

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

Chapter 11, Section 1101 – 1104: Selection of Architects and Engineers

Commonly referred to as the Brooks Act

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

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

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

In this chapter, the following definitions apply:

- (1) **Agency head.** – The term “agency head” means the head of a department, agency, or bureau [of the Federal Government].
- (2) **Architectural and engineering services.** – The term “architectural and engineering services” means–
 - (A) professional services of an architectural or engineering nature, as defined by state law, if applicable, that are required to be performed or approved by a person licensed, registered, or certified to provide the services described in this paragraph;
 - (B) professional services of an architectural or engineering nature performed by contract that are associated with research, planning, development, design, construction, alteration, or repair of real property; and
 - (C) other professional services of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform, including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals, and other related services.
- (3) **Firm.** – The term “firm” means an individual, firm, partnership, corporation, association, or other legal entity permitted by law to practice the profession of architecture or engineering.

§ 1103. Selection procedure (Formerly 40 U.S.C. § 543)

- (a) **In general.** – These procedures apply to the procurement of architectural and engineering services by an agency head.
- (b) **Annual statements.** – The agency head shall encourage firms to submit annually a statement of qualifications and performance data.
- (c) **Evaluation.** – For each proposed project, the agency head shall evaluate current statements of qualifications and performance data on file with the agency, together with statements submitted by other firms regarding the proposed project. The agency head shall conduct discussions with at least 3 firms to consider anticipated concepts and compare alternative methods for furnishing services.
- (d) **Selection.** – From the firms with which discussions have been conducted, the agency head shall select, in order of preference, at least 3 firms that the agency head considers most highly qualified to provide the services required. Selection shall be based on criteria established and published by the agency head.

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

- (a) **In general.** – The agency head shall negotiate a contract for architectural and engineering services at compensation which the agency head determines is fair and reasonable to the Federal Government. In determining fair and reasonable compensation, the agency head shall consider the scope, complexity, professional nature, and estimated value of the services to be rendered.
- (b) **Order of negotiation.** – The agency head shall attempt to negotiate a contract, as provided in subsection (a), with the most highly qualified firm selected under section 1103 of this title. If the agency head is unable to negotiate a satisfactory contract with the firm, the agency head shall formally terminate negotiations and then undertake negotiations with the next most qualified of the selected firms, continuing the process until an agreement is reached. If the agency head is unable to negotiate a satisfactory contract with any of the selected firms, the agency head shall select additional firms in order of their competence and qualification and continue negotiations in accordance with this section until an agreement is reached.

EXHIBIT I

O.1 Legal References

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

O.1.1 Federal Regulations

[23 USC 112](#), Letting of contracts

[23 USC 106](#), Project approval and oversight

[49 CFR 18.36](#), Common grant rule for states

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

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

O.1.2 Washington State Laws

[Chapter 39.80 RCW](#), Contracts for architect and engineering services

[RCW 39.80.010](#), Legislative declaration

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

[RCW 39.80.060](#), Procurement of architectural and engineering services – Exception for emergency work (see [Appendix D](#) for full text)

O.2 A&E Sole Source Justification and Procedures

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

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

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

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

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

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

O.2.1 Emergency Situations

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

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

O.2.2 Noncompetitive Acquisition Considerations

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

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

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

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

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

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

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

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

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

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

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

The project management involved and the area consultant liaison (ACL) should follow the provisions in [Chapter 600](#) and provide the appropriate documentation to the CSO as soon as reasonably possible.

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

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

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

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

O.3 Sole Source Contracts for Phased Work Assignments

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

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

1. One phase of work ends and another begins with the same consultant.
2. Overlapping phases require a new contract to start before work ends on the last phase.
3. Design support is needed during construction.
4. The contract payment type changes during the course of the work.
5. An expert witness is needed
6. There is a legislative exemption for expert or review panels (A&E).

In each of the first three cases above, the issue of potentially awarding the next phase of work to the consultant who has been authorized to do the first and possibly successive phases must be addressed in the announcement soliciting for the original work.

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

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

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

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

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

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

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

Occasionally, the wrong type of contract may be used for a project or work and it becomes necessary to change the contract type during the course of the work. This cannot be done by supplementing the existing contract. The HQ Accounting and Financial Services Office will not allow it. When executing the replacement contract, care must be taken not to change or modify the limits or general scope of the original solicitation.

