biological work, and wants to use the small purchase process, all agreements together for the project cannot exceed the simplified acquisition threshold. The memo must provide a draft scope of work and a detailed engineer’s estimate, prepared by the State, that demonstrates how the small purchase threshold is not exceeded by the work requested. The small purchase consultant will be competitively selected utilizing a process established by the CSO as outlined in Section 410.04.
410.02.06 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 172.7 and 23 USC 106 (c) and (h). The CSO manager will coordinate with the Assistant Secretary, Engineering, and Regional Operations Chief Engineer in obtaining approvals from FHWA.

410.03 Solicitation/Selection Processes – Advertised Agreements

For A&E contracts, the solicitation process is a qualifications based process designed to select the best qualified firm(s). All information provided below applies to A&E contracting. Professional Services (non-A&E) processes are covered in Chapter 200.

The solicitation for consultant Statements of Qualifications (SOQs) specific to a project is critical to the success of the project, and must meet the requirements of state policy. While some areas of an SOQ can be covered by a set criteria group that is used for every solicitation, 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.

It is WSDOT policy to not request or accept sealed bids in the solicitation process. Information below includes the process for several types of solicitations, including single project and category specific acquisitions. The simplified acquisition process for small purchases are covered in Section 410.04.

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 processes prior to official publication of the announcement, concurrently with the announcement, or subsequent to the announcement.

410.03.01 Pre-solicitation Meeting

After the request memo has been approved, notification will go back to the requester and the appropriate ACL. If this is a request for project-specific, category-specific, or Second Tier competitive selection, the CSO may start the process to develop the solicitation by scheduling a pre-solicitation meeting.

If applicable, the pre-solicitation meeting will be scheduled to include the requester or project team, the ACL, a member of the Office of Equal Opportunity, and the CSO as soon as possible after approval of the request memo.

The purpose of the pre-solicitation meeting is to discuss with the CSO manager the important aspects of developing the selection criteria and scoring factors, potential selection of committee/panel members, and DBE and/or SBE goal requirements, if appropriate. The discussion will include the option for interviews, potential interview
board members, and what interviews may cover. The CSO will develop the selection criteria and solicitation based on the input from this meeting.

410.03.02 Standard Solicitation Process and Selection

The process outlined below covers the competitive selection of single project and category-specific agreements. Non-competitive and emergency contracts are covered in Chapters 440 and 600. Small purchases under the competitive simplified acquisitions procedures are outlined in Section 410.04.

Notes Regarding 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 shall not be distributed. All inquiries shall be referred to the CSO manager.

After the announcement, no consultant may contact project personnel about the project. If such contact is made, it may result in disqualification. The CSO will publish the requirements regarding questions as part of the RFQ. The one exception is an organized pre-submittal 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 pre-submittal 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.

410.03.02.01 Develop and Publish Solicitation

Both 23 CFR 172.7 and RCW 39.80.010 require governmental agencies to publicly announce requirements for architectural and engineering services, and negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualifications for the type of professional services required.

In order to meet these requirements, the solicitation has to be specific to the type of services being sought. Therefore, the scoring criteria must address the type of services needed. To determine the services needed requires the development of a draft scope of work that outlines the expected services the consultant is to provide. In addition, a draft budget for the consultant services needs to be developed along with the draft scope. The draft scope and draft budget must be done as part of the Request Memo process and submitted prior to determining the criteria by which the consultant team will be selected.
As part of the solicitation, for all types of advertisements, but especially important for single project solicitations, the CSO, ACL and project office will develop an introductory summary of the type of work expected of the consultant(s) selected, using the draft scope as a basis for this summary.

Certain criteria categories have been established by the state based on past practice for all solicitations, including Qualifications and Expertise of the Firms on the team, Qualifications of the Proposed Project Manager, Key Team Member Qualifications (prime and subconsultants), Firm’s Project Management System (prime) and References/Past Performances (prime). Each of the sub-criteria under these categories can be made specific to the project or category of the solicitation, and should be revisited for each planned advertisement process. For project specific solicitations, a final category, Project Delivery Approach, is also developed to allow the consultant to provide their understanding of the project.

Each of the criteria for selection (except for References/Past Performances) is scored. Scores do not have to be the same for all criteria. The specific criteria scores and thus the total scores for a particular solicitation are designed to emphasize how critical particular criteria are to the final consultant team selection.

Category-specific advertisements to establish a list of consultants qualified to provide services on Task Order Agreements will use similar criteria to the project specific advertisements, with the exception that the Project Delivery Approach category is eliminated. Criteria for a category-specific set of agreements needs to be developed such that the consultants can provide specific information about their qualifications to provide the various services needed in that category.

References/Past performance evaluations are required as part of the solicitation process, but are not scored. Should the evaluations indicate a particular prime is not qualified to do the work within a proposal, the proposal will be eliminated from further consideration.

For Second Tier selections the process will be similar to the above outline for project specific solicitations, with the differences being that the criteria is very specific to the project and the consultants have already been awarded contracts based on qualifications in their category. The approach to the Second Tier Selection Process is in Appendix Y.

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.

410.03.02.02 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, publishes the announcement on each occasion when services of a consultant is needed. For Task Order Master Agreements, the announcement is general and covers the projected requirements for any type or category for which the services are anticipated to be needed.

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, pre-proposal meetings, proposal formats, and expected additions or exceptions to the contract, if any. Also included are any files containing project information along with 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), Small Business Enterprise (SBE either federal or state), Minority Business Enterprise (MBE), Veteran Business Enterprise and/or Women Business Enterprise (WBE) 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 and category-specific announcements may be open for as little as three (3) weeks, while larger projects may have announcements open for up to eight (8) weeks. Projects that anticipate services in multi-millions of dollars (such as GEC contracts) may need to be advertised nationally, with longer lead times, and longer open periods.

For all advertisements, consideration must be given to limit what may cause difficulty for those scoring the proposals, as well as the cost to the consultant to develop the proposal. Areas to consider include document size, page count, font size, graphics, tables and other items. If not limited, the solicitation may inadvertently eliminate smaller firms that would have responded if the costs and other requirements to provide a proposal were less.

Note: Prior to advertising for consultant services in a management support role, where the consultant selected would manage WSDOT or a mix of WSDOT and consultant staff, and the funding includes FHWA or other federal funds, the WSDOT shall obtain permission from FHWA or other federal agency to use federal funds to pay for these services. Reasons for the WSDOT to use consultant managers in place of WSDOT employees include large projects for which sufficient WSDOT managerial staff are not available and/or the WSDOT cannot increase staff to cover these services and/or the WSDOT technical expertise is not available.
410.03.02.03 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, SBE (federal), MBE, SBE (state), VBE, or WBE 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.

410.03.02.04 Log Received Submittals

The CSO will maintain a log of all submittals received. After logging submittals received, CSO personnel will review submittals for timeliness and completeness. If there is a closing date and time on an advertisement, then all submittals will be time-stamped and logged. Submittals received after published turn-in deadlines are considered nonresponsive and the submitting firm is to be notified. This should be done as soon as possible: first by phone call, then with a follow-up letter.

A general review of the submittals will be done to ensure all requested forms, files, data discs, and/or Statements of Qualifications are included. If something is missing that was requested as part of the solicitation, the firm will be notified immediately (preferably by phone) that a required item is missing. They will also be informed that they are now considered nonresponsive and will not be considered further under this solicitation.

410.03.02.05 Scoring Submittals

The CSO is responsible for determining the evaluation/selection board(s) appropriate to the solicitation. Possible methods for selecting the evaluation board members is in Appendix U. The CSO will catalog all responses and prepare and distribute all materials to the scoring team, along with uniformly formatted scoring sheets and scoring instructions. All score sheets will be returned to the CSO.

The CSO will finalize the total scores for the consultants proposing on a solicitation by combining the scores received from the evaluation board members chosen to review the proposals which are received for that solicitation. From these total scores, the CSO will develop a ranked list of the firms. For single project solicitations, if several firms score close together on the final ranked list, the top firms may be invited to an interview. See Section 410.03.02.08.
The CSO or its representative involved with the solicitation will verify that the consultants who have responded to the advertisement are not suspended or debarred and are actually eligible to contract with the WSDOT as specified in 2 CFR 1200 and 2 CFR 180. The WSDOT will use the federal System for Award Management (SAM) database to determine whether a consultant is suspended or debarred.

At times, the selection process identifies a firm whose qualifications for a project far exceed those of the other firms proposing. In this case, a request may be made by the project office through the ACL to CSO to select the top scoring firm without interview. If this request is approved by the CSO, then the process continues with negotiations, and the interview stage is skipped. Should the negotiations with this firm fail to come to a “fair and reasonable” price, the CSO and ACL will determine whether to negotiate with the second highest scoring firm or re-solicit for the services.

For category specific solicitations, the ACL in charge of the category together with the CSO will determine how many of the ranked list of firms will be awarded contracts.

**410.03.02.06 Short-Listing**

There are two notifications to be made after the CSO manager has approved the recommendations of the evaluation/selection board regarding the short-listing of firms. The first notification is to those firms no longer under consideration for interviews. The second notification is to those on the short list regarding interviews and the process that will follow.

- For firms no longer under consideration, notification will be in writing from the CSO manager explaining that they were not among the top firms still under consideration. The firms’ options for debriefing should be spelled out in the letter, as there are different processes involved if they request a debriefing (see Section 410.03.02.09 and Appendix K) prior to final selection and agreement execution.
- The firms on the short list for interviews will be contacted by phone, with written follow-up (email or letter). Because the time frames may be short, every effort should be made to speak with the firms’ designated contacts. If schedules and other pertinent data are not yet available, the firms are to be made aware of the anticipated timing, the person who will be in contact from the selection board, what process will be followed, and any other process-related details the firms will need.

**410.03.02.07 Interview Process**

If, for a single project solicitation the CSO, along with the ACL and the project office, determine that interviews need to be conducted with the top-ranked firms, they shall be scheduled to be held as soon after the proposals are scored as possible. 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 along with scheduling any conference rooms needed if the interviews are face to face or by telephone conference call. The questions and scoring factors can include soliciting information that may have been provided in the proposals, but using a different angle, along with additional questions specifically related to the anticipated work. The questions used in the interview process may be modified after the proposals have been scored and prior to the interviews to better focus them, if needed.
The interview panel should also be discussed and the interviewers nominated prior to advertising the project. The final selection of the scorers and the interview panel will be determined by the CSO. The proposal scoring team and the interview panel members’ names will not be provided to the consultants, and both the proposal scoring team and the interview panel members along with any observers will be required to sign the Evaluator Conflict of Interest and Confidentiality Statement (Appendix AB).

The selection board will meet with each firm scheduled for an interview based on the short list approved by the CSO manager. (Appendix U provides details regarding how interviews are conducted.) Upon completion of the interviews, the selection board will deliberate, document the ranked selections, and make the final recommendation to the CSO manager.

After the selection board has finished the selection process, made its recommendations to the CSO manager, and the manager has accepted the recommendations for the top three firms, notifications will be made in writing (email and letter) to the remaining firms regarding the outcome. The firms’ options for debriefing will be spelled out in the letter, as debriefing will not be done prior to completion of the negotiation process and contract execution.

Notifications by phone and follow-up letters will be made to the top firms, including an explanation of the process to be used for negotiation and contract award (see Appendix K). In addition, the project and lead negotiator (contract officer) will be notified of the selections and provided with the necessary data and information for the scoping and/or negotiation process.

410.03.02.08 Notification of Top-Ranking Firms

Whether or not an interview is required to select the consultant team for a specific project, or whether the ranked consultants are short listed for a Task Order Master Agreement list, the top-rated firm or firms will be notified of their ranking and the method of negotiation to be used based on the solicitation. For a single project agreement, if the state has a detailed statement of work (SOW), it should be submitted to the firm asking the firm to prepare and submit its proposal. A reasonable amount of time needs to be allowed for the top-ranked team to prepare its response to this request. Should no more discussion be necessary, the state and consultant will proceed to negotiate the cost of the agreement. For this process, see Chapter 420.

If the state intends to develop and/or discuss the SOW with the top-rated firm using the Managing Project Delivery (MPD) process (see Appendix N), the notification will address the process and establish the time and location for the initial meeting. Any further data required needs to be requested at this time.

Note: Under the Brooks Act regulations, the selection process is open through the negotiation process and until a contract is awarded. The top three consultants are considered selected going into negotiations, with negotiations beginning with the top-rated consultant. In the event that the consultant and the state are unable to reach a determination of “fair and reasonable” costs (see Appendix L), negotiations are terminated with the top firm and started with the next-ranked firm. Refer to Chapter 420 for details on the negotiation process.
410.03.02.09 Announce and Debrief

After the execution of the contract(s), the CSO will publicly announce the contract award(s). Notice will also be sent to each firm that submitted a statement of qualifications in response to the solicitation. The notice will identify the firm(s) that received a contract and a description of the process they must follow if they wish to be debriefed.

Debriefings are offered to consultants after a selection process to provide them information 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 offered to consultants after the final selection has occurred, and may be provided in writing, by phone, or in person. See Appendix K for details on notification, debriefing and disclosure of consultant information.

410.04 Small Purchases Using Simplified Acquisition

410.04.01 Introduction

As stated in the introduction (Section 400.01), 23 CFR 172 specifies three methods that state departments of transportation can use for competitively acquiring consultant services. One of the methods uses a simplified acquisition for small purchase contracts.

The CSO manager is responsible for generating requests for Statements of Qualifications and requests for statements of interest in small purchase contracting, which are announced separately from the specific project solicitations. Details regarding these solicitations can be found in Section 410.04.02 and Appendix J (databases).

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, currently set at $150,000 as defined under 48 CFR 2.101. 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 48 CFR 2.101.
- Public solicitations will occur 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 and Regional Operations Chief Engineer.
- At least three consultant firms must be reviewed for any simplified acquisition process, per 23 CFR 172.7(a)(1).
• Under most circumstances, the consultant will not hold more than one small purchase contract at any given time. However, an exception may be made for the consultant to 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. The CSO manager will determine if any consultant can hold more than one small purchase contract at a time.

• 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. Multiple small purchase contracts with different firms for different pieces on the same project may not be used to avoid the full solicitation process.

410.04.02 Selection Process

As noted, most contracting with the state utilizes the single project or task order procedures noted above, or for sole source and emergency needs, the processes noted in Chapters 440 and 600 respectively. Section J.3 describes the process for consultants to provide their statements of interest in working on small contracts, if the WSDOT decides to advertise for such statements and develop a database. The CSO is responsible for maintaining this consultant database. Should a project office require a simplified acquisition process, the project office must contact the ACL and CSO for direction.

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 that have expressed interest in small purchase contracting for the type of services being requested and will provide that information to the WSDOT Assistant Secretary Engineering and Regional Operations Chief Engineer. The Chief Engineer will determine whether sufficient competition exists.

If the Assistant Secretary of Engineering and Regional Operations Chief Engineer determines that there is not sufficient competition (a minimum of three or more potentially qualified firms from one or more lists), 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 determine the selection criteria, develop the selection board, and outline the selection process, including determining DBE goals, if needed. After the selection process and criteria determinations have been made, the list of firms, with their qualifications and the selection criteria, will be forwarded to the person designated as the selection process board chair.

Under the simplified acquisition, small purchase process, there are two options for board evaluation and selection.
**Option 1** – A list of the firms considered to be qualified is presented to the chair of the selection board. The board then evaluates project details, the firms’ Statements of Qualifications, 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** – If the selection board determines that a full selection board is not required to make the selection, then the selection board chair is authorized to make the decision, ranking of the three top 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:** To ensure the correct dollar threshold is used for simplified acquisition (small purchase) under federal guidelines, it is recommended that, prior to starting the selection process, the CSO manager, the project manager or the ACL check the current dollar cap which is defined in 48 CFR 2.101.
420.01 Cost Proposal and Statement of Work Negotiations

After the selection of the top-ranked firm(s), the process of finalizing the detailed Statement of Work (SOW) and the anticipated cost enters the negotiation phase. Depending on the method of SOW development presented in the solicitation announcement, the CSO manager will submit to the top-ranked firm either a Request for Proposal (RFP) or a proposed schedule for the Managing Project Delivery (MPD) process.

420.01.01 Request for Proposal

420.01.01.01 Project-Specific Contracts

If WSDOT is not going to use the MPD process for detailed SOW development, then a concise project description or synopsized SOW is published in the solicitation. The CSO manager submits a formal notice to the top-ranked firm and requests a full proposal from the firm, to include:

- A more detailed statement of work.
- A detailed cost proposal for the firm and any proposed subconsultants covering labor rates, overhead, non-labor expenses, and proposed profit (fee).
- A proposed schedule listing appropriate mileposts.
- A Disadvantages Business Enterprise, Small Business Enterprise, or Minority/Women/Veteran Business Enterprise plan based on the requirements of the solicitation. (See Chapter 700 for specifics on requirements.)
- Any other pertinent data necessary to the negotiations.

Refer to Section N.1.3 for additional details regarding the negotiation process for project-specific contracts which do not use the MPD process.

420.01.01.02 Master Task Order/Category Specific Contracts

For Master Task Order agreements used for category-specific on call services, the CSO will develop the general statement of work that will govern the boundaries of the category of work covered, the maximum amount of the contract, the end date, and other terms that govern the overall scope of the contract. The CSO will also negotiate the cost factors, expenses, and profit for the overall life of the contract and be responsible for negotiating any changes to these items through the life of the contract.

Work authorized under Master Task Order contracts will be done through task order documents (TODs), if appropriate to the agreement type (see Chapter 450). Selection of the consultant to do a project on a task order, unless specific permission is given by CSO for a sole sourced task order, will require a Second Tier Competition Process (see Appendix Y). Items of work proposed for the task order contracts must be competed between at least several of the on call agreement holders in the specific category (per specifications in Appendix Y). It is recommended that all firms on a list of agreement holders be requested to participate in the competition. However, all task order master
contracts have a maximum amount allowed for a specific project task order, and the project office and ACL involved must scope and estimate the full project amount to select the right list and to determine if the project can be accommodated on a task order rather than making the work a project specific agreement through the regular advertisement and selection processes. All Second Tier Competitive Processes are coordinated with the CSO prior to contacting the consultants.

After selection of the consultant, negotiations for each TOD, or an amendment to a TOD, will follow the same steps listed above for project-specific contracts, if the MPD process is not used to develop the TOD statement of work. For TOD negotiations using the MPD process, see Section 420.01.02.

For more information on category-specific contracts, see Appendix I.

For more information on TODs, see Chapter 450. For more information on Second Tier Competition Process, see Appendix Y.

420.01.02 Statement of Work and Budget Negotiations Using the MPD Process

The statement of work (SOW) is the narrative description of the work to be done by the consultant. It describes in detail what each party understands about the services to be provided for which the state will pay.

Experience has shown that for larger, more complex projects or items of work, there are significant benefits to both the consultant and the state when the SOW is developed jointly. The process used for developing the SOW through a joint effort is known as Managing Project Delivery (MPD). (A full explanation of the MPD process and the steps involved in its use are provided in Appendix N.)

Generally, Master Task Order contracts are limited in total project amounts, including all amendments, allowed per task order (which varies with each type of category-specific list), and cannot be used where high cost large or complex and multiple major work items are expected. For these, project-specific contracts should be used.

Nothing precludes WSDOT from using the MPD process on specific work authorizations under category-specific agreements as long as the process anticipated is announced as part of the solicitation process among the contract holders.

The appropriate ACL or a representative of the CSO manager will lead the MPD process, with support from the project personnel. A meeting is to be held between the project, the CSO, and the ACL prior to the first meeting with the consultant to establish the goals and expectations of the state.

420.02 Contract Execution and Notice to Proceed

After negotiations between the WSDOT and the consultant reach agreement and an award has been made, notifications will be sent to the submitting firms regarding the award. The award information included in the notification will include the contract amount, the name of the firm awarded the contract, and information regarding debriefing, if not already provided.
420.02.01 Final Submittals and Contract Assembly

For project-specific agreements, after the negotiations are complete, the ACL submits to the CSO:

- The completed SOW and the contract estimate of cost.
- The negotiation notes and any explanations regarding variances to the original engineer’s estimate of cost that are more than 10% over or under.

The CSO reviews the final documents and, if found acceptable, requests that the consultant submit any other required material not already received. The CSO then proceeds with the assembly of the contract.

Final documents needed from the consultant include the most current approved overhead rates for all firms on the consultant team from the WSDOT Internal Audit Office or the firm’s cognizant agency (see definition in Chapter 140); subconsultant information, including Disadvantaged Business Enterprise/Small Business Enterprise certifications; Washington State universal business identification number; System for Award Management (SAM) Excluded Parties Record search results for the prime and all subs on the contract; and federal employer identification number for prime and subs. Statewide Vendor Numbers are required for the prime, and requested from the subconsultants.

For category-specific on call agreements, the CSO manager will require the prime consultant to provide Actual Not to Exceed rates tables for the prime and all subconsultants based on the most current approved overhead rates for all firms and negotiated fee percentage, plus all additional information as outlined in the paragraph above.

420.02.02 Obtain Appropriate Signature

Upon completion of contract document assembly and receipt of necessary documentation, the CSO sends the original documents to the consultant for review and signature.

