

DRAFT: Updated 6-22-07
 KC-ACEC Contracts Subcommittee—Status Update

Issue	ACEC Interests	King County Interests	Status; Action Item
<p>Labor Rates, Labor Escalation, Salary Cap, & Timing</p>	<p>ACEC expressed concern that limitations established in the contract are not keeping up with market conditions. Consultant are taking on more risk and losing money as actual rates paid to employees are greater than the rates the County is paying to the Consultant. Currently ACEC is more concerned about escalation than the <u>salary cap</u> limitation.</p>	<p>King County has retained an independent consultant to review escalation and the \$65.00 salary cap. Consultant report is due January 2007. King County will share results of survey and is waiting until the results of the survey are released to address this issue. Survey may identify ideas for dealing with escalation and labor rate that are different than current procedures.</p>	<p><u>Two Remaining Outstanding Issues.</u> At the June 21st meeting of the KC-ACEC Executive Committee, the County presented its proposed methodology for setting the salary cap and the labor pool escalation rate. The methodology was based on recommendations from an independent consultant and a survey of practices in other public and private agencies.</p> <ul style="list-style-type: none"> • <u>Salary Cap:</u> The ACEC stated that they are opposed to salary caps and believe this could reduce the top talent assigned to County projects. <u>The ACEC, however, welcomed the County's efforts to allow for escalation of the cap, develop a method to determine the cap, and to tie the cap to labor statistics.</u> • <u>Escalation Rate:</u> The County's proposed methodology is a five-year weighted average index that factors in the regional consumer price index and regional salary data from engineering firms compiled by the Bureau of Labor Statistics. The ACEC does not support the <u>results of the County's methodology, stating that the escalation rates used do not reflect the actual salary escalation conditions that are currently occurring in the local municipal engineering community. ACEC believes that it will make it very difficult for them to recover their actual labor costs in multi-year contracts.</u> <p>There <u>also were</u> discussions about the labor pool concept agreed to last year. <u>It was quickly apparent that ACEC and the County viewed the pool concept very differently.</u> Both parties agreed this needed further clarification and agreed to form a small committee that could work on options.</p>

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Overhead Limits & Timing of changes	ACEC expressed concern that the County was limiting overhead rates and not paying based on actual overhead. ACEC expressed concern when the overhead could change and that the County is not using WSDOT overheads.	<p>In 2005, the County eliminated the plus/minus 5% limit on overhead and allows the prime consultant to select the date for the first change to the overhead rates for all firms. Thereafter, overhead rates are not subject to change for 365 days. For example: Consultant signs contract in October 2006, Consultant may select overhead change on February 1, 2007; thereafter every February 1 2008, 2009, etc is the adjustment date.</p> <p>County reviews overhead and consistently uses WS DOT overhead rates. County does not use DCAA rates because the audits are questionable because the federal government often pays significantly less than the overhead rate identified in the DCAA audit.</p>	<u>Consensus achieved.</u> No action required. Based on discussions, these issues have been addressed.
Ability to move task budget around & Use of CPFF with a Not to Exceed Total Price	<p>ACEC indicated that it was difficult for them to estimate the time it may take to perform an activity and expressed concern about being held to task budgets. ACEC requested that County administer to the Total Contract Price.</p> <p>ACEC would like to see more lump sum contracts or other types of contracts such as time and materials.</p>	<p>County indicated that current contract terms provide for movement between task budgets: the money remaining in completed tasks can be moved to fund other tasks.</p> <p>County expressed concern regarding accountability and our interest in clearly understanding what is going on during the project, how much time the Consultant is spending on what tasks, how much work has been accomplished versus costs expended. County does not want the Consultant to ask for an amendment late in the game or when they have run out of money. County is concerned that we will get poor quality or incomplete work products and be forced to choose between giving Consultant additional money to complete the job or use substandard documents for bidding purposes.</p> <p>Executive Policies & Procedures identify types of consultant contracts: CPFF and lump sum. County departments expressed concern and do not favor lump sum contracts when the scope of work has major uncertainties.</p>	<p><u>Consensus achieved.</u> County has amended the terms to allow greater flexibility for movement of money between task budgets.</p> <ol style="list-style-type: none"> 1. Money can be moved between task budgets provided that a budget crosswalk is prepared in advance and there is no impact on Fee, Schedule and Total Price. 2. Work Order tasks maybe included in the contract and may be utilized at the written direction of the Project Representative (PR). PR can authorize work with a letter that details the scope, deliverables, and price.
Markup on Subconsultants	<p>ACEC expressed concern that they are taking on additional risk by using subconsultants, especially MWBE firms who may not be able to obtain insurance.</p> <p>ACEC appreciates that County pays a project management task for managing the subconsultants; however, ACEC does not believe this compensates them for the additional risk the prime consultants takes by teaming up with subconsultants.</p> <p>ACEC is interested in what it may take to change the Executive P&P to allow markup on subconsultants.</p>	County compensates Prime Consultant for subconsultants in several ways: (1) project management task; (2) B&O tax is covered in overhead; and (3) County's risk analysis to establish fee includes a category for subconsultants. The County evaluates the number of subconsultants, the work being performed by subconsultants, and the percent of work subcontracted in establishing the fee for the project. County believes it has done everything reasonable to address the issue.	<u>Resolution:</u> The County does not intend to change its current practices.