Note: There is a distinction between task assignment contracts (TACs) and on-call task order contracts (TODs), both of which are currently in use. Under the TAC, the master contract is funded to the maximum covered by the contract or subsequent supplements. Under the on-call contract, no funding is committed until the individual task order documents are executed and work orders are set up for each particular TOD. Request memos need to be written and approved for these instances.

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

O.4 Request Memo

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

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

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

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

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

O.5 Notification and Request for Proposal

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

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

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

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

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

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

O.6 Negotiations and Notice to Proceed

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

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

Occasionally, there may be a need to acquire the services from a highly specialized firm that has typically provided services at market rates. It will be up to the chief negotiator to determine "fair and reasonable" for the state. Discussions with project management prior to the actual negotiations need to occur. The negotiator needs to become familiar with the budget and target pricing before starting the actual negotiations.

For details on negotiations and the MPD process for SOW development, including the MPD flow chart and narrative, see [Appendix N](#), Negotiations, Statements of Work, and Managing Project Delivery.

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

In cases where there is a time constraint, a limited notice to proceed (LNTP) may be issued once 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.

EXHIBIT J

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 (pre-design, 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 pre-design 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 document¹ 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.

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 Disclosure and Avoidance/Neutralization/Mitigation Plan *Exhibit P-1*

**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
Acknowledgment for Consultant Contracts**
Exhibit P-2

Organizational Conflict of Interest Certification

Name of Submitter: _____

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

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

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

Signed _____ Date _____

Printed Name and Title _____

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

Organizational Conflict of Interest Certification
Exhibit P-3

EXHIBIT K

V.1 Introduction and Narrative

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

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

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

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

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

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

V.2 Contract Supplement Process

Contract supplements require approval from the CSO prior to starting negotiations. The process starts with a “request to supplement” provided on the proper request memo. The request memo form includes questions, because the CSO is responsible for reporting architectural and engineering activity on a quarterly basis, and the questions asked by the Office of Financial Management (OFM) regarding the need to supplement the contract have to be answered by the CSO.

The request memos include the following information in accordance with the requirements of OFM.

V.2.1 Documentation Needed for a “Supplement for Time Extension Only”

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

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

1. Provide the project manager’s name, phone number, and org code.
2. Identify and describe the problem, requirement, or need that the supplement is intended to address and that makes the supplement necessary. Explain how WSDOT determined that the services under the proposed supplement are critical or essential to agency responsibilities or operations and/or whether the services are mandated or authorized by the Legislature. Also, identify and explain in detail why this supplement is of an emergent nature if it falls under the Governor’s order dated August 4, 2008 (if applicable). Emergent supplements include:
 - Those related to public safety and those that would prevent material loss of or damage to property, bodily injury, or loss of life if action is not taken.
 - Contracts that stem from court orders or are required under the law.
 - Contracts that secure the receipt of federal or other funds or that may be an integral part of a revenue-generating enterprise.
 - Contract supplements that reduce contract dollars and/or zero cost supplements that extend a contract end date. Supplements to finalize projects close to completion will be considered on a case-by-case basis. All other supplements should be carefully evaluated as to whether it is in the best interest of the state to move forward.
 - Mission-critical information technology contracts without which a system can fail, a project will encounter costly delays, or key deadlines will be missed and penalties will be incurred.
3. Explain how the agency concluded that sufficient staffing or expertise is not available within the agency (not just within the agency division) to perform the services.
4. Explain what effort has been taken to conclude that other public resources are not available to perform the services more efficiently or more cost-effectively.

5. State whether the original contract was competitively procured or awarded as a sole source, and explain when the contract was awarded, the cumulative dollar amount of the original contract, and any subsequent supplements prior to this supplement.
6. Explain why the services under the proposed supplement were not included in the terms of the original contract or in the solicitation document. Include any conditions that have changed since contract award and other information that supports the decision to supplement the contract.
7. State the rationale for executing a supplement to the existing contract rather than competitively procuring the services and awarding a new contract. Include whether the new services are within the scope of the original contract or solicitation document and how the supplement can most effectively achieve the department's purpose.
8. Provide an explanation of the consultant's qualifications, abilities, or expertise to meet the agency's specific needs for the services under the supplement.
9. Provide a written state estimate of the cost of additional work, including direct labor rates, overhead, profit, subconsultant costs, and reimbursables.
10. Provide the funding source for the project. Include the program identification number (PIN), work order number, and the organization code for the work order. Also, include the federal-aid number and participation percentage on federally funded projects. Provide assurance that the appropriate program management office has reviewed and approved the funding.
11. List the area consultant liaison's name and phone number.