420.02.03 Contract Approval and Execution

After the consultant has approved and signed the original contract documents, they are returned to the CSO for execution by the state. The CSO manager signs all contracts and contract supplements.

If the document is a supplement to an existing agreement, it is then sent to the Washington State Attorney General’s Office (AGO) for review and approval as to form, and returned to the CSO for final execution.

Task Order documents, including amendments, unless otherwise delegated, are also returned to the CSO for final execution.

420.02.04 Distribution and Notice to Proceed

After execution of the contract, contract supplement, or task order, the CSO sends one original to the appropriate ACL or requester for distribution to the consultant. The ACL will issue a notice to proceed (NTP), with a cover letter and the consultant’s original agreement document. Copies of the document will be made to distribute to the
project office, the ACL files, the appropriate program management office and others as identified in the cover letter.

For Master Task Order contracts, the CSO distributes the contracts to the consultant firm and copies of the contracts to the appropriate ACL managing those contracts, if applicable.

There may be times when the project does not want to give a notice to proceed until a later date. When this is the case, the project should fully document to the CSO manager what date the consultant should anticipate a notice to proceed and the reasons for the delay.

There may be other times when the services of the consultant may be needed prior to the agreement being fully executed. The project should document to the CSO the details. A limited notice to proceed (LNTP) can be issued by the CSO manager, or designee, provided the negotiations are complete, the work authorized is based on the completed cost factors contained in the negotiations, and the consultant accepts the limited nature of the NTP.

The LNTP must spell out specific items of work that may begin, the limited dollar approval, and the limited time frame in anticipation of the full NTP. The discretion to issue a limited notice to proceed rests with the CSO manager.

420.02.05 Announce and Debrief

After the execution of the contract(s), the CSO will publicly announce the contract award(s). Notice will also be sent to each firm that submitted a statement of qualifications in response to the solicitation. The notice will identify the firm(s) that received a contract, the contract amount, and a description of the process they must follow if they wish to be debriefed.

Appendix K describes the notification and debriefing requirements in detail.

420.03 Legal Basis Regarding 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.
Chapter 430  A&E Contract Supplements

430.01 Introduction

Contract supplements occur as a result of a changed condition affecting the terms of the existing contract, and can be expected or unplanned. Any material change to the existing terms of a contract requires renegotiation of those terms and a detailed written supplement to the contract, regardless of whether the change includes changes to the agreement total dollar amount. Material changes can include additions or deletions of deliverables, different methods of delivery, shifts in type of work between consultant team members, the time required for delivery, as well as changes in cost or in personnel assigned to the work. Modifications can also impact Disadvantaged Business Enterprise (DBE), Small Business Enterprise (SBE) and Minority/Small/Veteran/Women Business Enterprise goals and could potentially impact DBE, SBE, or MSVWBE participation. 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).

Supplements can be written and changes can be made only to the work within the scope of the original project as publicly described in the original solicitation. Where phased work is allowed, a supplement cannot be written to add subsequent phases of work to the contract unless those phases have specifically been covered in the original solicitation for subsequent inclusion in the contract. 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. Modifications that require a supplement need both documentation and justification, and they require approval from the HQ Consultant Services Office (CSO) prior to starting negotiations. In addition, all modifications to a contract with the exception of time modifications must have concurrence from the Office of Equal Opportunity.

430.02 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 form. Types include memos requesting time only, as well as requests for various types of changes, and proper forms are available through the offices of the regional ACLs and HQ CSO. All changes and modifications to the contract must be done in writing. The area consultant liaison (ACL) will assist the project management team in writing the request memo.

The supplement process for time extensions requires a short memo explaining the need, and the time supplement form available through HQ CSO or the regional ACL. The process for obtaining signatures on this supplement include requesting the consultant to provide their signature on two originals, and the state executing the supplement on the two originals. One original will be returned to the consultant for their records.
For supplements which change the project conditions, such as adding new work, subtracting or shifting work, or other items, the supplement process after the request memo is approved may involve negotiations between the state and the consultant. Documents often attached to the supplement include a supplemental Statement of Work, a cost estimate for the prime consultant and each subconsultant affected by the change, and information related to the use of DBE, SBE (federal), MBE, SBE (state), VBE and/or WBE firms. Multiple documents may be needed to adequately detail the agreement for the change between the state and the consultant.

In cases where the supplement changes the total funding authorization, either by adding funds, subtracting funds, and/or shifting funds, the state project office and the consultant will need to provide independent estimates, and if necessary, will negotiate the final cost. Supplements to close agreements are suggested to ensure that both the consultant and the state have fulfilled the requirements agreed to in the agreement, the final invoices have been submitted and paid, and the agreement is able to close. This closure process also allows the project office to better manage their work order procedures.

All supplemental processes can use the Managing Project Delivery process if desired by the consultant and the state. If this process is used for a supplement, schedules need to be established as quickly as possible to prevent delay to the project and maintain the overall progress of the work effort already under way.

Supplements with funding changes of any kind, and/or which add or subtract firms, are required to be approved by the Assistant Attorney General for form prior to final execution by the state. Time in the schedule should be included for this process, which can take from two to four weeks.

After the final signatures have been added to any of the supplement types noted above, one original will be sent back to the consultant for their records. The HQ CSO will keep the state’s original in their files. Copies will be provided to the accounting office, the project office, the appropriate program management office, and others as needed.
Acquisition of A&E Contracts
Through Noncompetitive Negotiation

Chapter 440

440.01 Introduction

Federal regulations under 23 CFR 172 identifies three methods for obtaining the services of consultants for A&E work. These three include: competitive negotiation (qualifications-based selection) procurement, small purchases procurement for small dollar value contracts (falling under the definition of the simplified acquisition threshold), and noncompetitive procurement. Competitive negotiation and small purchase procurement are covered in Chapter 410. FAR Subpart 6.3 covers policies and procedures for selecting consultants using other than full and open competition.

This chapter covers the process steps used by WSDOT for noncompetitive negotiation in the acquisition of architectural and engineering (A&E) consultant services in accord with the federal regulations. The circumstances under which the processes are used, also known as “sole source,” are described below, including emergency services, inadequate competition, and single sources. Note that while a brief description of emergency sole source acquisitions are outlined here, Chapter 600 covers additional information for them, covering both A&E and personal services contracts that must be instituted immediately to protect public safety and/or public property.

It is noted that processes for scoping and negotiations for sole source agreements will follow the same procedures outlined for competitively selected agreements in Chapter 420.

440.02 A&E Sole Source Justification and Procedures

440.02.01 Noncompetitive Acquisitions – General Considerations

FAR Part 6 governs acquisitions which normally are competitive, and under Subpart 6.3 covers those acquisitions done using other than full and open competition (non-competitive procurements). Non-competitive procurement may be used to procure engineering and design-related services on federal-aid participating contracts when specific conditions exist allowing solicitation and negotiations to take place with a single consultant. These conditions include that the procedures reflect applicable State and local laws and regulations in conformance to applicable Federal requirements, and the agency has established a process to determine when non-competitive procedures will be used. The award of a contract by non-competitive procedures can be done under the following limited circumstances:

1. The service is available from only a single source.
   • For the service to be available from only a single source requires that a firm be the only one that can provide the services.

2. There is an emergent situation that will not permit the time necessary to conduct competitive negotiations (see Chapter 600).

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

For all sole source acquisitions, a request memo must be submitted to the CSO that addresses the existence of one of the above three circumstances and provides documentation to support the assertion. Contracting agencies shall submit justification and receive approval from the Federal Highway Administration (FHWA) prior to using this form of contracting. For the information needed in a request memo, and the data required for it, see Section 410.02. ACLs need to be involved in the development of the memo, and the memo for sole source acquisitions must come from an appropriate executive level, such as a Regional Administrator or similar headquarters executive level.

After 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 will be notified and the scoping and negotiations process will go forward.

For obvious immediate emergency requests, see Chapter 600. Where the emergency is less obvious, full justification and documentation should be covered in the request memo and any supporting documents attached. When this occurs, the appropriate executive-level authority will sign the memo.

**440.02.03 Types of Noncompetitive Acquisitions**

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 processes for making that determination through open competition.

Every effort must be made to ensure that full and open competition is done. Should the need not be satisfied or other considerations apply, 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. There are also occasions when there is only one firm capable of providing a very specialized service, or only one firm is available to provide a necessary service. These occasions are outlined below.

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

For the service to be available from only a single source requires that a firm be the only one that can provide the services needed. 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 selection process falls under Section 440.02.03.03 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.
The process will begin with a request memo to the CSO for approval of the sole source determination. After approval from the CSO, the firm selected and the state will negotiate a contract specific to the work required in a similar process as outlined in Chapter 420.

440.02.03.02 An emergency exists that does not permit the time for competitive negotiations

WSDOT policy regarding acquisition for emergencies through noncompetitive negotiation requires executive-level determination as to whether or not a circumstance constitutes an emergency. Generally, those situations that pose an immediate threat of loss of life, bodily injury, or loss or damage to physical property are potentially situations which may require consultant services for an immediate response. Some situations which may be considered emergencies include earthquakes, severe weather events, accidents, land slides, and other natural disasters which can all pose an immediate threat to the public itself or to publicly owned property. However, there are circumstances when an emergency exists, but is not so readily seen.

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

For emergency contracts, the project managers involved and the area consultant liaison (ACL) will 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.

440.02.03.03 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. 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 sole sourced without further solicitations. The sole source justification must include documentation that 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 the process followed at least satisfies the requirements of publicly providing the opportunity.

440.02.03.04 Sole Source Contracts for Phased Work Assignments

There are circumstances when it makes sense to end an agreement 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 agreement is allowable without a determination of an emergency situation or inadequate competition:

1. One phase of work ends and another begins with the same consultant.
2. Overlapping phases require a new agreement to start before work ends on the last phase.
3. Design support is needed during construction.
4. The contract payment type or contract 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, and process is outlined below. The fourth case is also outlined below. The fifth and sixth cases usually are initiated by other branches of the state government.

The following is an example statement for use in 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” may 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.

**440.02.03.05 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 advertisement and 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 advertisement and construction, due to the uncertain nature of the amount of support services which will
be required, and difficulty in determining the proper fee for the services. In addition, changing the type of payment within a contract is not allowed by the HQ Office of Accounting and Financial Services. In this case, it is acceptable to issue a new sole source contract based on negotiated hourly rates. Additional information about design support during construction contracts is found in Appendix I.

It is also possible that a Task Order, for which a second tier process was used for consultant selection, was used to develop the design. In this case, it may be that the Task Order Master Agreement has insufficient time to cover the services during advertisement and construction. If this is the case, a project specific sole source can be requested to replace the Task Order for the project on a negotiated hourly rates basis.

Occasionally, the wrong type of contract may be used for a project. In this case, it may be necessary to change the contract type during the course of the work. This cannot be done by supplementing the existing contract, since usually the reason for the change is due to initially using the inappropriate type of payment for the work. A change of this type needs careful management to not to change or modify the limits or general scope of the original solicitation. In addition, to prevent project delays, the change should be done at a point where the shift can be easily made. Some overlap of the two contracts may be necessary to accommodate this change.

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 possibility of supplementing the existing contract, the potential contract type if a supplement option is not appropriate, and other parameters related to the progress of the project. This would be similar to the pre-solicitation meeting covered in Section 410.03.

### 440.03 Ensuring Sole Source Negotiations Obtain a Fair Price

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.

After appropriate approvals have been received, the CSO manager will notify the intended firm of its selection and the state’s intent to enter into a negotiated contract, per Chapter 420. In addition, the project manager and lead negotiator (contract officer) will be notified of the selection and provided with the necessary data and information for the scoping and/or negotiations process.

A detailed scope may be established using one of the two WSDOT methods outlined in Chapter 420 and Appendix N. The method used and the approach to negotiations will be determined by the nature of the work required.

For negotiations on a non-competitive contract, 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 and established labor rates within their organizations. The profit portion of an all-inclusive billing rate or a cost plus fixed fee contract 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, see Appendix N.

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 per the process outlined in Chapter 420. 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.
440.04  A&E Federal and State Regulations for Non-Competitive Consultant Acquisition

Following are the federal and state laws and regulations upon which Chapter 440 are based.

440.04.1  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 172.7(a)(3) Procurement Methods and Procedures

Contracting agencies shall submit justification and receive approval from the Federal Highway Administration (FHWA) before using this form of contracting.

440.04.2  Washington State Laws

RCW 39.26.130, Emergency Purchases (see Appendix E for full RCW text)
RCW 39.80, 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)
Chapter 500  Contract Administration

500.01 Introduction

This chapter covers the administrative procedures for all consultant contracts, both Professional Services and A&E services, from the point the consultant is given a notice to proceed on a project-specific contract or task order to the final close-out of the contract or task order. It also provides the basics of contract administration for existing on-call agreements.

Appropriate acronyms and definitions are in Chapters 130 and 140, respectively. The definitions which distinguish between “contract management” and “contract administration” are found in Chapter 140.

500.02 Responsibilities for Administering WSDOT Contracts

Overall contract administration for all contracts is the responsibility of the HQ Consultant Services Office (CSO). This includes the administrative responsibilities leading up to the award of a contract, through the progress of the contract, to the conclusion, acceptance of the work, evaluation of the consultant, and contract closeout. The CSO is supported by the ACLs, who report to the CSO for contractual matters. The CSO is responsible for establishing a regular process of training for ACLs and area project personnel.

The ACLs will work with the functional area project personnel to ensure the necessary steps are taken in any contractual matters related to initiating, negotiating, administering, and closing out contracts, including task orders, for consultant services. ACLs will also work with the project personnel responsible for the day-to-day contract administration in the field. The appropriate ACL is to be contacted prior to and be involved in any changes or change management functions that could materially affect the contract.

ACLs interface between the CSO and project delivery teams. It is the responsibility of the ACL to see that the requirements and necessary steps for consultant contract administration take place. They are responsible for providing guidance and training to project personnel, or arranging for direct CSO involvement in the guidance and training of personnel responsible for daily administration of consultant contracts. They are also responsible for providing consultative support to project engineers, managers, and area management teams.

It is expected that, under most circumstances, the manager of a consultant project for WSDOT will be a WSDOT employee who has the responsibility and qualifications to ensure the work delivered under the contract is complete, accurate and consistent with the terms, conditions and specifications of the contract. One or more WSDOT staff can be involved in the management of a contract, including negotiations, payment, and evaluation of the services provided.

Project personnel are assigned administrative responsibilities such as documenting and verifying monthly invoices, helping to assemble necessary documents, arranging meetings, and closing out contracts.
500.03 Administrative Procedures

After the contract has a full statement of work and has been negotiated and awarded, the process of contract administration is largely a function of the project office. This is true for all contract types, including task orders. If a consultant has been selected to provide some of the project office management services, oversight will be provided by the state at a higher level to ensure fulfillment of the state’s responsible charge.

A project kick-off meeting would cover such administrative issues such as review of monthly invoices; maintenance of source documents; notifications of change; delivery of the project schedule; and any other administrative matters. If the project includes more than one consultant team, a meeting at the beginning of the project which includes the project office, the assigned state manager with oversight responsibilities, the ACL, and all the consultants is recommended for project coordination.

Often, the WSDOT project office, the engineer or project business manager is responsible for establishing procedures for invoices and monthly progress report reviews. The ACL, who must be aware of all contract administration issues as the liaison between the project office and the CSO and CSO manager, needs to participate in these procedures. It is the responsibility of the project manager to see that the ACL is kept informed and engaged in the progress of the contract.

Change management is a major administrative issue, and a change management plan needs to be developed and reviewed during the initial meetings. Any changes to a contract (supplements or amendments) cannot be authorized until the supplement or amendment is approved.

Note: Chapter 250 covers Professional Services supplements to contracts, and Chapter 430 covers A&E supplements to contracts. The ACL for the project must be informed of any changes the project office requires to ensure the proper procedures are followed for supplementing, amending, closing or otherwise changing the contract with the consultant(s).

500.04 Contract Closeout Process

When the work covered by a project-specific Professional Services or architectural and engineering (A&E) consultant contract, including task orders, is complete, the contract must be closed. Task orders usually need a closure amendment, while the master agreement remains open. However, single project contracts will require some additional steps to close the contract satisfactorily.

After the work is completed on a consultant contract, the following steps will properly close out the contract:

1. The consultant notifies the project office and ACL in writing that all elements of the statement of work (SOW) have been completed and all deliverables have been provided. The consultant needs to submit an invoice labeled “Final” with a letter stating that it is the final invoice. The letter should also state that there are no other charges pending, that the amount invoiced represents the remaining total amount due, and that there are no other claims forthcoming under the contract work. At this time, if the consultant believes that additional work was completed on the project which was requested by the WSDOT without a supplement or amendment to the contract, and/or additional payment is due, the consultant should notify the project office and the ACL that outstanding issues remain.
2. If the WSDOT project office and ACL agree that all work has been accomplished to the state’s satisfaction, the project manager or ACL will acknowledge the consultant’s letter and final invoice; request all files, data, or other materials supplied to the consultant; and notify the consultant that the work has been done satisfactorily and is accepted by the state. In the letter, the project manager or ACL will remind the consultant that this acceptance does not release the consultant from potential obligations to correct, make whole, or complete any unknown omissions or design errors. The project manager or ACL should also provide the consultant with a copy of the consultant evaluation (see Section 500.05 below) when finished by the ACL.

3. If the WSDOT project office does not agree with the consultant’s request regarding the outstanding issues and/or additional payment for work completed, the WSDOT will notify the ACL immediately, and offer the consultant the opportunity to submit a claim per Appendix G procedures. Depending on the nature of the claim, the process may end at the project office level, or eventually reach a higher level of negotiation to resolve the issue. The ACL will notify the CSO and help to manage the claims process.

4. The project manager will be requested to assist the area consultant liaison (ACL) with completing the evaluation process, which is outlined in Appendix F. If there are problems with the process, the ACL and the consultant should be notified.

5. Upon payment of the final invoice, the HQ Consultant Services Office will notify the WSDOT Internal Audit Office of the completion of the contract and will formalize a request to audit the contract. Boilerplate contracts specify that the consultant is required to maintain source documents for all costs billed to the state for a period of six (6) years from the completion of the contract and receipt of final payment. If a final audit is in progress, these source documents must be maintained until the final audit is completed and all responses made and accepted.

Procedures for closeout and records retention required for contracts with federal-aid participation are found in 49 CFR 18.36 and are outlined in Section 500.06 below. For all contracts, the following should be added to the list:

- All liability actions resolved.
- Performance evaluation(s) prepared, approved, and distributed.
- Return of all government-furnished materials by the contractor.
- Assurance that, per the contract section titled “Protection of Confidential Information”, all confidential information has either been returned to the WSDOT or destroyed or has taken steps required by WSDOT to protect such confidential information beyond the life of the project.
- Release of claims executed by the contractor.
500.05 Consultant Performance Evaluation Reports

500.05.01 Introduction

The preparation of the Consultant Performance Evaluation Report is an important part of the contract 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 from project beginning to contract close-out. Performance needs to be made a part of the consultant selection process, the development of the statements of work, and the negotiations, 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. This is also required for TODs which exceed $30,000.

It is appropriate to provide a consultant with a performance report if either the consultant or the project office requests it, regardless of the value of the contract or task order. It is recommended that, if the project consists of work that is not standard to WSDOT, no matter the value, a performance report be provided for the consultant.

Note: The Consultant Performance Evaluation Report does not compare one consultant with another. It evaluates the performance of a specific consultant on a specific project’s statement of work. The report records whether the consultant did or did not meet those performance standards that were established in the contract and are generally accepted by the industry for the execution and management of the contract.

500.05.02 Preparation

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 should be submitted according to the intervals established herein, to meet legal and contractual obligations.


500.06 Recordkeeping and Records Retention

500.06.01 Introduction

Records related to the progress of WSDOT contracts are an important part of the contracting process. Audits can be initiated up to three years after close of the contract, and require that records be kept until the audit process is complete, no matter how long that takes. They seldom occur during the progress of the contract when records are current and memories are fresh. There are several timetables related to records retention covered by federal requirements (49 CFR 18.40–18.44), state law, the State Administrative and Accounting Manual, and the Purchasing Manual M 72-80.

Many of the responsibilities for records have already been covered in the manual sections related to their development. Records which must be maintained include, but are not limited to, request memos; planning documentation related to consultant use; solicitations; ratings and selections; negotiations notes; and awards notifications. How
these records are handled and maintained after they are generated is governed by one or more of the legal and policy and procedures manuals listed above.

Recordkeeping usually moves to the project offices after the notice to proceed, but the ACLs and the CSO also have records involvement throughout the life of the contract.

500.06.02 Records Management and Public Disclosure

500.06.02.01 Records Management

The CSO follows the provisions of Chapter 40.14 RCW in managing and archiving the essential records related to acquisitions and contract administration. The CSO is the custodian of the official contract files for Y agreements for Professional Services and architectural and engineering (A&E) consultant services. It is the CSO’s obligation to maintain the active records on-site in an accessible manner; maintain complete and well-organized contract files; protect original documents; and ensure records retention schedules are followed.