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Cherry Picking the FAR	ACEC expressed concern that King County does not pay all costs that are incurred by the Consultant. ACEC indicated that the FAR is a complete set of guidelines and should be used in total. They believe the County picks and chooses which FAR provisions the County wants to enforce.	King County indicated that the FAR does not mandate that an Owner pay all costs incurred by a Consultant. In accordance with the FAR the County may review for reasonableness and some costs are deemed discretionary. The County believes it is discretionary costs and requested that ACEC identify with particularity which costs or contract provisions are being cherry picked.	<u>Consensus achieved.</u> ACEC informed County in meeting on 10/31 that cherry picking the FAR was not a big issue and that the problem has been resolved over the years, and the County is complying with the FAR.
Compensation for negotiation & changes	<p>ACEC recognizes that some negotiation is a business cost; however, ACEC expressed concern over the length of time negotiations take and the fact that the time spent by the project staff in negotiations is non-compensable time. ACEC proposed a couple of variations:</p> <p>(1) Compensation for negotiation of initial contract and changes if the negotiations are protracted. (2) Initial contract negotiations are a business cost but they should be compensated when changes are made to the scope that was agreed upon by the parties. (3) County should not ask Consultants to cost alternatives</p>	<p>Negotiation is a business cost and reflected in overhead. County is also concerned about the length of time spent in negotiations and recognizes it is also a cost to the County to tie up personnel in protracted negotiations. County is very concerned that compensating the Consultant will result in extended times for negotiations.</p> <p>County continues to work on streamlining negotiation process and developing detailed scopes to include in RFP.</p>	<p><u>Consensus achieved.</u> County does not intend to change its current practice and pay for negotiations of the prime contract and amendments.</p> <p>However, County recognized that in some rare circumstances when the County needs advice from the Consultant on planning a project, the County may include a preliminary planning phase in the contract. The scope of work (SOW) included in the RFP will outline this phase and establish clear deliverables. County will compensate Consultant for such work.</p> <p>If during contract administration the County determines that it requires an alternatives analysis (including estimated costs), the County may issue an amendment identifying the SOW associated with alternatives analysis, establishing clear deliverables and reasonable compensation.</p>
Indemnification, Defense Obligation & Insurance	ACEC expressed concern that they are required to indemnify and defend the County for County actions. ACEC wants to limit their indemnification and defense obligation to the extent of their negligence.	County believes the Consultants indemnification provision applies to Consultant and subconsultant actions/inactions. County does not require Consultant to indemnify County for County actions, provided County action was not a result of advice provided by the Consultant. Current defense obligation requires Consultant to defend County despite fault. County will evaluate the defense obligation.	<p><u>Reached acceptable compromise.</u> The County and the ACEC both agreed that each party should be held responsible for their own negligence and this intent is now reflected in the contract language.</p> <p>At the meeting on June 21st two remaining issues were addressed:</p> <ol style="list-style-type: none"> <u>Patent Indemnification:</u> The key issue is: What happens if a consultant's design violates a patent? The County does not want to be held liable if a