EXHIBIT L

Agreement Number Y 9245**Supplement Number 2**

This SUPPLEMENTAL AGREEMENT, is made and entered into on this

16th day of June, 2008, between the State of Washington, acting through the Washington State Department of Transportation and the Secretary of Transportation, hereinafter called the "STATE," and David Evans & Associates Inc., hereinafter called the "CONSULTANT."

WHEREAS, the parties hereto have previously entered into an agreement for services, said agreement being Agreement Number Y 9245 dated May 16, 2005; and

WHEREAS, the STATE desires to have the CONSULTANT assist the STATE by providing additional services; and

WHEREAS, Section XIV, EXTRA WORK of the AGREEMENT provides for payment by supplemental agreement for additional work; and

WHEREAS, both parties desire to supplement said AGREEMENT by increasing the maximum amount payable to cover the cost for additional services.

NOW, THEREFORE, in consideration of the promises, covenants, terms, conditions, and performance contained herein, or attached and incorporated and made a part hereof, the parties mutually agree as follows:

Each and every provision of the original AGREEMENT as supplemented shall remain in full force and effect, except as expressly modified in the following sections:

IV**Time for Beginning and Completion**

Section IV, "Time for Beginning and Completion," shall be supplemented to extend the completion date from May 30, 2008, to June 30, 2010.

1 **V**

2 **Payment**

3 Section V, "Payment," shall be supplemented to compensate the CONSULTANT for the
4 additional engineering services necessary to complete the project as follows:

5 C. Maximum Total Amount Payable

6 The maximum total amount authorized for this SUPPLEMENTAL AGREEMENT is
7 increased by \$45,000,000.00 from \$50,000,000.00 to \$95,000,000.00. The
8 maximum total amount payable for this AGREEMENT is \$95,000,000.00, including
9 the MRF of \$0.00.

1 IN WITNESS WHEREOF, the parties hereto have executed this SUPPLEMENTAL
2 AGREEMENT as the day and year first above written.

3 DAVID EVANS & ASSOCIATES INC. WASHINGTON STATE DEPARTMENT
4 *Jay Evans, Sr. V.P.* OF TRANSPORTATION
5 *Arnold R. Anderson, Sr. VP.* *Dayle Dickey*

6 Approved as to form on this 6th day of June, 2008.

7 By: *J. N. Attridge*
8 Assistant Attorney General



DATE: 5/16/2008
TO: Director, Consultant Services
MS-47323
Ph- (360) 705-7103
FROM: Douglas P Ficco *DF*
MS-S 15
Ph-360-737-2726

RECEIVED
MAY 23 2008
DEPT. OF TRANSPORTATION
CONSULTANT SERVICES
OLYMPIA, WASHINGTON

SUBJECT: Request for Consultant Services- Supplement Original Agreement
Agreement Number: Y 9245, Supplement Number: 2
Project Title: Columbia River Crossing Project
Prime Consultants Name: David Evans & Associates, Inc.

1. *Project Manager Name, Phone Number, and Org Code.*

Name: Douglas P. Ficco Phone: 360-737-2726 Org Code: 441101

2. *Identify and fully describe the specific problem, requirement or need which the amendment is intended to address and which makes the services necessary.*

3. In February of 2005 the WSDOT advertised for this project. David Evans and Associates, Inc. was awarded a contract for the project. We are now ready to move to the next phase of work for the project.

The Columbia River Crossing Project is one of a finite list of projects recognized by the Oregon and Washington Departments of Transportation through the I-5 Partnership Strategic Plan as being a solution to improving the existing I-5 Columbia River crossing and significant to the future of the Pacific Northwest. This PROJECT encompasses a five-mile capacity improvement along Interstate 5 from the SR 500 interchange in Clark County to the Columbia Boulevard interchange in Portland. It includes possible improvements to 7 interchanges (4 in Washington and 3 in Oregon); and replacement of or the addition of a supplemental structure to the existing bridge over the Columbia River.

Describe how WSDOT determined that the services are critical or essential to the agency responsibilities or operations and/or whether the services are mandated or authorized by the legislature

The I-5 Corridor is a critical link in the Washington/Oregon transportation system, that is congested many hours of the day resulting in associated economic impacts. It serves as a vital regional travel corridor within the Portland/Vancouver region. As a major route for employees, freight, and goods for many large and small businesses, its importance extends beyond our borders, both nationally and internationally.