General records retention schedules are established by the Office of the Secretary of State, Division of Archives and Records Management. The “General Schedule” pertains to records that are consistently developed in the course of doing state business, and they refer to the primary record regardless of the storage media. The CSO adheres to the State required retainage schedules for contract-related records. The schedule is as follows:

- **Contracts for services**: Retained for six (6) years after termination and close-out.
- **Solicitation records**: Retained for six (6) years after closure or cancellation.
- **Documentation of unsuccessful proposers/bidders**: Retained for three (3) years after award or cancellation.

Records are stored at the Washington State Records Archive for the duration of the retainage period.

In order to increase the accessibility of its records, the CSO has instituted a document imaging process to provide electronic access to active contract documents.

500.06.02.02 Public Disclosure

Public disclosure is the process by which the general public requests and obtains public records from state agencies. In Washington State, public disclosure is governed by the provisions of Chapter 42.56 RCW, which requires all state agencies to respond to requests for public records in a timely and acceptable manner. The term “public record” applies to any record, in any media, including electronic records. Further direction regarding WSDOT’s policy on public disclosure is on the website at [www.wsdot.wa.gov/Contact/PublicDisclosure](http://www.wsdot.wa.gov/Contact/PublicDisclosure).

The WSDOT has notified consultants on its website that all submittal material received by the CSO for a selection process will be posted to the CSO website following the conclusion of the Post-Debrief Protest time period. Prior to posting, WSDOT will redact the submittal information pursuant to 42.56.270(2) RCW (Financial, commercial and proprietary information) and will also redact the proposer’s FID number. If a consultant desires to claim portions of the proposal as proprietary and exempt from public disclosure, each page claimed to be exempt must be clearly identified as
“proprietary information.” If a public records request is made for that information, the consultant will be notified of the request, and given the opportunity to seek to obtain a court order enjoining disclosure or cite other state or federal law that provides for nondisclosure.

Public disclosure of materials related to contracts, project progress and management also need to go through the mandated public disclosure process, and the consultant will be notified of the request if the request includes proprietary information. The WSDOT will redact material that is considered exempt under the law, and will notify the consultant should material that is marked “proprietary” or “confidential” by either the consultant or their subconsultant is requested.

500.07 Miscellaneous Administrative Procedures

500.07.01 Contract Claims Procedure

Contract claims most often occur when the consultant and WSDOT project personnel disagree on payments due to the consultant. Most claims are made at the end of the project, often when the contract maximum payment amount is reached or time has run out. Appendix G, Consultant Contract Claims and Claims Procedures, gives full details of the processes and the steps to take with a claim.

500.07.02 Consultant Design Errors and/or Omissions

Potential errors or omissions in the design may be identified either during or following the construction of a project which has been designed utilizing consultant services. Regardless of the cause, design errors or omissions can be costly in many ways. Appendix O, Consultant Design Errors and Omissions Procedures, explains how to determine whether a consultant error or omission has occurred and establishes uniform procedures for resolution and cost recovery.
Chapter 600  

Emergency Consultant Contracts

600.01  Introduction

*Note:* Nothing in this chapter is intended to interfere with, or inhibit, the decisions that may need to be made when an emergency occurs.

For both Professional Services and A&E services, in an emergency the competitive negotiations process is able to be bypassed, both under the federal regulations (23 CFR 172.7(a)(3)(iii)(B)) and the state regulations (RCW 39.26.130 and RCW 39.80.060). This chapter covers the basis for bypassing the competitive negotiations process when contracting with a consultant in an emergency situation, regardless of the type of service required. The Washington State Department of Enterprise Services has outlined procedures under 39.26.130 RCW and DES Policy DES-130-00 for state agencies, which WSDOT uses for emergencies, and is in accord with the requirements under 23 CFR 172. See Appendix A for 23 CFR 172 and Appendices D for RCW 39.80 and E for RCW 39.26.

23 CFR 172 allows for the State to use their own procedures and policies if they are not in conflict with State law. In this chapter, the process outlined in Section 600.02 covers the requirements the state has in providing emergency consultant services and developing the contracts needed.

600.01.01  Definition of “Emergency”

In the DES Policy DES-130-00, which is based on 39.26.130 RCW and is in accord with 23 CFR 172.7(a)(3)(iii)(B), to qualify for an emergency procurement, the event must represent a set of unforeseen circumstances beyond the control of the agency that either:

a) Presents a real, immediate, and extreme threat to the proper performance of essential functions; or

b) May reasonably be expected to result in material loss or damage to the property, bodily injury, or loss of life, if immediate action is not taken.

Examples of the types of situations that could constitute an emergency include flood damages, earthquake damages, gas line explosions, fire damage consultation, and personnel investigations when they are extremely critical and time sensitive.

600.01.02  General Considerations for Emergency Contracts

Based on the processes covered herein, the determination regarding the type of contract to use will typically be made by the HQ Consultant Services Office (CSO). In other circumstances, the determination may be made by the area consultant liaison (ACL). If there is a question about whether the subsequent contract is Professional Services or A&E, the definition for “Architectural and Engineering Services” in Chapter 140 is helpful. If the required services are not covered in the definition for A&E, then it will most likely be Professional Services as defined in Chapter 200.
It may be necessary to give Notice to Proceed prior to finalizing a contract for consultant services in an emergency. In this case, it may be that the type of service, Professional Services or A&E services, will not be clear. The steps to obtain services prior to determining contract type are in Section 600.02.

When appropriate, WSDOT can review and utilize the existing qualified DES master contracts except when the contract cannot justifiably satisfy agency needs. The agency needs includes the ability to provide a timely response to an emergency.

The duration of the emergency contract must not extend beyond the time needed to resolve the immediate threat.

Emergency procurements are only to be conducted for legitimate and qualified emergencies. Emergency procurements are not a substitute to avoid competition or mitigate for the time needed to competitively procure the services.

Caution needs to be taken to ensure the required services are not a “purchased service” as covered under 39.26. In an emergency, purchased services would most likely be such things as traffic control, roadway cleanup, or temporary roadway realignment or stabilization. Purchased services are not covered by the CSO and are not addressed in this manual. Region construction and maintenance engineers maintain approved lists of contractors appropriate for purchased services in an emergency.

### 600.02 Emergency Contract Process

Emergency contracts are awarded to resolve an emergency situation, which is specifically defined above. Lack of prior planning does not constitute an emergency.

If the following steps cannot be taken prior to giving a consultant a notice to proceed, then the authorizing WSDOT employee needs to initiate these steps as soon as possible after giving the consultant authorization to perform the work. The authorization must be made to help alleviate the immediate risks covered in Section 500.02.

#### 600.02.01 Request Memo for Emergency Consultant Services

If an emergency exists requiring the services of a consultant, the requester is to contact the area consultant liaison (ACL) to discuss the situation and determine the first steps. Regardless of the timing of the need for consultant services related to an emergency, and based on information provided to the ACL by the requester, the ACL will prepare a request memo for emergency consultant services to submit to the CSO requesting approval to select a consultant under emergency procedures. The request memo is encouraged to be emailed on a priority basis to the CSO to solicit a fast response to the emergency situation.

The following information needs to be provided in the request memo:

- **Nature of the emergency**: Explain the nature of the emergency and the relevant circumstances associated with the emergency.
- **Health or safety threat**: Describe the threat to the health or safety of individuals, property, or essential state functions if immediate action is not taken. Provide an estimate of the potential material loss or damage.
- Consultant’s qualifications: Since a consultant will already be identified as the provider for the emergency services, the memo will describe the consultant’s experience, background, and qualifications to provide the emergency service and the basis on which this consultant was selected over other qualified firms.
- Reasonableness of costs: Explain how the agency concluded that the costs negotiated are fair and reasonable (since a competitive process was not followed).

Upon receipt of the request memo, the CSO will review it to ensure it is complete and appropriate to the situation. The CSO will then submit the request to the WSDOT Assistant Secretary Engineering & Regional Operations Chief Engineer for approval. After the request is approved, the CSO will inform the ACL by telephone or email, depending on the conditions. A copy of the signed, approved request memo will be sent by the CSO to the requesting ACL.

The ACL, the CSO, and the assigned project manager will collaboratively complete the contract documentation and submit the completed contract to the CSO for execution by the state. No part of this section shall be used to circumvent the competitive process. The contract will be filed with the DES within three (3) business days as noted in Section 600.04.

If the request is not approved, the CSO will either explain in writing the reasons for the denial or identify additional information needed for further consideration of the request. The nature of the emergency will dictate the manner of communication between Headquarters and the requesting office.

600.02.02 Letter of Authorization to Start Work

If approval is given, and the circumstances warrant starting the work immediately, the ACL needs to request that the CSO send a letter of authorization to the consultant by fax to initiate the start of work. The letter needs to specify the nature of the emergency, the services to be provided, the limits of the current authorization, and the anticipated time when development of a full statement of work (SOW) and cost proposal negotiation will occur. The ACL is encouraged to participate in the development of the Letter of Authorization needed to start the consultant services in an emergency.

600.03 Emergency Contract Supplements

Supplements to emergency contracts are rare. If the emergent contract conditions still exist, then a supplement to an emergency contract is appropriate. If the conditions have been alleviated and are not severe, the supplement filing should be designated as a sole source supplement to an emergency filing.

All emergency contract supplements, similar to original emergency contracts, must be filed with the Department of Enterprise Services for review within three (3) business days following the date of the contract execution or start of work, whichever occurs first. See Section 600.04 below.
600.03.01 Request Memo to Supplement Emergency Services

If a supplement to an emergency contract is necessary, then a memo requesting a supplement is required. The ACL will prepare a request memo to supplement emergency services and submit it to the CSO for review and approval.

The following information needs to be provided in the supplement request memo:

- **Rationale for supplement**: Explain the rationale for executing a supplement rather than competitively procuring the services and awarding a new contract. Include how executing the supplement can most effectively achieve the department’s purpose.
- **Services previously not included**: Explain why the services under the proposed supplement were not included in the terms of the original contract.
- **Changed conditions**: Describe any changed conditions since the contract award and provide other applicable information that clearly justifies the decision to supplement the contract.
- **Within the SOW**: Explain whether the new services are within the SOW of the original contract.
- **Rates the same**: Clarify whether the rates are the same as those negotiated under the original contract and explain any increases.

600.03.02 Additional Elements

The same information provided to DES for the original emergency contract will need to be provided for any supplement to the emergency contract. See sections above.

Agencies are also encouraged to keep a detailed emergency contract file that may include photographs and pictures, video, receipts and other related information that may be useful in securing emergency financial aid, filing insurance claims or complying with Federal Emergency Management Agency (FEMA) requirements.

600.04 Reporting Requirements for Emergency Contracts

All emergency procurements must be reported using the Department of Enterprise Services Sole Source Contract Database (SSDC) within three (3) business days of initiating the emergency procurement. Direct Buy procurements (contracts $10,000 or under, or $13,000 or under if prime is qualified DBE or Small Business) are not included in the DES reporting requirements. The following information is required as part of the reporting:

- **An overview of the nature of the emergency including relevant circumstances.**
- **A description of the threat to the health or safety of individuals, property, or essential state functions if immediate action is not taken. Include an estimate of the potential material loss or damage.**
- **An account of how the contractor alleviated or eliminated the emergency. Include a description of what the consequences would have been if the emergency action had not been taken and the risks associated with inaction.**
- **A summary of the contractor’s qualifications, experience and background to provide the emergency service and the basis on which this contractor was selected over other qualified firms.**
Specify the costs, fees, or rates for the purchase.

A copy of an Emergency Memo that has been signed by the agency head must be uploaded as part of the supporting documentation for the emergency contract.

600.05 Legal References for Emergency Contracts

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

600.05.01 Federal Regulations

23 CFR 172.7(a)(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.

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.

600.05.02 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.
Chapter 700  Disadvantaged Business Enterprise

700.01  Introduction

This chapter covers the legal requirements and the roles and responsibilities of recipients and subrecipients of federal (United States Department of Transportation [USDOT]) funds on WSDOT project work. It also provides instructions for meeting the specific requirements of participation by disadvantaged groups in federally funded consultant projects.

700.02  Roles and Responsibilities

700.02.01  WSDOT Office of Equal Opportunity (OEO)

The OEO is responsible for review of DBE goals when established on WSDOT consultant contracts prior to solicitations, and for final review of DBE goals prior to the award of a consultant contract.

700.02.02  WSDOT HQ Consultant Services Office (CSO)

The CSO is responsible for ensuring its programs and activities are implemented consistent with the department’s DBE Program Plan and policies.

700.02.03  Area Consultant Liaisons (ACLs)

ACLs are responsible for interactions between the CSO and project personnel in matters that pertain to DBE goal setting, oversight, and implementation in their respective areas, as requested by the CSO manager. ACLs are responsible for working with their respective projects to monitor the performance of DBEs to ensure the DBEs are performing a commercially useful function and obtaining monthly and semiannual reporting information. They will coordinate collecting the appropriate data and ensuring it gets to the CSO for proper reporting. Other DBE activities will be assigned to the ACL by the CSO manager as needed.
Title 23: Highways

PART 172—PROCUREMENT, MANAGEMENT, AND ADMINISTRATION OF ENGINEERING AND DESIGN RELATED SERVICES

Contents
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SOURCE: 80 FR 29927, May 22, 2015, unless otherwise noted.

§172.1 Purpose and applicability.

This part prescribes the requirements for the procurement, management, and administration of engineering and design related services under 23 U.S.C. 112 and as supplemented by the Uniform Administrative Requirements For Federal Awards rule. The Uniform Administrative Requirements, Cost Principles and Audit Requirements For Federal Awards rule (2 CFR part 200) shall apply except where inconsistent with the requirements of this part and other laws and regulations applicable to the Federal-aid highway program (FAHP). The requirements herein apply to federally funded contracts for engineering and design related services for projects subject to the provisions of 23 U.S.C. 112(a) (related to construction) and are issued to ensure that a qualified consultant is obtained through an equitable qualifications-based selection procurement process, that prescribed work is properly accomplished in a timely manner, and at fair and reasonable cost. State transportation agencies (STA) (or other recipients) shall ensure that subrecipients comply with the requirements of this part and the Uniform Administrative Requirements, Cost Principles and Audit Requirements For Federal Awards rule. Federally funded contracts for services not defined as engineering and design related, or for services not in furtherance of a highway construction project or activity subject to the provisions of 23 U.S.C. 112(a), are not subject to the requirements of this part and shall be procured and administered under the requirements of the Uniform Administrative Requirements, Cost Principles and Audit Requirements For Federal Awards rule and procedures applicable to such activities.

§172.3 Definitions.

As used in this part:

Audit means a formal examination, in accordance with professional standards, of a consultant's accounting systems, incurred cost records, and other cost presentations to test the reasonableness, allowability, and allocability of costs in accordance with the Federal cost principles (as specified in 48 CFR part 31).

Cognizant agency means any governmental agency that has performed an audit in accordance with generally accepted government auditing standards to test compliance with the requirements of the Federal cost principles (as specified in 48 CFR part 31) and issued an audit report of the consultant's indirect cost rate, or any described agency that has conducted a review of an audit report and related workpapers prepared by a certified public accountant and issued a letter of concurrence with the audited indirect cost rate(s). A cognizant agency may be any of the following:

(1) A Federal agency;

(2) A State transportation agency of the State where the consultant's accounting and financial records are located; or
(3) A State transportation agency to which cognizance for the particular indirect cost rate(s) of a consulting firm has been delegated or transferred in writing by the State transportation agency identified in paragraph (2) of this definition.


Consultant means the individual or firm providing engineering and design related services as a party to a contract with a recipient or subrecipient of Federal assistance (as defined in 2 CFR 200.86 or 2 CFR 200.93, respectively).

Contract means a written procurement contract or agreement between a contracting agency and consultant reimbursed under a FAHP grant or subgrant and includes any procurement subcontract under a contract.

Contracting agencies means a State transportation agency or a procuring agency of the State acting in conjunction with and at the direction of the State transportation agency, other recipients, and all subrecipients that are responsible for the procurement, management, and administration of engineering and design related services.

Contract modification means an agreement modifying the terms or conditions of an original or existing contract.

Engineering and design related services means:

(1) Program management, construction management, feasibility studies, preliminary engineering, design engineering, surveying, mapping, or architectural related services with respect to a highway construction project subject to 23 U.S.C. 112(a) as defined in 23 U.S.C. 112(b)(2)(A); and

(2) Professional services of an architectural or engineering nature, as defined by State law, which are required to or may logically or justifiably be performed or approved by a person licensed, registered, or certified to provide the services with respect to a highway construction project subject to 23 U.S.C. 112(a) and as defined in 40 U.S.C. 1102(2).

Federal cost principles means the cost principles contained in 48 CFR part 31 of the Federal Acquisition Regulation for determination of allowable costs of commercial, for-profit entities.

Fixed fee means a sum expressed in U.S. dollars established to cover the consultant’s profit and other business expenses not allowable or otherwise included as a direct or indirect cost.

Management support role means performing engineering management services or other services acting on the contracting agency’s behalf, which are subject to review and oversight by agency officials, such as a program or project administration role typically performed by the contracting agency and necessary to fulfill the duties imposed by title 23 of the United States Code, other Federal and State laws, and applicable regulations.

Noncompetitive means the method of procurement of engineering and design related services when it is not feasible to award the contract using competitive negotiation or small purchase procurement methods.

One-year applicable accounting period means the annual accounting period for which financial statements are regularly prepared by the consultant.

Scope of work means all services, work activities, and actions required of the consultant by the obligations of the contract.

Small purchases means the method of procurement of engineering and design related services where an adequate number of qualified sources are reviewed and the total contract costs do not exceed an established simplified acquisition threshold.

State transportation agency (STA) means that department or agency maintained in conformity with 23 U.S.C. 302 and charged under State law with the responsibility for highway construction (as defined in 23 U.S.C. 101); and that is authorized by the laws of the State to make final decisions in all matters relating to, and to enter into, all contracts and agreements for projects and activities to fulfill the duties imposed by title 23 United States Code, title 23 Code of Federal Regulations, and other applicable Federal laws and regulations.

Subconsultant means the individual or firm contracted by a consultant to provide engineering and design related or other types of services that are part of the services which the consultant is under contract to provide to a recipient (as defined in 23 CFR 200.86) or subrecipient (as defined in 2 CFR 200.93) of Federal assistance.

§172.5 Program management and oversight.

(a) STA responsibilities. STAs or other recipients shall develop and sustain organizational capacity and provide the resources necessary for the procurement, management, and administration of engineering and design related consultant services, reimbursed in whole or in part with FAHP funding, as specified in 23 U.S.C. 302(a). Responsibilities shall include
(1) Preparing and maintaining written policies and procedures for the procurement, management, and administration of engineering and design related consultant services in accordance with paragraph (c) of this section;

(2) Establishing a procedure for estimating the level of effort, schedule, and costs of needed consultant services and associated agency staffing and resources for management and oversight in support of project authorization requests submitted to FHWA for approval, as specified in 23 CFR 630.106;

(3) Procuring, managing, and administering engineering and design related consultant services in accordance with applicable Federal and State laws, regulations, and approved policies and procedures, as specified in 23 CFR 1.9(a); and

(4) Administering subawards in accordance with State laws and procedures as specified in 2 CFR part 1201, and the requirements of 23 U.S.C. 106(g)(4), and 2 CFR 200.331. Administering subawards includes providing oversight of the procurement, management, and administration of engineering and design related consultant services by subrecipients to ensure compliance with applicable Federal and State laws and regulations. Nothing in this part shall be taken as relieving the STA (or other recipient) of its responsibility under laws and regulations applicable to the FAHP for the work performed under any consultant agreement or contract entered into by a subrecipient.

(b) Subrecipient responsibilities. Subrecipients shall develop and sustain organizational capacity and provide the resources necessary for the procurement, management, and administration of engineering and design related consultant services, reimbursed in whole or in part with FAHP funding as specified in 23 U.S.C. 106(g)(4)(A). Responsibilities shall include the following:

(1) Adopting written policies and procedures prescribed by the awarding STA or other recipient for the procurement, management, and administration of engineering and design related consultant services in accordance with applicable Federal and State laws and regulations; or when not prescribed, shall include:

(i) Preparing and maintaining its own written policies and procedures in accordance with paragraph (c) of this section; or

(ii) Submitting documentation associated with each procurement and subsequent contract to the awarding STA or other grantee for review to assess compliance with applicable Federal and State laws, regulations, and the requirements of this part;

(2) Procuring, managing, and administering engineering and design related consultant services in accordance with applicable Federal and State laws, regulations, and approved policies and procedures, as specified in 23 CFR 1.9(a).

(c) Written policies and procedures. The contracting agency shall prepare and maintain written policies and procedures for the procurement, management, and administration of engineering and design related consultant services. The FHWA shall approve the written policies and procedures, including all revisions to such policies and procedures, of the STA or recipient to assess compliance with applicable requirements. The STA or other recipient shall approve the written policies and procedures, including all revisions to such policies and procedures, of a subrecipient to assess compliance with applicable requirements. These policies and procedures shall address, as appropriate for each method of procurement a contracting agency proposes to use, the following items to ensure compliance with Federal and State laws, regulations, and the requirements of this part:

(1) Preparing a scope of work and evaluation factors for the ranking/selection of a consultant;

(2) Soliciting interests, qualifications, or proposals from prospective consultants;

(3) Preventing, identifying, and mitigating conflicts of interest for employees of both the contracting agency and consultants and promptly disclosing in writing any potential conflict to the STA and FHWA, as specified in 2 CFR 200.112 and 23 CFR 1.33, and the requirements of this part.

