



AMERICAN COUNCIL OF ENGINEERING COMPANIES
of Washington

Testimony of Van Collins to Port of Seattle Commission, February 9, 2016

Good Morning Mister President, Members of the Commission.

My name is Van Collins and I am the President and CEO of the American Council of Engineering Companies of Washington and I am here today in support of item number 6a on your agenda related to Procurement Excellence, at least as this proposal addresses and relates to the procurement of engineering and related professional services.

ACEC represents over 150 engineering firms in Washington State covering all engineering disciplines. Collectively, they employ over 5,000 Washington residents in highly technical and desirable family wage jobs. In short, ACEC members impact the quality and nature of life of every citizen in this state.

Specific to the Port of Seattle, these firms comprise the vast majority of the engineering firms with which the Port currently does business. ACEC members view the Port of Seattle as a very, very important client and believe that ACEC members, in turn, represent a valuable and important resource to the Port. In a nutshell, the Port/ACEC relationship is a vital one and symbiotic in nature. To function at the highest level, it demands a cooperative and collaborative interaction that seeks to maximize quality, innovation and value to the taxpayers. It also requires give and take and a basic equitable appreciation from each side as to what the other needs to be successful - cooperation and understanding rather than adversity and divergence.

Turning to the proposal at hand, ACEC supports the Port staff's recommendation regarding the need to investigate, analyze and overhaul the Port's procurement processes as it relates to engineering and professional services. In fact, ACEC has been attempting to more fully engage the Port on this topic for several years and, when Mr. Caplan was hired last year, we directly approached him with our concerns in an effort to open a more meaningful dialog regarding issues which often negatively affect both the Port and the engineering community alike. One example of this is the amount of time it takes to reach contractual agreement.

As you can see, I have provided you with a copy of a letter. This letter was drafted at Mr. Caplan's request and sets forth ACEC's top three concerns with the Port's procurement and contracting processes. I provide this as background and evidence of ACEC's concern and commitment to the Port. However, it is important to note that we do not make specific demands in the letter. Instead, we ask the Port to commit to a collaborative, ongoing, and highly functioning process by which to reach agreement on issues of concern to both ACEC and the Port.

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In closing, we view the Procurement Excellence proposal as another way to address these issues of concern – through outside expertise and independent analysis. To that end, we support the proposal and once again offer the experience and expertise of the ACEC membership to come alongside the Port in a collaborative effort to make the procurement and contracting processes at the Port work for both sides. As a directly affected industry, who helps the Port deliver its daily operations and capital development projects, we do ask, however, to be directly involved in this critical undertaking – from the beginning to end – and a commensurate commitment from the Port to meaningfully engage on our issues throughout. We hope for an environment where both sides can move forward with a pledge of creating win-win outcomes.

Thank you and I will be happy to answer any questions.



AMERICAN COUNCIL OF ENGINEERING COMPANIES
of Washington

November 17, 2015

Mr. David Caplan
Senior Director of Strategic Initiatives
Port of Seattle
P.O. Box 1209
Seattle, WA 98111

Re: Identification of Issues of Concern to ACEC of Washington Members

Dear Mr. Caplan:

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Thank you again for taking the opportunity to meet with me and our Chairman of the Board, Scott Woerman, on October 7, 2015 to discuss the status of the Port of Seattle/ACEC liaison committee and our issues of concern. We appreciated your candor and willingness to openly discuss these matters.

Many of the consultants represented by ACEC have worked repeatedly with the Port over a period of many years (often 15 to 20 years or more). They feel a sense of partnership with the Port in providing, upgrading and maintaining high quality facilities that are recognized throughout the transportation industry as state of the art. The Port benefits from these consultant's sense of partnership in receiving high quality work from experienced and qualified A/E firms who are familiar with the Port's facilities and the Port's typical requirements and procedures. Consultants represented by ACEC would like to perceive that their sense of partnership is being recognized and reciprocated by the Port through a genuine willingness to discuss and negotiate terms of engagement that are fair and reasonable to both parties.