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			<p>consultant infringes on any patent rights. The proposed compromise is that the County will insert language indicating the consultant will not be liable if it incorporates third party commercially available standard products into its design and someone alleges that the third party violated a patent. The consultant will be held responsible for researching patent rights on all other custom products or designs. Although the ACEC did not believe this clause was needed in the contract, it was considered acceptable as long as the County understood that patent research could be a reimbursable cost in the project budget. The County will conduct further legal review and decide whether to leave this clause in the contract. If the clause remains, the County acknowledges their could be added costs for patent research.</p> <p>2. <u>Monetary Claims and Consequential Damages:</u> The County is interested in adding language that limits any monetary claim filed by the consultant against the County (similar to language in construction contracts). The ACEC prefers reciprocal language. The agreed upon compromise is to create a short list of two items that the consultant could not include as part of a monetary claim, i.e., lost profits and lost business.</p>
Standard of Care & Absence of Warranties	ACEC expressed concerns with warranties and standard of care clause indicating they believed the County was seeking perfection.	The County does not believe we are asking for perfect document; however, County wants to maintain the standards and remedies available in Washington and needs an adequate avenue for recovery.	<u>Consensus achieved.</u> County has proposed revisions that are consistent with past discussions. Risk Management reviewed and approved draft.
Copyright, patent, & Ownership of Documents	ACEC indicated that they believe Consultants perform a service, much like a doctor or lawyer, and that the County is paying for their intellect, thought process, education and experience which enables the consultant to produce a design which meets the County's scope. ACEC explained that consultants produce recommendations, plans and specifications, but not a product.	The County maintains that the consultant is being paid by the taxpayers of King County to produce a specific design and thus the County owns the copyright and patent rights that are developed as a result of the work. The County believes that a consultant is responsible to produce a specific deliverable, in many cases a constructible building or process facility.	<u>Reached acceptable compromise.</u> County has proposed revisions that provide the Consultants with an opportunity to obtain a revocable nonexclusive license to use the design/data/documents ("design") with written approval from the County. This only

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	ACEC would like the County to have a reusable, royalty free license to utilize the design developed by the consultant, but believe the consultant retains the copyright and patent rights to the work produced.	The County is not interested in copyrighting the means and methods (for example: the source code) the A&E firms utilize to produce the final product, just the final product.	deals with design that was created while under contract. It does not include design known prior to the contract. This is not ideal from the ACEC's point of view but is acceptable as a compromise.
Transfer of knowledge & Liquidated Damages	<p>ACEC recognized that the Transfer of Knowledge provision has appropriate exceptions in the contract and that this hasn't necessarily been an issue in the past. The bigger problem is the liquidated damage portion and that it makes the A&E firms uneasy to have that written into the contract.</p> <p>ACEC also expressed some confusion over key personnel and essential personnel.</p>	<p>The County recognized that it is responsible for the transfer of knowledge when the County switch out its Project Representatives and if the Consultant must spend time getting the new County personnel up to speed, the Consultant charges the County for the time. County indicated that that is an appropriate charge.</p> <p>Liquidated damages provide a remedy and place more emphasis ensuring that they people offered during the proposal stage are committed to the project and that we maintain continuity of service. The County recognized normal turnover of staff and the clause provides numerous reasons liquidated damages will not be assessed and requires the County to act reasonably in approving replacement personnel. Liquidated damages are triggered when the Consultant acts in a harmful way and/or there is a suspect business motive.</p>	<u>Consensus achieved.</u> County will maintain current practice but will consolidate and reorganize provisions.
Timely payment of invoices	ACEC is concerned about timeliness of paying invoices and expressed concern over the amount of detail the County requests in the invoices.	<p>County acknowledges that we request backup documents to support costs in the invoices, in part because it is a CPFF type contract.</p> <p>County expressed concern over the Consultant submitting timely and well documented invoices. County is willing to shorten pay time from 45 days to 30 days provided the County receives timely and well documented invoices.</p>	<u>Consensus achieved.</u> County and ACEC expressed a mutual interest in the receipt of timely accurate invoices and timely payment. ACEC and County agreed to implement a two part invoice process: (1) County will review invoice and let Consultant know within a certain time frame if the invoice is accurate and properly documented; and (2) after determining the invoice is accurate and properly documented the County will pay within a date certain. Consultant will resubmit invoice if original invoice was not accurate and properly documented. County and ACEC need to finalize time frames.
Level of Effort (LOE)	ACEC remains opposed to providing information during the selection process that is inconsistent with qualification-based selections as defined in RCW. ACEC supports LOE after the selection process when the scope of work is clearly understood by both parties. Using the LOE during selection is time consuming and inefficient for those firms not selected and is a disincentive to submit a proposal on County projects.	King County is interested in an easy-to-use tool that depicts: (1) how the consultant plans to allocate key personnel and subconsultants to the project; and (2) an allocation of work among firms to complete major tasks. King County provided a handout identifying the interests we need to obtain via LOE or alternative evaluation criteria	<u>Consensus achieved.</u> The ACEC and County have agreed to use the new Project Approach Chart (PAC) on design procurements. The new PAC will make it easier and less time consuming for consultants to respond to RFP's. The County will reevaluate the effectiveness of this new tool in 1 to 2 years.

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