(4) Verifying suspension and debarment actions and eligibility of consultants, as specified in 2 CFR part 1200 and 2 CFR part 180;

(5) Evaluating interests, qualifications, or proposals and the ranking/selection of a consultant;

(6) Determining, based upon State procedures and the size and complexity of a project, the need for additional discussions following RFP submission and evaluation;

(7) Preparing an independent agency estimate for use in negotiation with the selected consultant;

(8) Selecting appropriate contract type, payment method, and terms and incorporating required contract provisions, assurances, and certifications in accordance with §172.9;

(9) Negotiating a contract with the selected consultant including instructions for proper disposal of concealed cost proposals of unsuccessful bidders;
(10) Establishing elements of contract costs, accepting indirect cost rate(s) for application to contracts, and assuring consultant compliance with the Federal cost principles in accordance with §172.11;

(11) Ensuring consultant costs billed are allowable in accordance with the Federal cost principles and consistent with the contract terms as well as the acceptability and progress of the consultant's work;

(12) Monitoring the consultant's work and compliance with the terms, conditions, and specifications of the contract;

(13) Preparing a consultant's performance evaluation when services are completed and using such performance data in future evaluation and ranking of consultant to provide similar services;

(14) Closing-out a contract;

(15) Retaining supporting programmatic and contract records, as specified in 2 CFR 200.333 and the requirements of this part;

(16) Determining the extent to which the consultant, which is responsible for the professional quality, technical accuracy, and coordination of services, may be reasonably liable for costs resulting from errors and omissions in the work furnished under its contract;

(17) Assessing administrative, contractual, or legal remedies in instances where consultants violate or breach contract terms and conditions, and providing for such sanctions and penalties as may be appropriate; and

(18) Resolving disputes in the procurement, management, and administration of engineering and design related consultant services.

(d) A contracting agency may formally adopt, by statute or within approved written policies and procedures as specified in paragraph (c) of this section, any direct Federal Government or other contracting regulation, standard, or procedure provided its application does not conflict with the provisions of 23 U.S.C. 112, the requirements of this part, and other laws and regulations applicable to the FAHP.

(e) Notwithstanding paragraph (d) of this section, a contracting agency shall have a reasonable period of time, not to exceed 12 months from the effective date of this rule unless an extension is granted for unique or extenuating circumstances, to issue or update current written policies and procedures for review and approval in accordance with paragraph (c) of this section and consistent with the requirements of this part.

§172.7 Procurement methods and procedures.

(a) Procurement methods. The procurement of engineering and design related services funded by FAHP funds and related to a highway construction project subject to the provisions of 23 U.S.C. 112(a) shall be conducted in accordance with one of three methods: Competitive negotiation (qualifications-based selection) procurement, small purchases procurement for small dollar value contracts, and noncompetitive procurement where specific conditions exist allowing solicitation and negotiation to take place with a single consultant.

(1) Competitive negotiation (qualifications-based selection). Except as provided in paragraphs (a)(2) and (3) of this section, contracting agencies shall use the competitive negotiation method for the procurement of engineering and design related services when FAHP funds are involved in the contract, as specified in 23 U.S.C. 112(b)(2)(A). The solicitation, evaluation, ranking, selection, and negotiation shall comply with the qualifications-based selection procurement procedures for architectural and engineering services codified under 40 U.S.C. 1101-1104, commonly referred to as the Brooks Act. In accordance with the requirements of the Brooks Act, the following procedures shall apply to the competitive negotiation procurement method:

(i) Solicitation. The solicitation process shall be by public announcement, publication advertisement, or any other public forum or method that assures qualified in-State and out-of-State consultants are given a fair opportunity to be considered for award of the contract. Procurement procedures may involve a single step process with issuance of a request for proposal (RFP) to all interested consultants or a multiphase process with issuance of a request for statements or letters of interest or qualifications (RFQ) whereby responding consultants are ranked based on qualifications and a RFP is then provided to three or more of the most highly qualified consultants. Minimum qualifications of consultants to perform services under general work categories or areas of expertise may also be assessed through a prequalification process whereby annual statements of qualifications and performance data are encouraged. Regardless of any process utilized for prequalification of consultants or for an initial assessment of a consultant's qualifications under a RFQ, a RFP specific to the project, task, or service is required for evaluation of a consultant's specific technical approach and qualifications.

(ii) Request for proposal (RFP). The RFP shall provide all information and requirements necessary for interested consultants to provide a response to the RFP and compete for the solicited services. The RFP shall:

(A) Provide a clear, accurate, and detailed description of the scope of work, technical requirements, and qualifications...
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Evaluation factors. (A) Criteria used for evaluation, ranking, and selection of consultants to perform engineering and design related services must assess the demonstrated competence and qualifications for the type of professional services solicited. These qualifications-based factors may include, but are not limited to, technical approach (e.g., project understanding, innovative concepts or alternatives, quality control procedures), work experience, specialized expertise, professional licensure, staff capabilities, workload capacity, and past performance.

(B) Price shall not be used as a factor in the evaluation, ranking, and selection phase. All price or cost related items which include, but are not limited to, cost proposals, direct salaries/wage rates, indirect cost rates, and other direct costs are prohibited from being used as evaluation criteria.

(C) In-State or local preference shall not be used as a factor in the evaluation, ranking, and selection phase. State licensing laws are not preempted by this provision and professional licensure within a jurisdiction may be established as a requirement for the minimum qualifications and competence of a consultant to perform the solicited services.

(D) The following nonqualifications-based evaluation criteria are permitted under the specified conditions and provided the combined total of these criteria do not exceed a nominal value of 10 percent of the total evaluation criteria to maintain the integrity of a qualifications-based selection:

(1) A local presence may be used as a nominal evaluation factor where appropriate. This criteria shall not be based on political or jurisdictional boundaries and may be applied on a project-by-project basis for contracts where a need has been established for a consultant to provide a local presence, a local presence will add value to the quality and efficiency of the project, and application of this criteria leaves an appropriate number of qualified consultants, given the nature and size of the project. If a consultant from outside of the locality area indicates as part of a proposal that it will satisfy the criteria in some manner, such as establishing a local project office, that commitment shall be considered to have satisfied the local presence criteria.

(2) The participation of qualified and certified Disadvantaged Business Enterprise (DBE) subconsultants may be used as a nominal evaluation criterion where appropriate in accordance with 49 CFR part 26 and a contracting agency’s FHWA-approved DBE program.

(iv) Evaluation, ranking, and selection. (A) The contracting agency shall evaluate consultant proposals based on the criteria established and published within the public solicitation.

(B) Although the contract will be with the consultant, proposal evaluations shall consider the qualifications of the consultant and any subconsultants identified within the proposal with respect to the scope of work and established criteria.

(C) The contracting agency shall specify in the RFP discussion requirements that shall follow submission and evaluation of proposals and based on the size and complexity of the project or as defined in contracting agency written policies and procedures, as specified in §172.9(c). Discussions, as required by the RFP, may be written, by telephone, video conference, or by oral presentation/interview and shall be with at least three of the most highly qualified consultants to clarify the technical approach, qualifications, and capabilities provided in response to the RFP.

(D) From the proposal evaluation and any subsequent discussions which may have been conducted, the contracting agency shall rank, in order of preference, at least three consultants determined most highly qualified to perform the solicited services based on the established and published criteria. In instances where only two qualified consultants respond to the solicitation, the contracting agency may proceed with evaluation and selection if it is determined that the solicitation did not contain conditions or requirements that arbitrarily limited competition. Alternatively, a contracting
(E) Notification must be provided to responding consultants of the final ranking of the three most highly qualified consultants.

(F) The contracting agency shall retain supporting documentation of the solicitation, proposal, evaluation, and selection of the consultant in accordance with this section and the provisions of 2 CFR 200.333.

(v) Negotiation. (A) The process for negotiation of the contract shall comply with the requirements codified in 40 U.S.C. 1104(b) for the order of negotiation.

(B) Independent estimate. Prior to receipt or review of the most highly qualified consultant's cost proposal, the contracting agency shall prepare a detailed independent estimate with an appropriate breakdown of the work or labor hours, types or classifications of labor required, other direct costs, and consultant's fixed fee for the defined scope of work. The independent estimate shall serve as the basis for negotiation.

(C) The contracting agency shall establish elements of contract costs (e.g., indirect cost rates, direct salary or wage rates, fixed fee, and other direct costs) separately in accordance with §172.11. The use of the independent estimate and determination of cost allowance in accordance with §172.11 shall ensure contracts for the consultant services are obtained at a fair and reasonable cost, as specified in 40 U.S.C. 1104(a).

(D) If concealed cost proposals were submitted in conjunction with technical/qualifications proposals, the contracting agency may consider only the cost proposal of the consultant with which negotiations are initiated. Due to the confidential nature of this data, as specified in 23 U.S.C. 112(b)(2)(E), concealed cost proposals of unsuccessful consultants may be disposed of in accordance with written policies and procedures established under §172.5(c).

(E) The contracting agency shall retain documentation of negotiation activities and resources used in the analysis of costs to establish elements of the contract in accordance with the provisions of 2 CFR 200.333. This documentation shall include the consultant cost certification and documentation supporting the acceptance of the indirect cost rate to be applied to the contract, as specified in §172.11(c).

(2) Small purchases. The contracting agency may use the State's small purchase procedures that reflect applicable State laws and regulations for the procurement of engineering and design related services provided the total contract costs do not exceed the Federal simplified acquisition threshold (as defined in 48 CFR 2.101). When a lower threshold for use of small purchase procedures is established in State law, regulation, or policy, the lower threshold shall apply to the use of FAHP funds. The following additional requirements shall apply to the small purchase procurement method:

(i) The scope of work, project phases, and contract requirements shall not be broken down into smaller components merely to permit the use of small purchase procedures.

(ii) A minimum of three consultants are required to satisfy the adequate number of qualified sources reviewed. In instances where only two qualified consultants respond to the solicitation, the contracting agency may proceed with evaluation and selection if it is determined that the solicitation did not contain conditions or requirements which arbitrarily limited competition. Alternatively, a contracting agency may pursue procurement following the noncompetitive method when competition is determined to be inadequate and it is determined to not be feasible or practical to recompete under a new solicitation as specified in §172.7(a)(3)(iii)(C).

(iii) Contract costs may be negotiated in accordance with State small purchase procedures; however, the allowability of costs shall be determined in accordance with the Federal cost principles.

(iv) The full amount of any contract modification or amendment that would cause the total contract amount to exceed the established simplified acquisition threshold is ineligible for Federal-aid funding. The FHWA may withdraw all Federal-aid from a contract if it is modified or amended above the applicable established simplified acquisition threshold.

(3) Noncompetitive. The following requirements shall apply to the noncompetitive procurement method:

(i) A contracting agency may use its own noncompetitive procedures that reflect applicable State and local laws and regulations and conform to applicable Federal requirements.

(ii) A contracting agency shall establish a process to determine when noncompetitive procedures will be used and shall submit justification to, and receive approval from FHWA before using this form of contracting.

(iii) A contracting agency may award a contract by noncompetitive procedures under the following limited circumstances:

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

(B) There is an emergency which will not permit the time necessary to conduct competitive negotiations; or
(C) After solicitation of a number of sources, competition is determined to be inadequate.

(iv) Contract costs may be negotiated in accordance with contracting agency noncompetitive procedures; however, the allowability of costs shall be determined in accordance with the Federal cost principles.

(b) Additional procurement requirements—(1) Uniform administrative requirements, cost principles and audit requirements for Federal awards. (i) STAs or other recipients and their subrecipients shall comply with procurement requirements established in State and local laws, regulations, policies, and procedures that are not addressed by or are not in conflict with applicable Federal laws and regulations, as specified in 2 CFR part 1201.

(ii) When State and local procurement laws, regulations, policies, or procedures are in conflict with applicable Federal laws and regulations, a contracting agency shall comply with Federal requirements to be eligible for Federal-aid reimbursement of the associated costs of the services incurred following FHWA authorization, as specified in 2 CFR 200.102(c).

(2) Disadvantaged Business Enterprise (DBE) program. (i) A 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. When DBE program participation goals cannot be met through race-neutral measures, additional DBE participation on engineering and design related services contracts may be achieved in accordance with a contracting agency's FHWA approved DBE program through either:

(A) Use of an evaluation criterion in the qualifications-based selection of consultants, as specified in §172.7(a)(1)(iii) (D); or

(B) Establishment of a contract participation goal.

(ii) The use of quotas or exclusive set-asides for DBE consultants is prohibited, as specified in 49 CFR 26.43.

(3) Suspension and debarment. A contracting agency shall verify suspension and debarment actions and eligibility status of consultants and subconsultants prior to entering into an agreement or contract in accordance with 2 CFR part 1200 and 2 CFR part 180.

(4) Conflicts of interest. (i) A contracting agency shall maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of engineering and design related services contracts under this part and governing the conduct and roles of consultants in the performance of services under such contracts to prevent, identify, and mitigate conflicts of interest in accordance with 2 CFR 200.112, 23 CFR 1.33 and the provisions of this paragraph (b)(4).

(ii) No employee, officer, or agent of the contracting agency shall participate in selection, or in the award or administration of a contract supported by Federal-aid funds if a conflict of interest, real or apparent, would be involved. Such a conflict arises when there is a financial or other interest in the consultant selected for award by:

(A) The employee, officer, or agent;

(B) Any member of his or her immediate family;

(C) His or her partner; or

(D) An organization that employs or is about to employ any of the above.

(iii) The contracting agency's officers, employees, or agents shall neither solicit nor accept gratuities, favors, or anything of monetary value from consultants, potential consultants, or parties to subagreements. A contracting agency may establish dollar thresholds where the financial interest is not substantial or the gift is an unsolicited item of nominal value.

(iv) A contracting agency may provide additional prohibitions relative to real, apparent, or potential conflicts of interest.

(v) To the extent permitted by State or local law or regulations, the standards of conduct required by this paragraph shall provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the contracting agency's officers, employees, or agents, or by consultants or their agents.

(vi) A contracting agency shall promptly disclose in writing any potential conflict of interest to FHWA.

(5) Consultant services in management support roles. (i) When FAHP funds participate in a consultant services contract, the contracting agency shall receive approval from FHWA, or the recipient as appropriate, before utilizing a consultant to act in a management support role for the contracting agency; unless an alternate approval procedure has been approved. Use of consultants in management support roles does not relieve the contracting agency of responsibilities associated with the use of FAHP funds, as specified in 23 U.S.C. 302(a) and 23 U.S.C. 106(g)(4) and should be limited to large projects or circumstances where unusual cost or time constraints exist, unique technical or
(ii) Management support roles may include, but are not limited to, providing oversight of an element of a highway program, function, or service on behalf of the contracting agency or may involve managing or providing oversight of a project, series of projects, or the work of other consultants and contractors on behalf of the contracting agency. Contracting agency written policies and procedures as specified in §172.5(c) may further define allowable management roles and services a consultant may provide, specific approval responsibilities, and associated controls necessary to ensure compliance with Federal requirements.

(iii) Use of consultants or subconsultants in management support roles requires appropriate conflicts of interest standards as specified in paragraph (b)(4) of this section and adequate contracting agency staffing to administer and monitor the management consultant contract, as specified in §172.9(d). A consultant serving in a management support role may be precluded from providing additional services on projects, activities, or contracts under its oversight due to potential conflicts of interest.

(iv) FAHP funds shall not participate in the costs of a consultant serving in a management support role where the consultant was not procured in accordance with Federal and State requirements, as specified in 23 CFR 1.9(a).

(v) Where benefiting more than a single Federal-aid project, allocability of consultant contract costs for services related to a management support role shall be distributed consistent with the cost principles applicable to the contracting agency, as specified in 2 CFR part 200, subpart E—Cost Principles.

§172.9 Contracts and administration.

(a) Contract types. The contracting agency shall use the following types of contracts:

(1) Project-specific. A contract between the contracting agency and consultant for the performance of services and defined scope of work related to a specific project or projects.

(2) Multiphase. A project-specific contract where the solicited services are divided into phases whereby the specific scope of work and associated costs may be negotiated and authorized by phase as the project progresses.

(3) On-call or indefinite delivery/indefinite quantity (IDIQ). A contract for the performance of services for a number of projects, under task or work orders issued on an as-needed or on-call basis, for an established contract period. The procurement of services to be performed under on-call or IDIQ contracts shall follow either competitive negotiation or small purchase procurement procedures, as specified in §172.7. The solicitation and contract provisions shall address the following requirements:

(i) Specify a reasonable maximum length of contract period, including the number and period of any allowable contract extensions, which shall not exceed 5 years;

(ii) Specify a maximum total contract dollar amount that may be awarded under a contract;

(iii) Include a statement of work, requirements, specifications, or other description to define the general scope, complexity, and professional nature of the services; and

(iv) If multiple consultants are to be selected and multiple on-call or IDIQ contracts awarded through a single solicitation for specific services:

(A) Identify the number of consultants that may be selected or contracts that may be awarded from the solicitation; and

(B) Specify the procedures the contracting agency will use in competing and awarding task or work orders among the selected, qualified consultants. Task or work orders shall not be competed and awarded among the selected, qualified consultants on the basis of costs under on-call or IDIQ contracts for services procured with competitive negotiation procedures. Under competitive negotiation procurement, each specific task or work order shall be awarded to the selected, qualified consultants:

(1) Through an additional qualifications-based selection procedure, which may include, but does not require, a formal RFP in accordance with §172.5(a)(1)(ii); or

(2) On a regional basis whereby the State is divided into regions and consultants are selected to provide on-call or IDIQ services for an assigned region(s) identified within the solicitation.

(b) Payment methods. (1) The method of payment to the consultant shall be set forth in the original solicitation, contract, and in any contract modification thereto. The methods of payment shall be: Lump sum, cost plus fixed fee, cost per unit of work, or specific rates of compensation. A single contract may contain different payment methods as appropriate for compensation of different elements of work.
(3) The lump sum payment method shall only be used when the contracting agency has established the extent, scope, complexity, character, and duration of the work to be required to a degree that fair and reasonable compensation, including a fixed fee, can be determined at the time of negotiation.

(4) When the method of payment is other than lump sum, the contract shall specify a maximum amount payable which shall not be exceeded unless adjusted by a contract modification.

(5) The specific rates of compensation payment method provides for reimbursement on the basis of direct labor hours at specified fixed hourly rates, including direct labor costs, indirect costs, and fee or profit, plus any other direct expenses or costs, subject to an agreement maximum amount. This payment method shall only be used when it is not possible at the time of procurement to estimate the extent or duration of the work or to estimate costs with any reasonable degree of accuracy. This specific rates of compensation payment method should be limited to contracts or components of contracts for specialized or support type services where the consultant is not in direct control of the number of hours worked, such as construction engineering and inspection. When using this payment method, the contracting agency shall manage and monitor the consultant's level of effort and classification of employees used to perform the contracted services.

(6) A contracting agency may withhold retainage from payments in accordance with prompt pay requirements, as specified in 49 CFR 26.29. When retainage is used, the terms and conditions of the contract shall clearly define agency requirements, including periodic reduction in retention and the conditions for release of retention.

(c) Contract provisions. (1) All contracts and subcontracts shall include the following provisions, either by reference or by physical incorporation into the language of each contract or subcontract, as applicable:

(i) Administrative, contractual, or legal remedies in instances where consultants violate or breach contract terms and conditions, and provide for such sanctions and penalties as may be appropriate;

(ii) Notice of contracting agency requirements and regulations pertaining to reporting;

(iii) Contracting agency requirements and regulations pertaining to copyrights and rights in data;

(iv) Access by recipient, the subrecipient, FHWA, the U.S. Department of Transportation's Inspector General, the Comptroller General of the United States, or any of their duly authorized representatives to any books, documents, papers, and records of the consultant which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts, and transcriptions;

(v) Retention of all required records for not less than 3 years after the contracting agency makes final payment and all other pending matters are closed;

(vi) Standard DOT Title VI Assurances (DOT Order 1050.2);

(vii) Disadvantaged Business Enterprise (DBE) assurance, as specified in 49 CFR 26.13(b);

(viii) Prompt pay requirements, as specified in 49 CFR 26.29;

(ix) Determination of allowable costs in accordance with the Federal cost principles;

(x) Contracting agency requirements pertaining to consultant errors and omissions;

(xi) Contracting agency requirements pertaining to conflicts of interest, as specified in 23 CFR 1.33 and the requirements of this part; and

(xii) A provision for termination for cause and termination for convenience by the contracting agency including the manner by which it will be effected and the basis for settlement.

(2) All contracts and subcontracts exceeding $100,000 shall contain, either by reference or by physical incorporation into the language of each contract, a provision for lobbying certification and disclosure, as specified in 49 CFR part 20.