As you requested, we are now following up with a list of our top three (3) ACEC issues regarding the Port's procurement and contracting processes. These three issues are (1) application of qualifications based selection (QBS) requirements, (2) the Port's position of non-negotiability of standard terms and conditions and (3) an institutional approach of "shifting any and all risk to the consultant".

In addressing these issues, we want to reiterate that it is not our intent to have the Port merely accede on any of these issues. To the contrary, we want the Port to be a strong owner and are certain there are countervailing concerns that will need to be addressed and balanced. Similarly, we also believe that ACEC may be able to assist the Port on issues that are important to the Port such as small and disadvantaged business development. We want to once again state our desire for this exchange to lead towards both sides committing to a collaborative process that can fully address all such issues. We believe that this is best accomplished through a highly functioning liaison committee structure.

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Based upon our experience with other public owners and with other highly functioning workgroups, we believe beyond any doubt that it is entirely possible to address issues of concern and importance to both sides and to effectively negotiate many solutions that are mutually acceptable. In fact, we believe that many issues often have common solutions once investigated fully. This type of effort takes dedication, trust, transparency, and perseverance. ACEC is strongly committed to this effort and hopes the Port sees the wisdom and value in partnering with ACEC.

1. Application of Qualifications Based Selection Requirements

At a very basic level, proper application and use of Qualifications Based Selection (QBS) for Architectural and Engineering (A/E) Services requires an understanding and appreciation of the policies underlying QBS laws. The rationale is based in quality, safety, and ultimately long-term cost savings to the public owner. We believe that an understanding and appreciation of these policies are critical to the successful implementation of the public procurement of A/E services. Accordingly, you will find attached hereto an addendum that provides both a general explanation of these laws and policies and a more specific look at how they relate to and are incorporated into Washington law.

In providing this background, ACEC believes it to be axiomatic that public owners must follow both the spirit and letter of the law to fully meet the Legislature's directives and to receive the full intended benefits – i.e. quality, innovation, and cost savings. Again, it is ACEC's desire to collaborate with the Port to help ensure that both the policies and letter of Washington's QBS law are addressed, understood, and appreciated. We further believe that to do otherwise could, in fact, have negative effects on the Port, the public interest, and the A/E community.

A. Fair and Reasonable Compensation

ACEC would like to engage with the Port regarding fair and reasonable compensation. As we indicated in our face to face meeting, the A/E community believes that the Port's allowable rates are neither fair nor reasonable. Two examples are the process used to establish rates at the outset of a project and then any subsequent changes to those rates.

The Port requires a long and laborious process to negotiate and approve the rates for each and every one of a consultant's employees and the employees of every sub-consultant that will be utilized on a project. This negotiation process is performed by Port employees that have no direct project involvement. If a consultant's employee receives a pay raise or is otherwise promoted, then the consultant often

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finds itself in another lengthy process to re-negotiate that employee's rate with the Port. The other alternative for the consultant is to bring a less experienced (and lower cost employee) onto the project, which could affect the quality of the work conducted.

At its best, the Port's procedure is highly time consuming and administratively costly to both the Port and the A/E community. At its worst, this procedure creates conditions that disfavor project success and economic survivability of the consultant.

This is especially important in relation to the Port's focus and emphasis on small and disadvantaged businesses. The Port's initiative in this area is clearly negatively impacted by its own contracting processes and procedures. It is, however, notable that the Port's process is very unusual and unique.

The effects of this process are dramatic, though. It tends to create an adversarial relationship when a collaborative relationship is necessary to foster innovation, creativity, and great solutions to difficult problems.