The project is a joint effort between the WSDOT, ODOT, Federal Highway Administration, Federal Transit Administration, Metro, Southwest Washington Regional

Transportation Council, C-Tran, TriMet, City of Vancouver, City of Portland, and the communities in the I-5 corridor.

4. *Explain what effort has been taken to conclude that sufficient staffing or expertise is not available within the agency, (not just within the agency division), to perform the service.*

WSDOT does not have sufficient staff or expertise to perform the work on this project.

Explain what effort has been taken to conclude that OTHER GOVERNMENTAL RESOURCES (LOCAL, STATE OR FEDERAL AGENCIES) OUTSIDE OF WSDOT are not available to perform the services more efficiently or more cost effectively.

N/A

5. *Provide an explanation of the consultant's qualifications, abilities, or expertise to meet the agency's specific needs for the services under the amendment.*

6. 2. In February of 2005 the WSDOT advertised for this project. That advertisement included the following.

7. 10. The WSDOT/ODOT project team desires to retain an experienced consultant team to gain the benefit of experience and expertise in major project management as well as to augment WSDOT/ODOT workforce to deliver this project. The consultant will come into this project at a very early preliminary stage to formulate strategies collaboratively with the WSDOT/ODOT project team on how to deliver this massive, challenging project, and then to implement the delivery strategies. The first stage of the agreement is to perform preliminary design and NEPA environmental documentation. At the option of the WSDOT/ODOT project team, additional design work, and one PS&E as well as On-Call services through completion of construction may be added, if necessary.

David Evans and Associates, Inc. was selected for the project.

8. *State the rationale for executing an amendment to an existing contract rather than competitively procuring the services and awarding a new contract. Include how executing the amendment can most effectively achieve the agency's purpose.*

See above.

9. *Are the proposed services within the scope of the original contract? If no, explain:*

Yes.

10. *Explain why the services were not included in the terms of the original contract?*

The services were included. The funding wasn't.

11. *Explain what conditions have changed since the award and other applicable information that clearly justifies the decision to amend the contract.*

We need the additional dollar amount to continue working on the project.

12. *Are the rates the same as that negotiated under the original contract?*

The rates are the same as the existing amended rates.

13. *Provide the funding source of the project, include the Program Identification Number (PIN) and Work Order Number. Also, include the organization code for the work order. Include Federal Aid Number and participation percentage on federally funded projects. Provide assurance that the appropriate Program Management office has reviewed and approved funding.*

PIN Number 400506A

Work Order Number XL 2268

Org Code 441101

The funding source will vary during the duration of the project.

14. *Provide a written State estimate for the costs of the services that will be performed by the consultant on the proposed project. The estimate should include the following:*

- *Direct Salary Costs*
Include number of hours and salary rates for each proposed classification.
- *Overhead Costs*
Based upon a percentage of direct salary costs (normally the range is between 120-200% of direct salary costs).
- *Fixed Fee Costs*
Based upon a percentage of direct salary costs. The fixed fee percentage will normally range from 17-35% of direct salary costs.
- *Reimbursable Expenses*
Usually 5-10% of total costs of the agreement. These costs may include mileage, travel, computer, copies, etc.
- *Sub-consultant Expenses*
Include estimated costs for sub-consultants, this will be an accumulative amount that will include direct salary costs, overhead costs, fixed fee costs and reimbursable expenses.

\$45,000,000.00

15. Identify the start date of the proposed supplement and duration of the supplemental work.

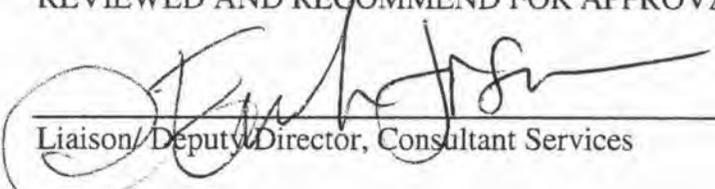
Start June 1, 2008, End date June 30 2010.

16. Area Consultant Liaison Name and Phone Number.

Name: George Humphrey

Phone: 360-816-8864

REVIEWED AND RECOMMEND FOR APPROVAL:


Liaison/Deputy Director, Consultant Services
5/20/08
Date

APPROVED:


Asst. Director, Consultant Services
6/02/08
Date

FOR INTERNAL USE ONLY

Agreement Type: CPFF TONHR TONPR HR LS

Attachments

cc:

EXHIBIT M