(d) Contract administration and monitoring—(1) Responsible charge. A full-time, public employee of the contracting agency qualified to ensure that the work delivered under contract is complete, accurate, and consistent with the terms, conditions, and specifications of the contract shall be in responsible charge of each contract or project. While an independent consultant may be procured to serve in a program or project management support role, as specified in §172.7(b)(5), or to provide technical assistance in review and acceptance of engineering and design related services performed and products developed by other consultants, the contracting agency shall designate a public employee as being in responsible charge. A public employee may serve in responsible charge of multiple projects and contracting agencies may use multiple public employees to fulfill monitoring responsibilities. The term responsible charge is intended to be applied only in the context defined within this regulation. It may or may not correspond to its usage in State laws regulating the licensure and/or conduct of professional engineers. The public employee's responsibilities shall include:

(i) Administering inherently governmental activities including, but not limited to, contract negotiation, contract
(ii) Being familiar with the contract requirements, scope of services to be performed, and products to be produced by the consultant;

(iii) Being familiar with the qualifications and responsibilities of the consultant’s staff and evaluating any requested changes in key personnel;

(iv) Scheduling and attending progress and project review meetings, commensurate with the magnitude, complexity, and type of work, to ensure the work is progressing in accordance with established scope of work and schedule milestones;

(v) Ensuring consultant costs billed are allowable in accordance with the Federal cost principles and consistent with the contract terms as well as the acceptability and progress of the consultant’s work;

(vi) Evaluating and participating in decisions for contract modifications; and

(vii) Documenting contract monitoring activities and maintaining supporting contract records, as specified in 2 CFR 200.333.

(2) Performance evaluation. The contracting agency shall prepare an evaluation summarizing the consultant’s performance on a contract. The performance evaluation should include, but not be limited to, an assessment of the timely completion of work, adherence to contract scope and budget, and quality of the work conducted. The contracting agency shall provide the consultant a copy of the performance evaluation and an opportunity to provide written comments to be attached to the evaluation. The contracting agency should prepare additional interim performance evaluations based on the scope, complexity, and size of the contract as a means to provide feedback, foster communication, and achieve desired changes or improvements. Completed performance evaluations should be archived for consideration as an element of past performance in the future evaluation of the consultant to provide similar services.

(e) Contract modification. (1) Contract modifications are required for any amendments to the terms of the existing contract that change the cost of the contract; significantly change the character, scope, complexity, or duration of the work; or significantly change the conditions under which the work is required to be performed.

(2) A contract modification shall clearly define and document the changes made to the contract, establish the method of payment for any adjustments in contract costs, and be in compliance with the terms and conditions of the contract and original procurement.

(3) A contracting agency shall negotiate contract modifications following the same procedures as the negotiation of the original contract.

(4) A contracting agency may add to a contract only the type of services and work included within the scope of services of the original solicitation from which a qualifications-based selection was made.

(5) For any additional engineering and design related services outside of the scope of work established in the original request for proposal, a contracting agency shall:

(i) Procure the services under a new solicitation;

(ii) Perform the work itself using contracting agency staff; or

(iii) Use a different, existing contract under which the services would be within the scope of work.

(6) Overruns in the costs of the work shall not automatically warrant an increase in the fixed fee portion of a cost plus fixed fee reimbursed contract. Permitted changes to the scope of work or duration may warrant consideration for adjustment of the fixed fee portion of cost plus fixed fee or lump sum reimbursed contracts.

§172.11 Allowable costs and oversight.

(a) Allowable costs. (1) Costs or prices based on estimated costs for contracts shall be eligible for Federal-aid reimbursement only to the extent that costs incurred or cost estimates included in negotiated prices are allowable in accordance with the Federal cost principles.

(2) Consultants shall be responsible for accounting for costs appropriately and for maintaining records, including supporting documentation, adequate to demonstrate that costs claimed have been incurred, are allocable to the contract, and comply with Federal cost principles.

(b) Elements of contract costs. The following requirements shall apply to the establishment of the specified elements of contract costs:

(1) Indirect cost rates. Indirect cost rates shall be updated on an annual basis in accordance with the applicable Federal cost principles.
Appendix A

(ii) Contracting agencies shall accept a consultant's or subconsultant's indirect cost rate(s) established for a 1-year applicable accounting period by a cognizant agency that has:

(A) Performed an audit in accordance with generally accepted government auditing standards to test compliance with the requirements of the Federal cost principles and issued an audit report of the consultant's indirect cost rate(s); or

(B) Conducted a review of an audit report and related workpapers prepared by a certified public accountant and issued a letter of concurrence with the related audited indirect cost rate(s).

(iii) When the indirect cost rate has not been established by a cognizant agency in accordance with paragraph (b)(1)(ii) of this section, a STA or other recipient shall perform an evaluation of a consultant's or subconsultant's indirect cost rate prior to acceptance and application of the rate to contracts administered by the recipient or its subrecipients. The evaluation performed by STAs or other recipients to establish or accept an indirect cost rate shall provide assurance of compliance with the Federal cost principles and may consist of one or more of the following:

(A) Performing an audit in accordance with generally accepted government auditing standards and issuing an audit report;

(B) Reviewing and accepting an audit report and related workpapers prepared by a certified public accountant or another STA;

(C) Establishing a provisional indirect cost rate for the specific contract and adjusting contract costs based upon an audited final rate at the completion of the contract; or

(D) Conducting other evaluations in accordance with a risk-based oversight process as specified in paragraph (c)(2) of this section and within the agency's approved written policies and procedures, as specified in §172.5(c).

(iv) A lower indirect cost rate may be accepted for use on a contract if submitted voluntarily by a consultant; however, the consultant's offer of a lower indirect cost rate shall not be a condition or qualification to be considered for the work or contract award.

(v) Once accepted in accordance with paragraphs (b)(1)(ii) through (iv) of this section, contracting agencies shall apply such indirect cost rate for the purposes of contract estimation, negotiation, administration, reporting, and contract payment and the indirect cost rate shall not be limited by administrative or de facto ceilings of any kind.

(vi) A consultant's accepted indirect cost rate for its 1-year applicable accounting period shall be applied to contracts; however, once an indirect cost rate is established for a contract, it may be extended beyond the 1-year applicable period, through the duration of the specific contract, provided all concerned parties agree. Agreement to the extension of the 1-year applicable period shall not be a condition or qualification to be considered for the work or contract award.

(vii) Disputed rates. If an indirect cost rate established by a cognizant agency in paragraph (b)(1)(ii) of this section is in dispute, the contracting agency does not have to accept the rate. A contracting agency may perform its own audit or other evaluation of the consultant's indirect cost rate for application to the specific contract, until or unless the dispute is resolved. A contracting agency may alternatively negotiate a provisional indirect cost rate for the specific contract and adjust contract costs based upon an audited final rate. 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 contracting agency.

(2) Direct salary or wage rates. (i) Compensation for each employee or classification of employee must be reasonable for the work performed in accordance with the Federal cost principles.

(ii) To provide for fair and reasonable compensation, considering the classification, experience, and responsibility of employees necessary to provide the desired engineering and design related services, contracting agencies may establish consultant direct salary or wage rate limitations or “benchmarks” based upon an objective assessment of the reasonableness of proposed rates performed in accordance with the reasonableness provisions of the Federal cost principles.

(iii) When an assessment of reasonableness in accordance with the Federal cost principles has not been performed, contracting agencies shall use and apply the consultant's actual direct salary or wage rates for estimation, negotiation, administration, and payment of contracts and contract modifications.

(3) Fixed fee. (i) The determination of the amount of fixed fee shall consider the scope, complexity, contract duration, degree of risk borne by the consultant, amount of subcontracting, and professional nature of the services as well as the size and type of contract.

(ii) The establishment of fixed fee shall be contract or task order specific.

(iii) Fixed fees in excess of 15 percent of the total direct labor and indirect costs of the contract may be justified only when exceptional circumstances exist.
(4) Other direct costs. A contracting agency shall use the Federal cost principles in determining the reasonableness, allowability, and allocability of other direct contract costs.

(c) Oversight—(1) Agency controls. Contracting agencies shall provide reasonable assurance that consultant costs on contracts reimbursed in whole or in part with FAHP funding are allowable in accordance with the Federal cost principles and consistent with the contract terms considering the contract type and payment method. Contracting agency written policies, procedures, contract documents, and other controls, as specified in §§172.5(c) and 172.9 shall address the establishment, acceptance, and administration of contract costs to assure compliance with the Federal cost principles and requirements of this section.

(2) Risk-based analysis. The STAs or other recipient may employ a risk-based oversight process to provide reasonable assurance of consultant compliance with Federal cost principles on FAHP funded contracts administered by the recipient or its subrecipients. If employed, this risk-based oversight process shall be incorporated into STA or other recipient written policies and procedures, as specified in §172.5(c). In addition to ensuring allowability of direct contract costs, the risk-based oversight process shall address the evaluation and acceptance of consultant and subconsultant indirect cost rates for application to contracts. A risk-based oversight process shall consist of the following:

(i) Risk assessments. Conducting and documenting an annual assessment of risks of noncompliance with the Federal cost principles per consultant doing business with the agency, considering the following factors:

(A) Consultant's contract volume within the State;
(B) Number of States in which the consultant operates;
(C) Experience of consultant with FAHP contracts;
(D) History and professional reputation of consultant;
(E) Audit history of consultant;
(F) Type and complexity of consultant accounting system;
(G) Size (number of employees or annual revenues) of consultant;
(H) Relevant experience of certified public accountant performing audit of consultant;
(I) Assessment of consultant's internal controls;
(J) Changes in consultant organizational structure; and
(K) Other factors as appropriate.

(ii) Risk mitigation and evaluation procedures. Allocating resources, as considered necessary based on the results of the annual risk assessment, to provide reasonable assurance of compliance with the Federal cost principles through application of the following types of risk mitigation and evaluation procedures appropriate to the consultant and circumstances:

(A) Audits performed in accordance with generally accepted government audit standards to test compliance with the requirements of the Federal cost principles;
(B) Certified public accountant or other STA workpaper reviews;
(C) Other analytical procedures;
(D) Consultant cost certifications in accordance with paragraph (c)(3) of this section; and
(E) Consultant and certified public accountant training on the Federal cost principles.

(iii) Documentation. Maintaining supporting documentation of the risk-based analysis procedures performed to support the allowability and acceptance of consultant costs on FAHP funded contracts.

(3) Consultant cost certification. (i) Indirect cost rate proposals for the consultant's 1-year applicable accounting period shall not be accepted and no agreement shall be made by a contracting agency to establish final indirect cost rates, unless the costs have been certified by an official of the consultant as being allowable in accordance with the Federal cost principles. The certification requirement shall apply to all indirect cost rate proposals submitted by consultants and subconsultants for acceptance by a STA or other recipient. Each consultant or subconsultant is responsible for certification of its own indirect cost rate and may not certify the rate of another firm.

(ii) The certifying official shall be an individual executive or financial officer of the consultant's organization at a level no lower than a Vice President or Chief Financial Officer or equivalent who has the authority to represent the financial
(iii) The certification of final indirect costs shall read as follows:

Certificate of Final Indirect Costs

This is to certify that I have reviewed this proposal to establish final indirect cost rates and to the best of my knowledge and belief:

1. All costs included in this proposal (identify proposal and date) to establish final indirect cost rates for (identify period covered by rate) are allowable in accordance with the cost principles of the Federal Acquisition Regulation (FAR) of title 48, Code of Federal Regulations (CFR), part 31; and

2. This proposal does not include any costs which are expressly unallowable under applicable cost principles of the FAR of 48 CFR part 31.

Firm: 
Signature: 
Name of Certifying Official: 
Title: 
Date of Execution: 

(4) Sanctions and penalties. Contracting agency written policies, procedures, and contract documents, as specified in §§172.5(c) and 172.9(c), shall address the range of administrative, contractual, or legal remedies that may be assessed in accordance with Federal and State laws and regulations where consultants violate or breach contract terms and conditions. Where consultants knowingly charge unallowable costs to a FAHP funded contract:

(i) Contracting agencies shall pursue administrative, contractual, or legal remedies and provide for such sanctions and penalties as may be appropriate; and


(d) Prenotification; confidentiality of data. FHWA, recipients, and subrecipients of FAHP funds may share audit information in complying with the recipient's or subrecipient's acceptance of a consultant's indirect cost 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 recipient's or subrecipient's acceptance of a consultant's indirect cost 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.
Appendix B

Vacated
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)

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

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

(b) 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.

(c) 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.
Chapter 39.80 RCW

CONTRACTS FOR ARCHITECTURAL AND ENGINEERING SERVICES

Chapter Listing | RCW Dispositions

Sections
39.80.010 Legislative declaration.
39.80.020 Definitions.
39.80.030 Agency's requirement for professional services—Advance publication.
39.80.040 Procurement of architectural and engineering services—Submission of statement of qualifications and performance data—Participation by minority and women-owned firms and veteran-owned firms.
39.80.050 Procurement of architectural and engineering services—Contract negotiations.
39.80.060 Procurement of architectural and engineering services—Exception for emergency work.
39.80.070 Contracts, modifications reported to the office of financial management.
39.80.900 Savings.

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.

[1981 c 61 § 1.]

NOTES:

Effective date—1981 c 61: "This act shall take effect on January 1, 1982." [1981 c 61 § 9.]

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.

[ 1999 c 153 § 55; 1981 c 61 § 2.]

NOTES:

Part headings not law—1999 c 153: See note following RCW 57.04.050.

Effective date—1981 c 61: See note following RCW 39.80.010.

39.80.030
Agency's requirement for professional services—Advance publication.

Each agency shall publish in advance that agency's requirement for professional 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 professional 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 professional services.

[ 1981 c 61 § 3.]

NOTES:

Effective date—1981 c 61: See note following RCW 39.80.010.
39.80.040  
**Procurement of architectural and engineering services—Submission of statement of qualifications and performance data—Participation by minority and women-owned firms 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 ensure 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. For the 2015-2017 biennium the procurement for services related to modular classrooms may be expedited.

[ 2016 1st sp.s. c 35 § 6010; 2010 c 5 § 10; 1981 c 61 § 4.]

**NOTES:**

**Effective date**—2016 1st sp.s. c 35: See note following RCW 28B.10.027.

**Purpose**—Construction—2010 c 5: See notes following RCW 43.60A.010.

**Effective date**—1981 c 61: See note following RCW 39.80.010.

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.

[ 1981 c 61 § 5.]

NOTES:

Effective date—1981 c 61: See note following RCW 39.80.010.

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.

[ 1981 c 61 § 6.]

NOTES:

Effective date—1981 c 61: See note following RCW 39.80.010.

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.

[ 1993 c 433 § 9.]

39.80.900 Savings.

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

[ 1981 c 61 § 7.]

NOTES:

Effective date—1981 c 61: See note following RCW 39.80.010.
# Appendix E

## Chapter 39.26 RCW

### PROCUREMENT OF GOODS AND SERVICES

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</tbody>
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### 39.26.005

**Intent.**

It is the intent of this chapter to promote open competition and transparency for all contracts for goods and services entered into by state agencies, unless specifically exempted under this chapter. It is further the intent of this chapter to centralize within one agency the authority and responsibility for the development and oversight of policies related to state procurement and contracting. To ensure the highest ethical standards, proper accounting for contract expenditures, and for ease of public review, it is further the intent to centralize the location of information about state procurements and contracts. It is also the intent of the legislature to provide state agency contract data to the public in a searchable manner.

In addition, the legislature intends that the state develop procurement policies, procedures, and materials that encourage and facilitate state agency purchase of goods and services from Washington small businesses.

[2012 c 224 § 1.]

### 39.26.010

**Definitions.**

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

1. "Agency" means any state office or activity of the executive and judicial branches of state government, including state agencies, departments, offices, divisions, boards, commissions, institutions of higher education as defined in RCW 28B.10.016, and correctional and other types of institutions.

2. "Bid" means an offer, proposal, or quote for goods or services in response to a solicitation issued for such goods or services by the department or an agency of Washington state government.
(3) "Bidder" means an individual or entity who submits a bid, quotation, or proposal in response to a solicitation issued for such goods or services by the department or an agency of Washington state government.

(4) "Client services" means services provided directly to agency clients including, but not limited to, medical and dental services, employment and training programs, residential care, and subsidized housing.

(5) "Community rehabilitation program of the department of social and health services" means any entity that:
   (a) Is registered as a nonprofit corporation with the secretary of state; and
   (b) Is recognized by the department of social and health services, division of vocational rehabilitation as eligible to do business as a community rehabilitation program.

(6) "Competitive solicitation" means a documented formal process providing an equal and open opportunity to bidders and culminating in a selection based on predetermined criteria.

(7) "Contractor" means an individual or entity awarded a contract with an agency to perform a service or provide goods.

(8) "Debar" means to prohibit a contractor, individual, or other entity from submitting a bid, having a bid considered, or entering into a state contract during a specified period of time as set forth in a debarment order.

(9) "Department" means the department of enterprise services.

(10) "Director" means the director of the department of enterprise services.

(11) "Estimated useful life" of an item means the estimated time from the date of acquisition to the date of replacement or disposal, determined in any reasonable manner.

(12) "Goods" means products, materials, supplies, or equipment provided by a contractor.

(13) "In-state business" means a business that has its principal office located in Washington.

(14) "Life-cycle cost" means the total cost of an item to the state over its estimated useful life, including costs of selection, acquisition, operation, maintenance, and where applicable, disposal, as far as these costs can reasonably be determined, minus the salvage value at the end of its estimated useful life.

(15) "Master contracts" means a contract for specific goods or services, or both, that is solicited and established by the department in accordance with procurement laws and rules on behalf of and for general use by agencies as specified by the department.

(16) "Microbusiness" means any business entity, including a sole proprietorship, corporation, partnership, or other legal entity, that: (a) Is owned and operated independently from all other businesses; and (b) has a gross revenue of less than one million dollars annually as reported on its federal tax return or on its return filed with the department of revenue.

(17) "Minibusiness" means any business entity, including a sole proprietorship, corporation, partnership, or other legal entity, that: (a) Is owned and operated independently from all other businesses; and (b) has a gross revenue of less than three million dollars, but one million dollars or more annually as reported on its federal tax return or on its return filed with the department of revenue.

(18) "Polychlorinated biphenyls" means any polychlorinated biphenyl congeners and homologs.

(19) "Practical quantification limit" means the lowest concentration that can be reliably measured within specified limits of precision, accuracy, representativeness, completeness, and comparability during routine laboratory operating conditions.
(20) "Purchase" means the acquisition of goods or services, including the leasing or renting of goods.

(21) "Services" means labor, work, analysis, or similar activities provided by a contractor to accomplish a specific scope of work.

(22) "Small business" means an in-state business, including a sole proprietorship, corporation, partnership, or other legal entity, that:
   (a) Certifies, under penalty of perjury, that it is owned and operated independently from all other businesses and has either:
      (i) Fifty or fewer employees; or
      (ii) A gross revenue of less than seven million dollars annually as reported on its federal income tax return or its return filed with the department of revenue over the previous three consecutive years; or
   (b) Is certified with the office of women and minority business enterprises under chapter 39.19 RCW.

(23) "Sole source" means a contractor providing goods or services of such a unique nature or sole availability at the location required that the contractor is clearly and justifiably the only practicable source to provide the goods or services.

(24) "Washington grown" has the definition in RCW 15.64.060.


NOTES:


39.26.020
Ethics in public contracting.

(1)(a) A state officer or employee of an agency who seeks to acquire goods or services or who participates in those contractual matters is subject to the requirements in RCW 42.52.150.

   (b) A contractor who contracts with an agency to perform services related to the acquisition of goods and services for or on behalf of the state is subject to the requirements in RCW 42.52.150.

(2) No person or entity who seeks or may seek a contract with a state agency may give, loan, transfer, or deliver to any person something of economic value for which receipt of such item would cause a state officer or employee to be in a violation of RCW 42.52.040, 42.52.110, 42.52.120, 42.52.140, or 42.52.150.

[2012 c 224 § 3.]
39.26.030  
State procurement records—Disclosure.

(1) Records related to state procurements are public records subject to disclosure to the extent provided in chapter 42.56 RCW except as provided in subsection (2) of this section.

(2) Bid submissions and bid evaluations are exempt from disclosure until the agency announces the apparent successful bidder.

[2012 c 224 § 4.]

39.26.040  
Prohibition on certain contracts.

Agencies that are authorized or directed to establish a board, commission, council, committee, or other similar group made up of volunteers to advise the activities and management of the agency are prohibited from entering into contracts with any or all volunteer members as a means to reimburse or otherwise pay members of such board, commission, council, committee, or other similar group for the work performed as part of the entity, except where payment is specifically authorized by statute.

[2012 c 224 § 5.]

39.26.050  
Provision of goods and services.

(1) In addition to the powers and duties provided in chapter 43.19 RCW, the department shall make available goods and services to support state agencies, and may enter into agreements with any other local or federal governmental agency or entity or a public benefit nonprofit organization, in compliance with RCW 39.34.055, and any tribes located in the state, to furnish such products and services as deemed appropriate by both parties.