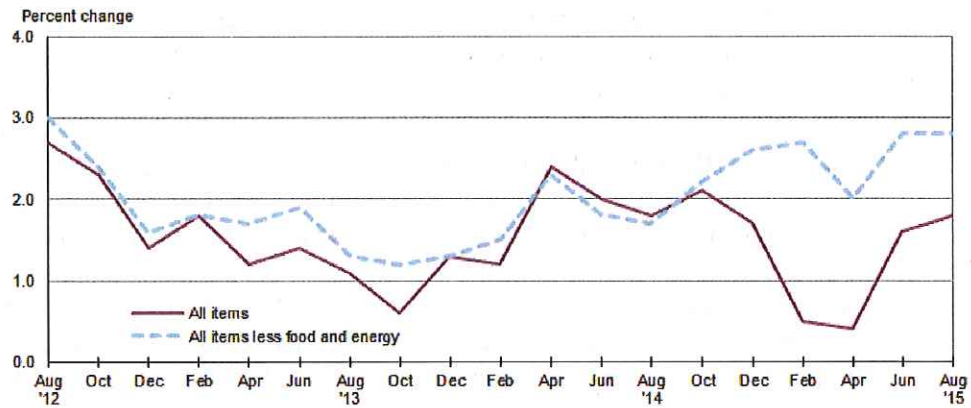
It is generally accepted that total design costs are approximately 1% to 2% of a project's life-cycle costs, where the life-cycle costs include the costs to design, construct, operate and maintain a project. Accordingly, the design is a small fraction of a project's overall cost. More importantly, a project's design is the single largest factor that impacts its life-cycle cost. Of course, this fact merely serves to reiterate and support QBS's underlying policies - innovation, quality, creativity and the recognition of cost savings. This also means that public owners should create systems and processes that promote this policy.

Another area that causes rates to become neither fair nor reasonable is in relation to periodic escalation for multiyear contracts. The Port's contract makes escalation optional and fully within the Port's discretion regardless of market conditions. Moreover, any approval is often tied to the consumer price index which clearly underestimates escalating costs to the A/E community. The first chart below was taken from the Bureau of Labor Statistics for the consumer price index (CPI) in Seattle. As can be seen, the CPI has generally been between 1% and 2% over the last year. Of course, CPI is the cost seen by consumers, not the A/E community. Contrastingly as shown by the second chart, annual wage adjustment alone (and largest cost factor for firms) in the A/E community is well over 3%. This data is the result of a scientifically based, double-blind, annual survey just released by ACEC.

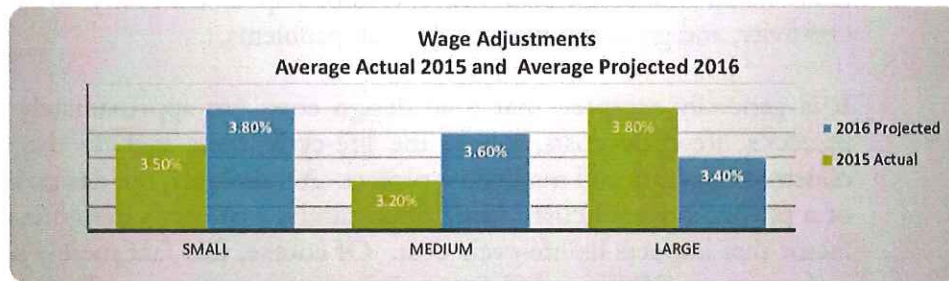
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Chart 1. Over-the-year percent change in CPI-U, Seattle, August 2012–August 2015



Source: U.S. Bureau of Labor Statistics.



Source: ACEC Salary Survey, 2015

Collectively, these pricing pressures negatively affect the overall project quality, that were discussed above in relation to low cost bidding versus QBS selection.

As is discussed in the addendum, RCW Chapter 39.80 clearly provides that fair and reasonable compensation must be paid on A/E contracts. However, it is also not lost on ACEC that the Port actually purports to support a similar position as part of its foundational documents. The Port's Mission Statement reads:

The Port of Seattle is a public agency that creates jobs by advancing trade and commerce, promoting industrial growth, and stimulating economic development.

ACEC believes that the A/E community is demonstrably part of that economic development mission and that this can be accomplished within the A/E community only if fair and reasonable compensation is paid.

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2. Non-negotiable Contract Language

As was previously described, all public owners in Washington State have the obligation to negotiate A/E contracts pursuant to RCW Chapter 39.80. Unfortunately, this is not the Port's standard position. The following was taken from a recent Port Request for Qualifications:

6. Contract Terms & Insurance. A copy of the Port's standard terms and conditions is contained in Attachment C. By offering a submittal, the firm represents that it has carefully read the terms and conditions and agrees to be bound by them. The Port will not negotiate changes to the standard contract terms and conditions. Specific insurance requirements for this contract are contained in Attachment C.

