

**Sound Transit/WSDOT Re-Alignment
Issue Paper No. 45**

TOPIC:	Common Rule - Adhering to Conflict of Interest Requirements in Contracts Involving Environmental and Engineering Services
ACTION SPONSOR TEAM:	Program Action Team
PRIMARY AUTHOR(S):	Perry Weinberg, Sound Transit
APPLICABLE PROJECTS:	All Regional Express projects
DATE OF FIRST DRAFT: DATE OF SECOND DRAFT	March 6, 2001 April 24, 2001
ISSUE:	How to assure that contracts with environmental/engineering consultants are consistent with “conflict of interest” requirements
CURRENT STATUS:	Final
DATE APPROVED:	June 5, 2001

BACKGROUND:

The contracts for a number of Regional Express projects include a variety of tasks, including systems-level alternatives analysis, environmental documentation (ED), community and agency involvement, preliminary engineering studies (PE), and permit support. These tasks are all contracted by one consulting firm. These projects involve project components that are located on WSDOT right-of-way, such as an HOV direct access ramp. For some projects, ST and WSDOT have agreed that WSDOT will do the final design work (which WSDOT refers to as PS&E—plans, specifications, and estimates). To do this work, WSDOT intends to utilize consultants from their existing roster, which is current through June 2001. At that time WSDOT intends to prepare separate advertisements when consultants are needed to prepare PS&E. In some cases, WSDOT may select the same firm to do PS&E that had done the previous PE/ED work.

The question arose in one of the PAT meetings about whether this way of using consultants is consistent with conflict-of-interest requirements. These requirements come from USDOT federal regulations referred to as the “common rule” and from federal NEPA regulations. The common rule regulations state, “In order to ensure objective contractor performance and eliminate unfair competitive advantage,

contractors that develop or draft specifications, requirements, statements of work, invitations for bids and/or requests for proposals shall be excluded from competing for such procurements.” 49 CFR 19.43.

The NEPA regulations provide: “It is the intent of these regulations that the contractor be chosen . . . to avoid any conflict of interest. Contractors shall execute a disclosure statement prepared by the lead agency, or where appropriate the cooperating agency, specifying that they have no financial or other interest in the outcome of the project.” 40 CFR 1506.5. According to NEPA guidance on this issue, the regulation is intended to cover any known benefits other than general enhancement of professional reputation. This includes any financial benefit such as a promise of future construction or design work on the project, as well as indirect benefits the consultant is aware of (e.g., if the project would aid proposals sponsored by the firm’s other clients). The guidance allows a consultant who was involved in developing initial data and plans for the project to prepare the EIS so long as the firm does not have a financial or other interest in the outcome of the proposal. In addition, a consultant may later bid in competition with others for future work on the project so long as there was no promise of future work or other interest in the outcome of the proposal. See NEPA 40 Questions Guidance Memorandum, question 17.

Specifically, project teams need guidance on the following questions:

1. Is it permissible to structure a single consulting services contract that includes tasks for both preliminary engineering (PE) and environmental documentation (ED)?
2. Is it permissible for WSDOT to utilize the same consultant to do PS&E, where that firm previously had done the PE/ED work under a single contract with ST for the same project?

Decisions

For both questions, the answer is a qualified “Yes.” Including PE and ED in a single contract does not necessarily violate conflict of interest requirements. PE work is necessary for ED and the two tasks often are intertwined. WSDOT and FHWA often include both tasks in a single contract. FTA prefers that the tasks be separated in order to avoid even the appearance of potential conflict of interest (e.g., Central Link project), but is willing to accept them being combined in a single contract if certain protections are in place. First, initial design work should be limited to that which is necessary to support the ED and in no case should exceed PE level of work (i.e., no final design or PS&E work), unless specifically authorized. Second, the consultant must provide a disclosure statement assuring that it does not have a financial or other interest in the outcome of the engineering or environmental work and that it can and will perform an objective environmental analysis of alternatives (including the “no-build” alternative), even though it is also doing design work. A copy of the executed disclosure statement should be kept in the agency’s official procurement file.

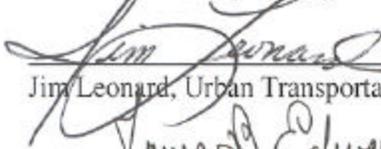
It is also permissible to utilize the same consultant to do the PS&E work provided that the consultant is selected through a competitive process; that the consultant was not involved in drafting the specifications, invitations for bids, etc., and that ST or WSDOT independently evaluates the environmental documentation and assures it is objective.

PROGRAM ACTION TEAM DECISION ON ISSUE PAPER NO. 45:
Common Rule - Adhering to Conflict of Interest Requirements in Contracts with Environmental Consultants

AGREED TO ON JUNE 5, 2001 BY:



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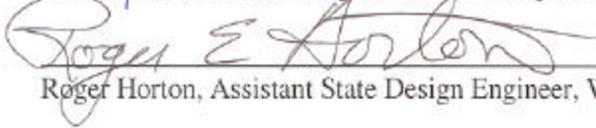
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