(2) The department shall ensure full cost recovery from state agencies, other local or federal governmental agency or entity, public benefit nonprofit organizations, or any tribes located in the state, for activities performed pursuant to subsection (1) of this section. Cost recovery must ensure that the department is reimbursed its full cost for providing the goods and services furnished as determined by the department. Cost recovery may be collected through the state agency, other governmental entity, nonprofit organization, or through the contractor.

(3) All governmental entities of this state may enter into agreements under this section with the department, unless otherwise prohibited.

[2012 c 224 § 6.]
39.26.060
Cooperative purchasing.

(1) On behalf of the state, the department may participate in, sponsor, conduct, or administer a cooperative purchasing agreement for the procurement of any goods or services with one or more states, state agencies, local governments, local government agencies, federal agencies, or tribes located in the state, in accordance with an agreement entered into between the participants. The cooperative purchasing may include, but is not limited to, joint or multiparty contracts between the entities, and master contracts or convenience contracts that are made available to other public agencies.

(2) All cooperative purchasing conducted under this chapter must be through contracts awarded through a competitive solicitation process.

[ 2012 c 224 § 7.]

39.26.070
Convenience contracts.

A convenience contract is a contract for specific goods or services, or both, that is solicited and established in accordance with procurement laws and rules for use by a specific agency or a specified group of agencies as needed from time to time. A convenience contract is not available for general use and may only be used as specified by the department. Convenience contracts are not intended to replace or supersede master contracts as defined in this chapter.

[ 2015 c 79 § 6; 2012 c 224 § 8.]

39.26.080
Procurement policy—Director's responsibility and authority—Master contracts.

(1) The director is responsible for the development and oversight of policy for the procurement of goods and services by all state agencies under this chapter. When establishing policies, standards, and procedures, the director shall account for differentiation in procurement practices and needs among state agencies and strive to establish policies, standards, and procedures that promote greater efficiency in procurement.

(2) The director is authorized to adopt rules, policies, and guidelines governing the procurement, contracting, and contract management of any and all goods and services procured by state agencies under this chapter.

(3) The director or designee is the sole authority to enter into master contracts on behalf of the state.
39.26.090
Director's duties and responsibilities—Rules.

The director shall:

(1) Establish overall state policies, standards, and procedures regarding the procurement of goods and services by all state agencies;

(2) Develop policies and standards for the use of credit cards or similar methods to make purchases;

(3) Establish procurement processes for information technology goods and services, using technology standards and policies established by the office of the chief information officer under *chapter 43.41A RCW;

(4) Enter into contracts or delegate the authority to enter into contracts on behalf of the state to facilitate the purchase, lease, rent, or otherwise acquire all goods and services and equipment needed for the support, maintenance, and use of all state agencies, except as provided in RCW 39.26.100;

(5) Have authority to delegate to agencies authorization to purchase goods and services. The authorization must specify restrictions as to dollar amount or to specific types of goods and services, based on a risk assessment process developed by the department. Acceptance of the purchasing authorization by an agency does not relieve the agency from conformance with this chapter or from policies established by the director. Also, the director may not delegate to a state agency the authorization to purchase goods and services if the agency is not in substantial compliance with overall procurement policies as established by the director;

(6) Develop procurement policies and procedures, such as unbundled contracting and subcontracting, that encourage and facilitate the purchase of goods and services from Washington small businesses, microbusinesses, and minibusinesses, and minority and women-owned businesses to the maximum extent practicable and consistent with international trade agreement commitments;

(7) Develop and implement an enterprise system for electronic procurement;

(8) Provide for a commodity classification system and provide for the adoption of goods and services commodity standards;

(9) Establish overall state policy for compliance by all agencies regarding:

(a) Food procurement procedures and materials that encourage and facilitate the purchase of Washington grown food by state agencies and institutions to the maximum extent practicable and consistent with international trade agreement commitments; and

(b) Policies requiring all food contracts to include a plan to maximize to the extent practicable and consistent with international trade agreement commitments the availability of Washington grown food purchased through the contract;

(10) Develop guidelines and criteria for the purchase of vehicles, high gas mileage vehicles, and alternate vehicle fuels and systems, equipment, and materials, that reduce overall energy-related costs and energy use by the state, including investigations into all opportunities to aggregate the purchasing of clean technologies by state and local governments, and including the requirement that new passenger vehicles purchased by the state meet the minimum standards for passenger automobile fuel economy established by the
United States secretary of transportation pursuant to the energy policy and conservation act (15 U.S.C. Sec. 2002); and

(11) Develop and enact rules to implement the provisions of this chapter.

[ 2012 c 224 § 10.]

NOTES:

*Reviser's note: Chapter 43.41A RCW was recodified and/or repealed by chapter 1, Laws of 2015 3rd sp.s.

### 39.26.100 Exemptions.

(1) The provisions of this chapter do not apply in any manner to the operation of the state legislature except as requested by the legislature.

(2) The provisions of this chapter do not apply to the contracting for services, equipment, and activities that are necessary to establish, operate, or manage the state data center, including architecture, design, engineering, installation, and operation of the facility, that are approved by the technology services board or the acquisition of proprietary software, equipment, and information technology services necessary for or part of the provision of services offered by the consolidated technology services agency.

(3) Primary authority for the purchase of specialized equipment, and instructional and research material, for their own use rests with the institutions of higher education as defined in RCW 28B.10.016.

(4) Universities operating hospitals with approval from the director, as the agent for state hospitals as defined in RCW 72.23.010, and for health care programs provided in state correctional institutions as defined in RCW 72.65.010(3) and veterans' institutions as defined in RCW 72.36.010 and 72.36.070, may make purchases for hospital operation by participating in contracts for materials, supplies, and equipment entered into by nonprofit cooperative hospital group purchasing organizations if documented to be more cost-effective.

(5) Primary authority for the purchase of materials, supplies, and equipment, for resale to other than public agencies, rests with the state agency concerned.

(6) The authority for the purchase of insurance and bonds rests with the risk manager under RCW 43.19.769, except for institutions of higher education that choose to exercise independent purchasing authority under RCW 28B.10.029.

(7) The authority to purchase interpreter services and interpreter brokerage services on behalf of limited-English speaking or sensory-impaired applicants and recipients of public assistance rests with the department of social and health services and the health care authority.

(8) The provisions of this chapter do not apply to information technology purchases by state agencies, other than institutions of higher education and agencies of the judicial branch, if (a) the purchase is less than one hundred thousand dollars, (b) the initial purchase is approved by the chief information officer of the state, and (c) the agency director and the chief information officer of the state jointly prepare a public document providing a detailed justification for the expenditure.
39.26.102
Exemption—Department of corrections.


[2011 1st sp.s. c 43 § 220; 1989 c 185 § 2; 1981 c 136 § 14. Formerly RCW 43.19.1932.]

NOTES:


Effective date—Purpose—2011 1st sp.s. c 43: See notes following RCW 43.19.003.


39.26.110
Training.

(1) The department must provide expertise and training on best practices for state procurement.

(2) The department must establish either training or certification programs, or both, to ensure consistency in procurement practices for employees authorized to perform procurement functions under the provisions of this chapter. When establishing training or certification programs, the department may approve existing training or certification programs at state agencies. When establishing programs or approving existing programs, the department shall work with agencies with existing training programs to ensure coordination and minimize additional costs associated with training requirements.

(3) Beginning July 1, 2013, state agencies must require agency employees responsible for developing, executing, or managing procurements or contracts, or both, to complete department-approved training or certification programs, or both. Beginning July 1, 2015, no agency employee may execute or manage contracts unless the employee has met the training or certification requirements or both as set by the department. Any request for exception to this requirement must be submitted to the director for approval before the employee or group of employees executes or manages contracts.

[2012 c 224 § 12.]
39.26.120
Competitive solicitation.

(1) Insofar as practicable, all purchases of or contracts for goods and services must be based on a competitive solicitation process. This process may include electronic or web-based solicitations, bids, and signatures. This requirement also applies to procurement of goods and services executed by agencies under delegated authority granted in accordance with RCW 39.26.090 or under RCW 28B.10.029.

(2) Subsection (1) of this section applies to contract amendments that substantially change the scope of work of the original contract or substantially increase the value of the original contract.

[ 2012 c 224 § 13.]

39.26.125
Competitive solicitation—Exceptions.

All contracts must be entered into pursuant to competitive solicitation, except for:

(1) Emergency contracts;
(2) Sole source contracts that comply with the provisions of RCW 39.26.140;
(3) Direct buy purchases, as designated by the director. The director shall establish policies to define criteria for direct buy purchases. These criteria may be adjusted to accommodate special market conditions and to promote market diversity for the benefit of the citizens of the state of Washington;
(4) Purchases involving special facilities, services, or market conditions, in which instances of direct negotiation is in the best interest of the state;
(5) Purchases from master contracts established by the department or an agency authorized by the department; (6) Client services contracts;
(7) Other specific contracts or classes or groups of contracts exempted from the competitive solicitation process when the director determines that a competitive solicitation process is not appropriate or cost-effective;
(8) Off-contract purchases of Washington grown food when such food is not available from Washington sources through an existing contract. However, Washington grown food purchased under this subsection must be of an equivalent or better quality than similar food available through the contract and must be able to be paid from the agency's existing budget. This requirement also applies to purchases and contracts for purchases executed by state agencies, including institutions of higher education as defined in RCW 28B.10.016, under delegated authority granted in accordance with this chapter or under RCW 28B.10.029;
(9) Contracts awarded to companies that furnish a service where the tariff is established by the utilities and transportation commission or other public entity;
(10) Intergovernmental agreements awarded to any governmental entity, whether federal, state, or local and any department, division, or subdivision thereof;
(11) Contracts for services that are necessary to the conduct of collaborative research if the use of a specific contractor is mandated by the funding source as a condition of granting funds;
(12) Contracts for architectural and engineering services as defined in RCW 39.80.020, which shall be entered into under chapter 39.80 RCW;
(13) Contracts for the employment of expert witnesses for the purposes of litigation; and
(14) Contracts for bank supervision authorized under *RCW 30.38.040.

[ 2012 c 224 § 14.]

NOTES:
*Reviser's note: RCW 30.38.040 was recodified as RCW 30A.38.040 pursuant to 2014 c 37 § 4, effective January 5, 2015.

39.26.130
Emergency purchases.

(1) An agency may make emergency purchases as defined in subsection (3) of this section. When an emergency purchase is made, the agency head shall submit written notification of the purchase within three business days of the purchase to the director. This notification must contain a description of the purchase, a description of the emergency and the circumstances leading up to the emergency, and an explanation of why the circumstances required an emergency purchase.
(2) Emergency contracts must be submitted to the department and made available for public inspection within three working days following the commencement of work or execution of the contract, whichever occurs first.
(3) As used in this section, "emergency" means a set of unforeseen circumstances beyond the control of the agency that either:
   (a) Present a real, immediate, and extreme threat to the proper performance of essential functions; or
   (b) May reasonably be expected to result in material loss or damage to property, bodily injury, or loss of life, if immediate action is not taken.

[ 2012 c 224 § 15.]

39.26.140
Sole source contracts.

(1) Agencies must submit sole source contracts to the department and make the contracts available for public inspection not less than ten working days before the proposed starting date of the contract. Agencies must provide documented justification for sole source contracts
to the department when the contract is submitted, and must include evidence that the agency posted the contract opportunity at a minimum on the state’s enterprise vendor registration and bid notification system.

(2) The department must approve sole source contracts before any such contract becomes binding and before any services may be performed or goods provided under the contract. These requirements shall also apply to all sole source contracts except as otherwise exempted by the director.

(3) The director may provide an agency an exemption from the requirements of this section for a contract or contracts. Requests for exemptions must be submitted to the director in writing.

(4) Contracts awarded by institutions of higher education from nonstate funds are exempt from the requirements of this section.

[ 2012 c 224 § 16.]

39.26.150
Public notice—Posting on enterprise vendor registration and bid notification system.

(1) Agencies must provide public notice for all competitive solicitations. Agencies must post all contract opportunities on the state’s enterprise vendor registration and bid notification system. In addition, agencies may notify contractors and potential bidders by sending notices by mail, electronic transmission, newspaper advertisements, or other means as may be appropriate.

(2) Agencies should try to anticipate changes in a requirement before the bid submittal date and to provide reasonable notice to all prospective bidders of any resulting modification or cancellation. If, in the opinion of the agency, it is not possible to provide reasonable notice, the submittal date for receipt of bids may be postponed and all bidders notified.

[ 2012 c 224 § 17.]

39.26.160
Bid awards—Considerations—Requirements and criteria to be set forth—Negotiations—Use of enterprise vendor registration and bid notification system.

(1)(a) After bids that are submitted in response to a competitive solicitation process are reviewed by the awarding agency, the awarding agency may:

(i) Reject all bids and rebid or cancel the competitive solicitation;

(ii) Request best and final offers from responsive and responsible bidders; or

(iii) Award the purchase or contract to the lowest responsive and responsible bidder.

(b) The agency may award one or more contracts from a competitive solicitation.
(2) In determining whether the bidder is a responsible bidder, the agency must consider the following elements:

(a) The ability, capacity, and skill of the bidder to perform the contract or provide the service required;
(b) The character, integrity, reputation, judgment, experience, and efficiency of the bidder;
(c) Whether the bidder can perform the contract within the time specified;
(d) The quality of performance of previous contracts or services;
(e) The previous and existing compliance by the bidder with laws relating to the contract or services; and
(f) Such other information as may be secured having a bearing on the decision to award the contract.

(3) In determining the lowest responsive and responsible bidder, an agency may consider best value criteria, including but not limited to:

(a) Whether the bid satisfies the needs of the state as specified in the solicitation documents;
(b) Whether the bid encourages diverse contractor participation;
(c) Whether the bid provides competitive pricing, economies, and efficiencies;
(d) Whether the bid considers human health and environmental impacts;
(e) Whether the bid appropriately weighs cost and noncost considerations; and
(f) Life-cycle cost.

(4) The solicitation document must clearly set forth the requirements and criteria that the agency will apply in evaluating bid submissions.

(5) The awarding agency may at its discretion reject the bid of any contractor who has failed to perform satisfactorily on a previous contract with the state.

(6) After reviewing all bid submissions, an agency may enter into negotiations with the lowest responsive and responsible bidder in order to determine if the bid may be improved. An agency may not use this negotiation opportunity to permit a bidder to change a nonresponsive bid into a responsive bid.

(7) The procuring agency must enter into the state's enterprise vendor [registration] and bid notification system the name of each bidder and an indication as to the successful bidder.

[2012 c 224 § 18.]


(1) All agencies that have original or delegated procurement authority for goods or services must have a clear and transparent complaint process. The complaint process must provide for the complaint to be submitted and response provided before the deadline for bid submissions.

(2) All agencies that have original or delegated procurement authority for goods or services must have a clear and transparent protest process. The protest process must include a protest period after the apparent successful bidder is announced but before the contract is signed.
(3) The director may grant authority for an agency to sign a contract before the protest process is completed due to exigent circumstances.

[ 2012 c 224 § 19.]

39.26.180
Contract management.

(1) The department must adopt uniform policies and procedures for the effective and efficient management of contracts by all state agencies. The policies and procedures must, at a minimum, include:
   (a) Precontract procedures for selecting potential contractors based on their qualifications and ability to perform;
   (b) Model complaint and protest procedures;
   (c) Alternative dispute resolution processes;
   (d) Incorporation of performance measures and measurable benchmarks in contracts;
   (e) Model contract terms to ensure contract performance and compliance with state and federal standards;
   (f) Executing contracts using electronic signatures;
   (g) Criteria for contract amendments;
   (h) Postcontract procedures;
   (i) Procedures and criteria for terminating contracts for cause or otherwise; and
   (j) Any other subject related to effective and efficient contract management.

(2) An agency may not enter into a contract under which the contractor could charge additional costs to the agency, the department, the joint legislative audit and review committee, or the state auditor for access to data generated under the contract. A contractor under such a contract must provide access to data generated under the contract to the contracting agency, the joint legislative audit and review committee, and the state auditor.

(3) To the extent practicable, agencies should enter into performance-based contracts. Performance-based contracts identify expected deliverables and performance measures or outcomes. Performance-based contracts also use appropriate techniques, which may include but are not limited to, either consequences or incentives or both to ensure that agreed upon value to the state is received. Payment for goods and services under performance-based contracts should be contingent on the contractor achieving performance outcomes.

(4) An agency and contractor may execute a contract using electronic signatures.

(5) As used in subsection (2) of this section, "data" includes all information that supports the findings, conclusions, and recommendations of the contractor's reports, including computer models and the methodology for those models.

[ 2012 c 224 § 20.]
**39.26.190**

**Bonds.**

When any bid has been accepted, the agency may require of the successful bidder a bond payable to the state in such amount with such surety or sureties as determined by the agency, conditioned that he or she will fully, faithfully, and accurately perform the terms of the contract into which he or she has entered. Bidders who regularly do business with the state shall be permitted to file with the agency an annual performance bond in an amount established by the agency and such annual bond shall be acceptable as surety in lieu of furnishing individual bonds. The agency may also require bidders to provide bid bonds conditioned that if a bidder is awarded the contract the bidder will enter into and execute the contract, protest bonds, or other bonds the agency deems necessary. Agencies must adhere to the policies developed by the department regarding the use of protest bonds. All bonds must be filed with the agency on a form acceptable to the agency. Any surety issuing a bond must meet the qualification requirements established by the agency.

[2012 c 224 § 21.]

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**39.26.200**

**Authority to fine or debar.**

(1)(a) The director shall provide notice to the contractor of the director's intent to either fine or debar with the specific reason for either the fine or debarment. The department must establish the debarment and fining processes by rule.

(b) After reasonable notice to the contractor and reasonable opportunity for that contractor to be heard, the director has the authority to debar a contractor for cause from consideration for award of contracts. The debarment must be for a period of not more than three years.

(2) The director may either fine or debar a contractor based on a finding of one or more of the following causes:

(a) Conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract;

(b) Conviction or a final determination in a civil action under state or federal statutes of fraud, embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, violation of the federal false claims act, 31 U.S.C. Sec. 3729 et seq., or the state medicaid fraud false claims act, chapter 74.66 RCW, or any other offense indicating a lack of business integrity or business honesty that currently, seriously, and directly affects responsibility as a state contractor;

(c) Conviction under state or federal antitrust statutes arising out of the submission of bids or proposals;

(d) Two or more violations within the previous five years of the federal labor relations act as determined by the national labor relations board or court of competent jurisdiction;

(e) Violation of contract provisions, as set forth in this subsection, of a character that is regarded by the director to be so serious as to justify debarment action:
(i) Deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or
(ii) A recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts, however the failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor may not be considered to be a basis for debarment;
(f) Violation of ethical standards set forth in RCW 39.26.020; and
(g) Any other cause the director determines to be so serious and compelling as to affect responsibility as a state contractor, including debarment by another governmental entity for any cause listed in regulations.

(3) The director must issue a written decision to debar. The decision must:
(a) State the reasons for the action taken; and
(b) Inform the debarred contractor of the contractor's rights to judicial or administrative review.

[2015 c 44 § 1; 2013 2nd sp.s. c 34 § 1; 2012 c 224 § 22.]

39.26.210
List of agency contracts—Contract audits.

(1) Agencies must annually submit to the department a list of all contracts that the agency has entered into or renewed. "Contracts," for the purposes of this section, does not include purchase orders. The department must maintain a publicly available list of all contracts entered into by agencies during each fiscal year, except that contracts for the employment of expert witnesses for the purposes of litigation shall not be made publicly available to the extent that information is exempt from disclosure under state law. Except as otherwise exempt, the data must identify the contracting agency, the contractor, the purpose of the contract, effective dates and periods of performance, the cost of the contract and funding source, any substantive modifications to the contract, and whether the contract was competitively procured or awarded on a sole source basis.

(2) The department may conduct audits of its master contracts and convenience contracts to ensure that the contractor is in compliance with the contract terms and conditions, including but not limited to providing only the goods and services specified in the contract at the contract price.

[2012 c 224 § 23.]

39.26.220
Contract audit and investigative findings, enforcement actions, and status of agency resolution—Report.

The state auditor and the attorney general must annually by November 30th of each year, provide a collaborative report of contract audit and investigative findings, enforcement actions,
and the status of agency resolution to the governor and the policy and fiscal committees of the legislature.

[ 2012 c 224 § 24.]

**39.26.230**
**Purchases from entities serving or providing opportunities through community rehabilitation programs.**

The state agencies and departments are hereby authorized to purchase products and/or services manufactured or provided by community rehabilitation programs of the department of social and health services.

Such purchases shall be at the fair market price of such products and services as determined by the department of enterprise services. To determine the fair market price the department shall use the last comparable bid on the products and/or services or in the alternative the last price paid for the products and/or services. The increased cost of labor, materials, and other documented costs since the last comparable bid or the last price paid are additional cost factors which shall be considered in determining fair market price. Upon the establishment of the fair market price as provided for in this section the department is hereby empowered to negotiate directly for the purchase of products or services with officials in charge of the community rehabilitation programs of the department of social and health services.