Strangely, the Port's standard terms and conditions also contains a provision in the indemnification clause that acknowledges, to be effective under state law, that it must be specifically negotiated between the parties. Clearly, this is not done by the Port and would accordingly negate the clause's otherwise purported indemnification requirement.

ACEC believes that the better answer is for the Port to actively engage with ACEC to collectively reach acceptable terms and conditions. In doing so, it should be possible to reach terms that comply with state law, clear up ambiguity, increase enforceability, minimize disagreement, and decrease negotiation time. The Agreement should also be consistent with insurance policies issued by both US and London Professional liability underwriters.

The Washington State Department of Transportation (WSDOT) is a prime example of a state agency that uses this process effectively. WSDOT actively engages its consultants and contractors to work out problems and ambiguities in its standard terms and conditions. Both sides find it effective and worthwhile.

3. Allocation of Risk to the Consultant

The Port's standard terms and conditions while being non-negotiable currently are also pervasive with examples of terms and conditions that shift risk to a consultant regardless of the ability of that consultant to control the risk. ACEC, again, would like the opportunity to articulate why this is not beneficial to either the consultant or the Port and to negotiate more acceptable terms.

The Port's standard terms and conditions contain a number of provisions that might well create concern with a consultant's professional liability insurance. First and

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foremost, these provisions, again, tend to create an adversarial atmosphere that will affect the manner in which the A/E community approaches contracts with the Port. Unlike contractors, A/E firms cannot directly price risk into their contracts. However, they will still respond to reduce that risk. In short, risk suppresses innovation and creativity because uninsurable risk can literally destroy a firm financially (and leave the Port without an adequate remedy).

One of the results of this risk is that it can negatively affect construction costs. The reason for this is that a firm in this environment will have to evaluate the project's demonstrated areas of risk. For example, given a choice between option A which is "safe" or "tried and true" but results in higher construction costs (which the A/E firm does not incur) versus option B which is more creative and saves construction costs, but may be less conventional, it is clear which one a prudent designer would choose. This is very akin to practicing "defensive" medicine by physicians and leads to a clear proposition that processes, procedures, contract terms, or other items that foster an adversarial atmosphere do in fact tend to inhibit creativity and innovation and to increase project costs.

This concept was vocalized by President Ronald Reagan a number of years ago during a ceremony recognizing design excellence in federal buildings when he said, "[g]ood design doesn't cost money. Good design saves money, and you know how that warms my heart."

At a recent conference sponsored by the American Public Works Association, Ms. Karen Erger, Vice President and Director of Practice Risk Management for the Lockton Companies gave a PowerPoint presentation that stressed it is actually in a public owner's best interest for its contracts to generally consider the areas and likelihood that a consultant's insurance coverage could become problematic. The slides that Ms. Erger used included the following:

But Our Lawyer Wrote this Contract!

- Transactional lawyers draft contracts
 - Want to get "best" terms and shift most risk
- But litigators settle (and sometimes try) cases
 - Know it's hard to settle when defendant's uninsured
- Skilled lawyer ≠ insurance expert
 - Especially about A/E professional liability

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Insurance Helps Resolve and Fund Claims

- Most civil cases do not go to trial (only 5% do)
- Lack of coverage creates settlement problems
 - Coverage issues delay and complicate settlement
 - Collecting from an insurance company is simple
 - Collecting from an A/E defendant will be hard
- Uninsurable contract provisions must be deployed – if at all – with this in mind

As can be seen, Ms. Erger advises that public owners will find it more difficult to be paid and to resolve claims if public owners maintain overly narrow contract terms. In addition, Ms. Erger suggests that public owners will find it difficult to ever collect beyond a consultant's insurance coverage because of the type of assets (mainly accounts receivable) consultants have within their firms. Lastly, Ms. Erger suggests a list of common contract liability issues that public owners should be willing to address with consultants in relation to professional liability coverage.