[ 2011 1st sp.s. c 43 § 226; 2005 c 204 § 2; 2003 c 136 § 3; 1977 ex.s. c 10 § 2; 1974 ex.s. c 40 § 3. Formerly RCW 43.19.530.]

**NOTES:**

Effective date—Purpose—2011 1st sp.s. c 43: See notes following RCW 43.19.003.

**39.26.235**
**Purchase of wireless devices or services.**

(1) State agencies that are purchasing wireless devices or services must make such purchases through the state master contract, unless the state agency provides to the office of the chief information officer evidence that the state agency is securing its wireless devices or services from another source for a lower cost than through participation in the state master contract.

(2) For the purposes of this section, "state agency" means any office, department, board, commission, or other unit of state government, but does not include a unit of state government headed by a statewide elected official, an institution of higher education as defined in RCW 28B.10.016, the student achievement council, the state board for community and technical colleges, or agencies of the legislative or judicial branches of state government.
NOTES:

Effective date—2012 c 229 §§ 101, 117, 401, 402, 501 through 594, 601 through 609, 701 through 708, 801 through 821, 902, and 904: See note following RCW 28B.77.005.

Effective date—Purpose—2011 1st sp.s. c 43: See notes following RCW 43.19.003.

39.26.240
Awards of procurement contracts to veteran-owned businesses.

All procurement contracts entered into under this chapter on or after June 10, 2010, are subject to the requirements established under RCW 43.60A.200.

[ 2010 c 5 § 9. Formerly RCW 39.29.052.]

NOTES:

Purpose—Construction—2010 c 5: See notes following RCW 43.60A.010.

39.26.245
Awards of procurement contracts to office of minority and women's business enterprises.

(1) All contracts entered into and purchases made, including leasing or renting, under this chapter on or after September 1, 1983, are subject to the requirements established under chapter 39.19 RCW.

(2) All procurement contracts entered into under this chapter on or after June 10, 2010, are subject to the requirements established under RCW 43.60A.200.

[ 2010 c 5 § 6; 1983 c 120 § 13. Formerly RCW 43.19.536.]

NOTES:

Purpose—Construction—2010 c 5: See notes following RCW 43.60A.010.

39.26.250  
Preferences—Purchase of goods and services from inmate work programs.

Any person, firm, or organization which makes any bid to provide any goods or any services to any state agency shall be granted a preference over other bidders if (1) the goods or services have been or will be produced or provided in whole or in part by an inmate work program of the department of corrections and (2) an amount equal to at least fifteen percent of the total bid amount has been paid or will be paid by the person, firm, or organization to inmates as wages. The preference provided under this section shall be equal to ten percent of the total bid amount.

[1981 c 136 § 15. Formerly RCW 43.19.535.]

NOTES:


39.26.251  
Purchase of articles or products from inmate work programs—Replacement of goods and services obtained from outside the state—Rules.

(1) State agencies, the legislature, and departments shall purchase for their use all goods and services required by the legislature, agencies, or departments that are produced or provided in whole or in part from class II inmate work programs operated by the department of corrections through state contract. These goods and services shall not be purchased from any other source unless, upon application by the department or agency: (a) The department finds that the articles or products do not meet the reasonable requirements of the agency or department, (b) are not of equal or better quality, or (c) the price of the product or service is higher than that produced by the private sector. However, the criteria contained in (a), (b), and (c) of this subsection for purchasing goods and services from sources other than correctional industries do not apply to goods and services produced by correctional industries that primarily replace goods manufactured or services obtained from outside the state. The department of corrections and department shall adopt administrative rules that implement this section.

(2) Effective July 1, 2012, this section does not apply to the purchase of uniforms for correctional officers employed with the Washington state department of corrections.

[2015 c 79 § 7; 2012 c 220 § 1. Prior: 2011 1st sp.s. c 43 § 227; 2011 c 367 § 707; 2009 c 470 § 717; 1993 sp.s. c 20 § 1; 1986 c 94 § 2. Formerly RCW 43.19.534.]

NOTES:

Effective date—Purpose—2011 1st sp.s. c 43: See notes following RCW 43.19.003.
39.26.255
Preferences—Purchase of products containing recycled material—Directory of suppliers—Rules.

(1) The director shall develop specifications and adopt rules for the purchase of products which will provide for preferential purchase of products containing recycled material by:

(a) The use of a weighting factor determined by the amount of recycled material in a product, where appropriate and known in advance to potential bidders, to determine the lowest responsible bidder. The actual dollars bid shall be the contracted amount. If the department determines, according to criteria established by rule that the use of this weighting factor does not encourage the use of more recycled material, the department shall consider and award bids without regard to the weighting factor. In making this determination, the department shall consider but not be limited to such factors as adequate competition, economics or environmental constraints, quality, and availability.

(b) Requiring a written statement of the percentage range of recycled content from the bidder providing products containing recycled material. The range may be stated in five percent increments.

(2) The director shall develop a directory of businesses that have a master contract with the department that supply products containing significant quantities of recycled materials. This directory may be combined with and made accessible through the database of recycled content products to be developed under RCW 43.19A.060.

(3) The director shall encourage all parties using the state purchasing office to purchase products containing recycled materials.

(4) The rules, specifications, and bid evaluation shall be consistent with recycled content standards adopted under RCW 43.19A.020.

[ 2015 c 79 § 8; 2011 1st sp.s. c 43 § 228; 1991 c 297 § 5; 1988 c 175 § 2; 1987 c 505 § 26; 1982 c 61 § 2. Formerly RCW 43.19.538.]

NOTES:

Effective date—Purpose—2011 1st sp.s. c 43: See notes following RCW 43.19.003.

Effective date—1988 c 175: "This act shall take effect July 1, 1988." [ 1988 c 175 § 4.]

Cycled product procurement: Chapter 43.19A RCW.
39.26.260
Preferences—In-state procurement.

The legislature finds that in-state preference clauses used by other states in procuring goods and services have a discriminatory effect against Washington vendors with resulting harm to this state’s revenues and the welfare of this state’s citizens. Chapter 183, Laws of 1983 is intended to promote fairness in state government procurement by requiring that, when appropriate, Washington exercise reciprocity with those states having in-state preferences, and it shall be liberally construed to that effect.

[ 1983 c 183 § 1. Formerly RCW 43.19.700.]

39.26.265
Preferences—Purchase of electronic products meeting environmental performance standards—Requirements for surplus electronic products.

(1) The department shall establish purchasing and procurement policies that establish a preference for electronic products that meet environmental performance standards relating to the reduction or elimination of hazardous materials.

(2) The department shall ensure that their surplus electronic products, other than those sold individually to private citizens, are managed only by registered transporters and by processors meeting the requirements of RCW 70.95N.250.

(3) The department shall ensure that their surplus electronic products are directed to legal secondary materials markets by requiring a chain of custody record that documents to whom the products were initially delivered through to the end use manufacturer.

[ 2011 1st sp.s. c 43 § 229; 2006 c 183 § 36. Formerly RCW 43.19.539.]

NOTES:

Effective date—Purpose—2011 1st sp.s. c 43: See notes following RCW 43.19.003.

Construction—Severability—Effective date—2006 c 183: See RCW 70.95N.900 through 70.95N.902.

39.26.270
List of statutes and regulations of each state that grants preference to in-state vendors.

The director shall compile a list of the statutes and regulations, relating to state purchasing, of each state, which statutes and regulations the director believes grant a preference to vendors located within the state or goods manufactured within the state. At least once every twelve months the director shall update the list.
39.26.271
Rules for reciprocity in bidding.

The director shall adopt and apply rules designed to provide for some reciprocity in bidding between Washington and those states having statutes or regulations on the list under RCW 39.26.270. The director shall have broad discretionary power in developing these rules and the rules shall provide for reciprocity only to the extent and in those instances where the director considers it appropriate. For the purpose of determining the lowest responsible bidder pursuant to RCW 39.26.160, such rules shall (1) require the director to impose a reciprocity increase on bids when appropriate under the rules and (2) establish methods for determining the amount of the increase. In no instance shall such increase, if any, be paid to a vendor whose bid is accepted.

39.26.280
Preference—Products and products in packaging that does not contain polychlorinated biphenyls—Limitations—Products and products in packaging containing polychlorinated biphenyls.

(1) The department shall establish purchasing and procurement policies that provide a preference for products and products in packaging that does not contain polychlorinated biphenyls.

(2) No agency may knowingly purchase products or products in packaging containing polychlorinated biphenyls above the practical quantification limit except when it is not cost-effective or technically feasible to do so.

(3) Nothing in this section requires the department or any other state agency to breach an existing contract or dispose of stock that has been ordered or is in the possession of the department or other state agency as of June 12, 2014.
Findings—2014 c 135: "Polychlorinated biphenyls, commonly known as PCBs, are a family of human-made organic chemicals that were used in many industrial and commercial products such as insulating fluids for electric transformers and capacitors, hydraulic fluids, plasticizers, paint additives, lubricants, inks, caulk, and carbonless copy paper. PCBs were used because of their fire resistance, chemical stability, and electrical insulating properties. PCBs are also found in products as an unintentional by-product of manufacturing processes. PCBs are ubiquitous in the environment because of their stability, extensive previous use, by-production in manufacturing, inadvertent release, and the inability to control and eliminate them through current waste management practices. PCBs are persistent, bioaccumulative, and toxic, and they cycle between the air, soil, and water. PCBs have been shown to cause cancer and affect the human immune, reproductive, nervous, and endocrine systems. The United States toxic substances control act prohibited the commercial production of PCBs in 1979. However, the United States environmental protection agency rules implementing the ban provides exemptions for certain products containing PCBs at concentrations of fifty parts per million or less as a result of manufacturing processes and therefore the continued manufacture, processing, distribution, and use of products containing PCBs remains permitted." [2014 c 135 § 1.]

39.26.285
Purchases of goods and services from nonprofit agencies for the blind.

(1) All contracts entered into and purchases made under this chapter are subject to the requirements established under RCW 19.06.020.

(2) This section is not intended to create an entitlement to an individual or class of individuals.

[2016 c 40 § 1.]

NOTES:

Construction—2016 c 40: "Nothing in this act requires the department of enterprise services or any other public agency to breach an existing contract or dispose of stock that has been ordered or is in the possession of the department or other agency as of June 9, 2016." [2016 c 40 § 3.]

39.26.290
Tests and data of products procured.

(1) This chapter does not require the department to test every product procured. However, the department may accept from businesses, manufacturers, organizations, and individuals results obtained from an accredited laboratory or testing facility documenting product or product packaging polychlorinated biphenyl levels.
(2) The department may request suppliers of products to provide testing data from an accredited laboratory or testing facility documenting product or product packaging polychlorinated biphenyl levels.

[ 2014 c 135 § 4.]

NOTES:


39.26.900
Effective date—2012 c 224.

This act takes effect January 1, 2013.

[ 2012 c 224 § 31.]
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.
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.
G.1 Introduction

Generally speaking, claims by the consultant occur as a result of poor communication between the WSDOT project office, the consultant’s team, and the contract officer. Too often, the contract officer, usually the area consultant liaison (ACL), has not been included in any early discussions in which issues have been raised to the project office by the consultant.

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.

If possible, claims should be avoided. Suggested avoidance measures include:

• Taking sufficient time during the SOW development and negotiations phase to ensure both sides understand the details of the work plan and are clear about project expectations.

• 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, and reach agreement with WSDOT regarding whether the work is needed, and whether it requires 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 returning work as incomplete or needing improvements, the WSDOT project manager 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.

If a claim cannot be avoided, the following outlines procedures based on the size of the claim. Note that all settlements of claims must be included in the agreement with the Consultant by supplement or task amendment, or, if the agreement is expired, in a new agreement specific to the settlement of the claim.

• 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 contacts the CSO manager and discuss the situation. The CSO manager will determine whether the claim warrants CSO involvement. If not, the ACL and the project manager will work with the consultant to 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 ACL and/or 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. Consultants may also notify WSDOT of issues regarding or requesting a 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. 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 request memo, 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 440) will need to be executed. The reason and title need to address “claim resolution” for the project. Depending on the circumstance, a specific claim resolution contract form may be available.

When approved, the ACL will prepare the supplement, task amendment, or new contract and submit it to the consultant for execution. After the supplement, amendment or 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 prior to finalizing the decision regarding the claim.

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

For project specific agreements, the selection of a payment method can enhance the ability of the project manager to obtain the best service for the cost. Below are outlined the types of payment methods available for an agreement and how the different payment methods work. It is noted that certain agreements are almost always under a specific type of payment method, as outlined below. Exceptions for those agreements can be made only with the concurrence of the Consultant Services Office. Further information regarding contract management is in Chapter 500.

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 can clearly define the level of completion of all deliverables expected (quantity and type) at the start of the project. These agreements usually are not able to be supplemented except for time, so it is required that a clear scope of work and specific cost be well defined ahead of negotiations. 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.

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 to the state 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 are not recommended for long-term work or projects that include phases based on design decisions during project progress. Lump sum agreements will not be allowed for 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.
If the complete project scope can be defined at the beginning, and there is pressure to meet a design deadline, the lump sum payment type can work well, especially as an incentive to the consultant to complete the work in a short time frame. Lump sum contracts are negotiated to a firmly fixed price and are not subject to audit. 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. 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. 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 at the start of the project. This method offers an incentive through the fixed fee to the consultant to complete the work efficiently, and can be used effectively for projects with multiple phases. It is expected that negotiations will occur in some form whenever the project phase or deliverables or other elements change. These contracts provide the maximum flexibility for managing large multi-year design projects with several significant elements of work at reasonable costs.

The following elements are considerations when using the CPFF method:

- The benefits to the consultant are: (1) the labor costs (including Indirect Cost Rate) are covered at actual rates, even if there are fluctuations in the original anticipated effort required to complete the deliverables, (2) it may potentially take less effort if the consultant is more efficient, and (3) the ratio of profit earned to labor cost may increase without increase to the total cost as efficiencies occur.
- The disadvantage to the consultant is the potential for a “blown estimate,” which requires a larger labor effort without additional profit, since the fee portion is fixed for the work scoped and additional labor for the existing work will not increase the fee portion. The CPFF method is an incentive for the consultant to accomplish the work as described efficiently and to manage scope creep.
• The benefit to the state is the ability to develop the project in stages and move the project forward, especially if time is a major issue. Profit is fixed for the scope negotiated, and, if the work requires less labor than anticipated for that scope, the state benefits in lower direct labor and indirect costs. If the work requires more labor than anticipated, the additional labor costs less because no additional profit is involved.

A cost plus fixed fee agreement is a flexible agreement which allows the costs to be adjusted to actual costs annually. Labor rates for all firms are invoiced at actual cost, and 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. The Indirect Cost Rate can move up or down during a given agreement’s life span, and discussions during negotiations will 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. It is mainly for this reason that this type of agreement often has a Management Reserve option.

In negotiations for a CPFF contract, it is important to consider the timeframe of the entire project, and provide an escalation factor (if applicable) for the estimate for a given scope to accommodate changes in indirect costs and direct labor over multiple years. To do this escalation, consideration must be made about which elements of work will need multiple years to complete and how much of the work of those elements is expected to be completed within each year of the multi-year contract. Escalation is expressed in terms of a percentage of total direct labor cost, and is usually slightly under current inflation.

Additional fee (profit) is considered for supplements when new elements are added to the agreement and may be considered for some additional project management element hours (usually only for added time on the project, and subject to further discussion and negotiations; it is not a given that additional project management fee will be allowed). Existing elements that require additional hours to complete above the original negotiated hours, termed a scope and magnitude increase for those elements, will not include added fee, only direct labor and indirect costs. Existing elements that are modified by a supplement may include subtracting already approved fee on work that is changed in such a way that the actual work is reduced. In this case, the percent used to estimate the original fee is used to develop the subtractive amount of fee. It is recommended that the ACL and/or CSO be involved in any additions, changes or subtractions of work to ensure the financial portion of the contract is changed appropriately.

Invoicing a CPFF agreement will require that all elements of the project, including direct labor, indirect costs, fixed fee and direct expenses, be invoiced in separate sections of the invoice, and supported. Direct labor is invoiced at actual cost, and can increase based on raises given to staff over the life of the agreement. Indirect costs are invoiced at the approved indirect cost rate (and adjusted annually to actual cost for the previous year). Fixed fee is invoiced based on percent project complete multiplied against the total approved dollar amount of the fee less fee already paid, which is supported by both detailed progress reports and an earned value chart which
outlines the consultant’s estimate of the completion of the project (percent complete). Note that the fixed fee paid to the consultant with each monthly progress payment has no relationship to the amount of labor billed for that month, nor to the percent of direct labor used to develop the fee amount. To obtain the full fee, the project must be complete. If a project or certain elements of work are stopped prior to finalization of the deliverables, negotiations must be held to determine the actual percent complete for final invoicing of the project or elements for all firms on the contract.

A final audit will be requested for larger contracts using the Cost Plus Fixed Fee payment type. Final audits will ensure that the amount of fee paid is appropriate to the level of completion for all firms, will confirm the indirect cost rates (if not already provided on an annual basis through the Audit Office), will confirm the direct salary rates, and ensure direct expenses have been invoiced properly without markup for the prime consultant and at least the subconsultants with larger work efforts on the project. Final audits can result in either WSDOT paying out appropriate costs not previously invoiced, or receiving back overpayments of funds.

**H.1.3 Negotiated Hourly Rate (NHR)**

Another type of agreement which allows some flexibility for changes during the progress of the work or where work is assigned as the budget is approved, is the Negotiated Hourly Rate payment type. This payment method is used for all Task Order contracts and for those situations such as design support services during AD and construction or other circumstances where a Cost Plus Fixed Fee agreement, or Lump Sum is not appropriate. 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 (fixed fee) and is updated on an annual basis for all firms on the contract.

The ACL or a designee should obtain the most recent applicable approved audited Indirect Cost Rate from the CSO. The negotiated Indirect Cost Rate, 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. These rates are subject to annual renewal for indirect cost adjustments as indirect cost percentages for the previous year are approved. The adjustments to the billing rates occur 181 days after the consultant’s fiscal year end. If the rates are approved prior to the 181 days after fiscal year end, the new rates will not be invoiced until the 181st day. If the rates are approved after the 181 days after fiscal year end, the new rates can be adjusted back to the 181st day and following days invoiced prior to approval of the rates.

With the negotiated hourly rate, there is no incentive for consultants to keep costs down, so WSDOT project management must be diligent to ensure efficient delivery by estimating for the state a reasonable number of staff hours for the work, carefully negotiating the hours to complete the work, managing the work schedule by overseeing the work progress, and not automatically approving 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)

Task Order contracts use the task order document as the project delivery method. Negotiated hourly rates are established in the master agreement 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 utilizing the approved rates in the master agreement, 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  Contract Types

I.1 Introduction

This appendix provides descriptions of the various types of contracts used in project or program delivery, including both Professional Services and A&E services. The information below is appropriate for both types of contracts. Specific areas of difference in setting up contracts are in Chapter 200 and Chapter 400. Payment method descriptions for all contracts is in Appendix H.

Covered in this section are the following types of contracts:

- Project/Program-Specific
- Task Order
- Design Support During Ad and Construction
- Disputes Review Board

I.1.1 Contract Boilerplates

Most contracts will use the boilerplate contracts already approved by the Attorney General’s office (AGO). Any contracts not written on these “boilerplate forms” 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.

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 all contracts are developed in coordination with the Washington State Attorney General’s Office (AGO), the Federal Highway Administration, the WSDOT Risk Manager, and, for A&E contracts, the American Council of Engineering Companies of Washington.

Agreement supplements also have boilerplates available which may be helpful to modifying the contract for specific items. These boilerplates are not reviewed by the AGO, and are subject to the review and approval of both the CSO and the AGO. The ACL works with the project office to ensure the proper language and document forms are used.

For all contracts, 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 any contract 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 original contract to be used for a project based on information provided by the project, the responsible ACL, and through discussions with project management.
I.3 Project/Program-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) and other environmental work, appraisal and acquisition of real estate for projects, preliminary design or design, full PS&E or any other effort, whether A&E or Professional Services, which lead to a construction or other type of project that involves multiple 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. Task Order contracts are not available for projects of magnitude greater than $1,500,000 total project cost. Note that some Task Order Agreement lists have lower thresholds for maximum task order costs, and the project manager needs to check with the list manager for any limits on the list used. There is no lower limit below which a project specific contract is not appropriate, and any project may use a project specific contract. Some larger contracts may cover an entire program, such as a Task Order General Engineering Contract under which multiple projects are authorized over a long period of time are completed for a single highway system or program.

The solicitation/selection processes, development of statements of work (SOWs) and negotiations, and contract awards are covered under Chapters 200 and 400. The importance of understanding that material, as well as the timely involvement of the appropriate ACL and the CSO, can help to prevent future problems with delivery of consultant services on a project.

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 a supplemental contract document process, and must conform to those processes outlined in Chapters 200 and 400.

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.

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, lump sum, or negotiated all-inclusive hourly rate. Some program specific contracts will include Task Orders to properly separate out costs for specific projects authorized under the program, and will usually be paid under negotiated hourly rates. 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.
I.4 Task Order Contracts for Project Support

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

On-call contracts do not replace multiple discipline single project contracts. They are specifically to fulfill shorter term specific needs for a project under design by the WSDOT when staffing is short in a particular area. Larger efforts are required to use the project-specific contracting procedures.

Each contract will clearly state the limits of the scope of services allowed under the contract in both dollar amounts and time of performance.

Depending on WSDOT’s needs, one or more contracts may be awarded for each on-call solicitation. Often, the CSO will determine ahead of advertisement the number expected to be awarded.

Support groups overseeing specific disciplines within the WSDOT often identify areas of specific need which are serviced by task order contracts. When identified, the support groups work with the CSO to determine the type of service (A&E or Professional) and process (usually a solicitation process) to obtain a list of qualified consultants for a specified time period, not to exceed five (5) years. The number of pre-qualified consultants on each list will vary with the perceived need by the support groups. General engineering contracts will be provided on an approximately three (3) to four (4) year schedule, based on legislative actions and perceived need.

The CSO will work with the project delivery teams to ensure that these lists of task order qualified consultants provide equivalent participation by disadvantaged and smaller firms in accordance with 39.80.040 RCW and 49 CFR 26.

Under task order contracts, contract payment is normally on a Negotiated Hourly Rate basis. This payment method is covered in Appendix H, Contract Payment Methods. Upon occasion, and for a CSO-approved specific purpose, a Task Order may be authorized under the Lump Sum payment method. This payment method must have prior approval from the CSO, and be defended in writing in the files for the Task Order contract.

I.6 Design Support Services During Ad and Construction

Regardless of the type of construction method (design-bid-build, design-build or general contractor- construction methods), if a consultant is part of the process to develop the project, it is strongly recommended that the consultant also continue to be available to answer questions and respond to change orders regarding the consultant’s design during the ad period as well as the construction period. These questions may come up any time during the process of acquiring the services of the contractor and construction of the project.
The consultant services during ad and construction do not necessarily have to be for a design for the entire project, but could also apply to availability for category-specific work. The selection of a consultant for services related to a project scheduled to go to construction will need to include language that provides for the consultant to remain part of the project through project completion. This may be accommodated by either a supplement to an existing agreement for the project, an amendment to a task order on the project, or a new agreement or task order. If the agreement payment method needs to change (for example, cost plus fixed fee to negotiated hourly rate), then a new agreement for these services will be required. A separate agreement specific to the project may be required if the master task order agreement end date will not provide sufficient time for the consultant to remain available throughout the full construction timeline.

Note that these services are for the consultant to be available to answer questions and provide design reviews and are not related to design error issues which are treated differently. For determining and settling design error issues, see Appendix O.

All agreements for these services are on a Negotiated Hourly Rates basis, due to the inability to determine how much or little the services will be required during the advertisement and construction processes. An allowance, against which the project office can draw for the consultant services, is assigned to the agreement and only increased if the project is not complete and the allowance for the consultant is not sufficient to cover the anticipated additional requests for information (RFIs). Invoices for these agreements need to detail the RFIs in status and expenditures.

The process by which the consultant is requested to provide project services under this type of agreement or task order will be outlined in the general scope of work. Negotiations for specific work items under the general scope are appropriate for larger efforts, though they need to be completed quickly to prevent delay. If the amount of work anticipated is small, then written notices to proceed should be authorized by the project office. Larger efforts may also be authorized by the project office, and the ACL needs to be notified of project progress on a regular basis. Should the effort include significant design changes, the CSO and the State Construction Engineer or Assistant Secretary Engineering & Regional Operations Chief Engineer, may need to become involved. 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:** Consultant designers cannot provide construction oversight and/or inspection services 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) 1-09.11.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, and unless there is permission given by the CSO, there will be three members on each 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.

Advertisements for Dispute Review Board State and Third Party members will be managed through the CSO. Members selected will have an agreement for whichever services they have been selected. Only one member will be on any agreement.

Following the A&E selection procedures covered in Chapter 400, the CSO manager will finalize negotiation for rates and proceed with execution of the contract with the state or third party member.

I.7.2 Agreement Process

On a regular 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. Task Order Master Agreements specifically developed for DRB members will be used to manage the services. Each list will include sufficient numbers of members that allow for different kinds of projects to be served. A request memo will be developed for each list.

The total number of contracts may vary, but it is recommended to have at least 20 State members available, and at least 15 Third Party members available.

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 Chapter 410, 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 (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 must include an up to date résumé with sufficient pages to determine the expertise of the member as a separate PDF document.
The CSO will assemble a selection board that will follow the process described in Chapter 400 for selection of contract awards. The board members need to be familiar with WSDOT construction procedures, whether design-bid-build (DBB), design-build (DB) or general contractor/construction management (GCCM) methods.

For the third member short list, the CSO will coordinate and assemble the selection board for third members, and the board will review the materials presented by the respondents to the advertisement.

Scores will be provided to the CSO, and a determination of the members to be offered contracts will be made. The Association of General Contractors may be provided a list of the third party members proposed for contracts, for their review and comment. If objections are made on any members, the CSO will consider those objections prior to issuing final agreements.

### 1.7.4 Agreements and Task Orders

Contracts will be negotiated and entered into with the top-ranked proposed DRB members using a specific State or Third Party Member Task Order master contract. All agreements will be negotiated hourly rate agreements, and will be managed by the CSO or their delegated representative.

Under most circumstances, the process to select a board will include sending the resumes of the approved members either to the project construction office (state members) or state and contractor’s members (third party members) as the Second Tier process to select the best member possible for the board.

All task orders will be issued in accordance with task order process (see Chapter 450), with the exception that the task order forms are specific to DRBs. 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.
Qualifications and Past Performance Database

Appendix J

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 email 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.
K.1.1  General Debriefing Procedures

The purpose of debriefing is to provide information to the consultant regarding any apparent weaknesses or shortfalls in the procurement 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 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 upon request.

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). It is noted, however, that WSDOT will post, after all debriefings and protests have been resolved for a solicitation, the submittals of all consultants for that solicitation on their external website.
K.1.2 Specific Procedures

K.1.2.1 Debriefing Conferences

To provide the opportunity for unsuccessful proposers responding to either an advertisement for a single project agreement or to a Second Tier Competition, the consultant may participate in a debriefing conference. The debriefing must be requested in writing within three (3) business days after the notification of the apparently successful consultant is selected.

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 will 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.

Debriefings may be conducted in person or by telephone and may be time-limited.

K.1.2.2 Debriefing Protests

To allow sufficient response time, all post-debrief protests must be received by CSO no later than 3:00 p.m. Pacific Time (PT) of the fifth (5th) business day following the debrief conference. 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.

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 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.

The CSO’s decision shall be final and conclusive. Selection of the successful Proposer, if any, will be postponed until after the CSO has issued its decision.

K.1.2.3 Protests Regarding the Solicitation

A protest regarding the solicitation may be made if the consultant believes that the solicitation unduly constrains competition, or contains inadequate or improper criteria. If the protest is received prior to the due date of the solicitation response, the CSO will consider the protest, 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 protest is being considered. The solicitation document will include the timeframe and procedures by which a protest regarding the solicitation itself can be filed should the protest be made after the solicitation due date.

For all solicitation protests, 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 protest is received after the solicitation due date, the Proposer/protestant and the Proposer(s) against whom the
Appendix K Procurement Debriefing and Protest Procedures and Disclosure of Consultant Information

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.

K.2 Protest Procedures

All protests regarding any contents or portion of a Request for Qualifications must be submitted to the 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 the 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 the 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 (5) 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 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.

K.3 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.

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.
Appendix L  Determining Cost Factors

L.1 Introduction

For A&E contracts, cost factors will be part of a selected firm’s proposal and will be subject to negotiation as allowed by 23 CFR 172. For Professional Services, cost factors may be requested as part of the selection process, and final costs 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.

Oversight on costs is provided by both CSO and the WSDOT Audit Office. The Audit Office uses its risk-based oversight framework to review a firm’s indirect costs for compliance with FAR Part 31, based on the requirements in 23 CFR 172.11(b)(1). The Audit Office obtains the certificate of indirect costs to accompany a firm’s indirect cost rate schedule in accordance with 23 CFR 172.11(c)(3). More information about the Audit Office and its role in the billing rate approval process may be found at www.wsdot.wa.gov/Audit/default.htm.

Federal Acquisition Regulation (FAR) Part 31 sets the criteria for determining costs eligible for cost reimbursement on Federally-funded agreements and is used for contracts funded solely by State funds. The Audit Office uses FAR Part 31 in its evaluation process. 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 is negotiable if the department determines the rates are unreasonable for the labor class. Direct labor is billed at actual cost unless capped or otherwise negotiated.

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 difficult 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, these costs, if allowable, are recovered as a component of the indirect costs. The Audit Office may assist CSO in verifying the standard rate of pay for salaried employees and executives.

Under certain circumstances, such as the need to complete a particular design by a certain time, overtime on the part of consultant staff may be requested. Certain levels of consultant staff are eligible for overtime premium payments, or are eligible for shift differential and call-back premium payments (shift differential and call back premiums are usually needed when the consultant is required to provide inspection services or other services during construction, though the premiums may also be negotiated for critical timeline design work) which are above and beyond the normal salary rate.
These costs, which are related to the direct salary cost of the employee, must be negotiated at the time the contract is negotiated. However, the overtime, call back or shift differential portion of the salary, which is paid in addition to the underlying hourly salary rate, is not eligible to include indirect cost recovery or fee. The underlying hour for the overtime, call back or shift differential work is allowed indirect cost recovery and fee. For the WSDOT policy and details regarding this aspect of the direct salary costs, see Appendix Q. It is noted that all overtime or other premiums must be pre-approved both in the contract documents and prior to working the overtime.

L.3 Indirect Costs (Fringe and General Overhead)

Consultants establish, for their employees, compensation packages which may include sick leave, vacation leave, contributions to various retirement systems (including Social Security), health care costs, employer taxes and other items related to employing a staff member. These costs are fringe benefits and are not eligible for direct billing to the project. Instead, these costs are recovered as part of the indirect costs attributed to the labor costs.

The company’s other costs, including indirect labor, insurance, rent, and a number of other factors covered in FAR 31, are recovered in the indirect costs as well. These costs are referred to as general overhead costs.

Indirect Costs are recovered as a percentage of each labor hour billed to the project. In coordination with CSO, the Audit Office uses its risk-based oversight framework to review a firm’s indirect costs for compliance with FAR 31, based on the requirements in 23 CFR 172.11(b)(1). The indirect cost rates for a consultant will be used for all contracts the consultant holds with the WSDOT. For more details on determining these costs, see the Audit Office website. For further adjustments that must be made to the cost-plus-fixed-fee (CPFF) and Negotiated Hourly billing methods, see Appendix H. Note that indirect cost recovery is not allowed on the overhead premium, call back premium or shift differential premium pay.

L.4 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. For all contracts, profit (fixed fee) shall be negotiated separately in accordance with 23 CFR 172.11(b)(3).

At the federal level, profit is determined for all Professional and 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 using a method which is expected to approximate the federal allowable percentages. The method used by the WSDOT to calculate fixed fee for any payment method is described in Appendix AA. A fee calculation worksheet is included in Appendix AA. Note that fee (profit) is not allowed on the overhead premium, call back premium or shift differential premium pay.
• 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 labor costs related to the work effort, and then fixing the profit amount as a lump sum profit for the work.

• For all negotiated hourly rate contract types (both single project and master task order contracts), the fee is calculated for an appropriate percentage over all the work expected, and that percentage is included in every hour worked as part of the negotiated hourly rate.

• For lump sum agreements, the fee is calculated similarly to the cost plus fixed fee type of payment method, and included as part of the negotiated lump sum total price.

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.5 Direct Non-salary Costs

On many projects, there are costs not associated with labor, including expenses such as travel costs, temporary housing, printing, specialized services not considered to be A&E or Professional Services (such as drilling or traffic control), 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.

If travel costs are approved for the contract, the Accounting Manual Chapter 10 determines allowability (excluding air, train, and rental car costs). The FAR 31.205-46 “Travel Costs” determines allowability for air, train, and rental car costs.

Anticipated direct non-labor costs are covered in the estimates and at the negotiations. Unanticipated costs need to be discussed with the WSDOT project manager and ACL, and written approval through the ACL or CSO Manager must be obtained whenever possible before the costs are incurred. Unusual direct costs may need to be negotiated prior to acceptance by the WSDOT on a consultant contract.
Appendix M  Ethics in Contracting

M.1 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.

M.1.1 Federal Regulations

49 CFR 18.36: This law covers individual and organizational conflict of interest requirements, including ethical behavior 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.

M.3.2 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 42.52 RCW applies to all state employees contracting on behalf of the state. All WSDOT employees are required to state annually 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 required to complete ethics training once every three years and be knowledgeable of the statutes and rules governing professional conduct.

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.
M.3.3 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.

M.2 Ethics Requirements for Contracting

State employees, their families and friends, contractors and consultants are required to comply with 49 CFR 18.36 in their work together on WSDOT projects, whether or not there are federal funds involved.

During procurements, those directly or indirectly involved in the selection of consultants, negotiations for the final contract, and management of the consultant work will need to ensure that their behavior is ethical at all times. This may require that each person involved in the procurement and management of consultants sign a confidentiality and/or conflict of interest statement which outlines the restrictions or other requirements for the project. One such document is that found in Appendix AB, which is specific to the procurement of consultant services. Other documents may be requested of those involved in consultant services based on the particular situation.

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 is expected to 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.3 Ethics Roles and Responsibilities

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 on state-related issues. It also
investigates complaints of alleged ethics violations.

The state has established an Executive Ethics Board under RCW 42.52.320, 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.

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 non-allowable 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

MPD: Negotiations Flow Chart

Exhibit N-1a

September 2016
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.
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.
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.
Consultant Design Errors and Omissions Procedures

Appendix O

O.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.

O.1.1 WSDOT Project Manager Identifies Design Error

The WSDOT 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. 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.

As soon as a suspected design error or omission is found, a determination must be made whether an error or omission has actually occurred. 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; payment of 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). The ACL will immediately notify the CSO that the potential for a design error and/or omission exists on the project. The ACL will also indicate to the project manager that documentation of the full situation is critical.
O.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 will include but not be limited to: 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 (including pass through funds from a local or state agency), that federal agency and its local or state partners (if any) must also be advised of the issue. The appropriate agencies must be kept informed of the proceedings throughout the process to conclusion.

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 was caused by, the negligence of the consultant firm/team. (Note: 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.)
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).

O.1.3 CSO Manager Contacts Consultant

After the WSDOT project team and the ACL determine the need for further action, the ACL will notify the CSO manager of that determination. The CSO 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, the 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.
O.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.

O.1.5 WSDOT Assistant Secretary, Engineering, and 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.
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 of 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.

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.

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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.
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:

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________

___________________________________________________________________________
Appendix Q  Overtime/Premium Pay

Q.1 Introduction
The FARS allows overtime premium, if approved by WSDOT in advance. Under Q.3(i), this is applied to direct and indirect labor; however WSDOT does not pay overhead or fee on the premium portion of direct labor. Overhead is not paid on the premium portion because WSDOT does not use the premium portion to compute the hourly rate. If that computation was made, the rate would be slightly smaller. Fee is paid on the underlying hour and not computed for premium time paid that is in addition to the hourly rate.

Q.2 Procedures
(a) Solicitations normally shall not specify delivery or performance schedules that may require overtime at Government expense.
(b) In negotiating contracts, contracting officers should, consistent with the Government’s needs, attempt to (1) ascertain the extent that offers are based on the payment of overtime and shift premiums and (2) negotiate contract prices or estimated costs without these premiums or obtain the requirement from other sources.
(c) When it becomes apparent during negotiations of applicable contracts that overtime will be required in contract performance, the ACL in coordination with the Project Office shall secure from the consultant a request for overtime to be used to ensure the contract deliverables meet the project schedule, to the extent that the overtime can be estimated with reasonable certainty. The consultant’s request shall include the total hours for which the premium is requested, and show the premium rate used for each person receiving overtime salary premium as a separate line item in the contract documents. This calculation will also apply to shift differential and call back premiums added to an hourly rate.

Q.3 Approvals
(a) The contracting officer shall review the consultant’s request for overtime. Approval of the use of overtime may be granted by an agency approving official after determining in writing that overtime is necessary to—

(1) Meet essential delivery or performance schedules;
(2) Make up for delays beyond the control and without the fault or negligence of the consultant; or
(3) Eliminate foreseeable extended production bottlenecks that cannot be eliminated in any other way.
(b) Approval by the designated official of use and total dollar amount of overtime is required before inclusion of an amount in the estimate for the consultant’s services. Overtime premium as well as call back and shift differentials will be calculated in the project estimate on separate lines.

(c) Contracting officer approval of payment of overtime premiums is required for negotiated hourly rates (including task orders) and cost plus fixed fee contracts. Lump sum contracts do not require approvals for paying overtime premiums as the costs are already fixed.

(d) During contract performance, consultant requests for overtime work must be approved by the project office and/or the ACL, to track use of same. Overtime requests exceeding the amount authorized by previous negotiations shall be submitted as outlined above under Q-2, Procedures to the Project Office and the ACL. The ACL along with the Project Office will review the request and if it is approved, the ACL will supplement the agreement or amend the task order with the approved additional overtime premium hours per the standard procedures for supplements and amendments.

(e) Overtime premiums at Government expense should not be approved when the contractor is already obligated, without the right to additional compensation, to meet the required delivery date.

(f) When the use of overtime is authorized under a contract, the office administering the contract and the auditor should periodically review the use of overtime to ensure that it is allowable in accordance with the criteria in the FARS part 31. Only overtime premiums for work in those sections of the consultant’s estimate that have been approved shall be considered for payment.

(g) Approvals for using overtime shall ordinarily be prospective, but, if justified by emergency circumstances, approvals may be retroactive.
Appendix R

Vacated
Appendix U  Selection Process and Boards

U.1 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.

U.1.1 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.1.2 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.1.2.1 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 Section 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.1.2.2 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.1.2.3 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.1.2.4 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.1.2.5 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.1.2.6 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.1.3 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.1.4 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 Section 410.05 for information on notification and debriefing.
U.1.5 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.1.6 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 Section 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).
Appendix V

Vacated
Appendix W  Vacated
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.

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 and 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

To help with the Second Tier process, a checklist has been developed which outlines the minimum required documentation for the competition from the WSDOT rosters, and offers information on critical items to have prior to starting the process. This checklist is in this appendix, located after these 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.

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.
Second Tier Selection Processes – Checklist

Below are the minimums required for documentation of 2nd tier competition when selecting from WSDOT’s statewide On-Call Rosters:

- List of who you sent the “Request for Additional Information” (RFAI) to;
- RFAI Documents, including copy of the email;
- Copies of all responses; and
- Justification for selection.

Notes: The ACL or HQ Consultant Services can help with the following additional items:

- Make sure you have authorization from the Agreement Manager to pursue a task order utilizing their master agreements;
- Make sure the firms that you send it to have the capacity/time left on their master agreements to complete your Task; and
- When selection is complete and all documentation is attached, please make sure that this documentation package is included as back-up data to the Task Order that is generated from this process. (Keep with your copy of the Task Order in your working files and do not attach to the original Task Order, this is an internal WSDOT process only.)
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>
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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:
Appendix AA  Consultant Fee Calculation Worksheet

AA.1 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>Weighted Guidelines</th>
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<tbody>
<tr>
<td>Factor</td>
</tr>
<tr>
<td>Degree of Risk</td>
</tr>
<tr>
<td>Relative Difficulty of Work</td>
</tr>
<tr>
<td>Size of Job</td>
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<tr>
<td>Period of Performance</td>
</tr>
<tr>
<td>Assistance by the State</td>
</tr>
<tr>
<td>Sub-consulting</td>
</tr>
</tbody>
</table>

Total

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, indicates the fair and reasonable fixed fee and/or profit percentage of direct (raw) labor costs for the agreement and/or supplement.

AA.2 Description of Calculation of Fee Factors

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 agreements without options for which quantities are provided. Other things to consider: nature of the 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 proportionally 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 whether it is rehabilitation or new work.

Size of Job: All agreement (estimated) total costs less than $100,000 shall be weighted at .35. The fixed fee percentage should be proportionately weighted for those projects between $100,000 and $5,000,000 from .34 to .21. Agreements from $5,000,000 to $10,000,000 may be proportionately weighted from .21 to .17, and work in excess of $10,000,000 at .17.
**Period of Performance:** Agreements and/or supplements that are 24 months or longer are to be weighted at .35. Agreements and/or supplements of lesser duration are to be proportionately weighted to a minimum of .17 for work less than 2 months.

**Assistance by the State:** To be weighted from .35 in those situations where few items are provided by the state to .17 in those situations where the state provides many items. Things to consider: existing or provided design or plans, mapping, quantities, surveys, geotechnical information, etc.

**Sub-Consulting:** To be weighted in proportion to the amount of subconsulting. Where 40% (40 percent) or more of the design is to be done by subconsultants, the weighting is to be .35. The weighting is proportionally decreased to .17 where all the design is performed by the consultant’s own forces.
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 RFQ/RFP or Second Tier Project

________________________
Signature of Evaluator

________________________
Printed Name

________________________
Date