Common Contract Insurability Issues

1. Elevated Standard of Care
2. Indemnity with Duty to Defend
3. Indemnity for Damages Caused by Others
4. Owner as Additional Insured
5. Guarantees and Warranties
6. Prevailing Party Fee Clauses
7. Guaranteeing Contractor's Work
8. Responsibility for Site Safety
9. Everything Else

ACEC would like the opportunity to examine the Port's standard terms and conditions and to work with it and representatives from the insurance industry to eliminate ambiguities and to maximize the insurability of the contract to the benefit of both parties.

4. Conclusion

In closing, it has been ACEC's intent to demonstrate why it would be beneficial to both the Port and to the A/E community to agree to engage in an active and highly functioning process to address issues of mutual concern. We strongly hope that the

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Port agrees with our position and moves to create a collaborative and high functioning work group to work through issues of mutual concern.

Thank you and we look forward to your response,

Van A. Collins
President/CEO

**ADDENDUM
POLICIES AND LAWS RELATED TO
WASHINGTON QBS**

A. Policies Underlying QBS

QBS was developed to procure services for which price competition made no sense. For example, innovation and creativity cannot be fairly and accurately priced until both the owner and A/E have engaged in a collaborative process and the full scope of work is mutually understood and agreed upon. An engineer can hardly "hard bid" (submit a firm price) for a project when part of the cost to the engineering firm (and therefore its needs for compensation) will be determined only after discovery of the owner's needs and intentions.

A common question regarding the use of QBS is simply: "Why not select a consultant based on lowest bid?" The answer is that design services are different in nature than construction services because project design informs construction tasks and subsequently overall project cost. For example, design can take into consideration life-cycle and maintenance costs. Design based on low bid could mean that lower costing (and likely less experienced) personnel are doing the work, or that innovative or creative alternatives are not considered. In the long-run, a cheaper design could mean the overall project costs more (including life-cycle and maintenance costs) or will not last as long as a project carefully designed. To put this in perspective, according to guidance published from the Washington State Office of Financial Management, approximately one-third of public works project costs should be for design. If project design costs less, for instance, because particular products or methods were not utilized, the constructed project could have higher maintenance costs attributed to the use of inferior products or methods, thus increasing the overall cost over time.

All consulting firms, regardless of the type of services offered, earn their money by billing out "hours." Because professional consulting firms are not selling an actual commodity, the only way to lower the cost charged to complete a project is to either cut the number of hours spent on the project, use less experienced personnel that cost less per hour, or implement some combination of both methods. For design firms to win project work via a low bid, they would have to use less experienced personnel, evaluate fewer alternatives, develop plans and specifications that include less detail (which in turn can add to construction costs through additional Requests for Information [RFIs] or submittals) and provide minimal review of final drawings, plans, and specifications. All of those tactics add up to less attention to detail and perhaps lower quality of the final product.

An Analysis of Qualifications-Based Selection in Washington State - Procurement of Design Services by Public Agencies, Cynthia Jean Reese, June 1, 2013 (emphasis added).

This does not mean that QBS leads to escalated project costs. To the contrary, QBS often saves money.

Among the studies which have concluded that QBS in fact has saved tax dollars include *An Analysis of Issues Pertaining to Qualifications Based Selection* by Paul S. Chinowsky, PhD (University of Colorado) and Gordon A. Kinsley, PhD (Georgia Tech). It found that government agencies that use qualifications-based selection are better able to control construction costs and achieve a consistently high degree of project satisfaction than those using price based procurement methods.

The study drew from a database of approximately 200 public and private construction projects in 23 US states, included transportation, water, commercial, and industrial projects, ranging in size from relatively small projects to those costing hundreds of millions dollars. Its authors compared various procurement methods, including QBS, Best Value, and Low-Bid, with such factors as total project cost, projected life-cycle cost, construction schedule, and project quality outcome. Results showed that using QBS to procure the design component of a construction project “consistently meant lower overall construction costs, reduced change orders, better project results and more highly satisfied owners than in other procurement methods.”

The authors, both experts and noted researchers in the engineering and construction field, concluded that QBS should continue to be the procurement method of choice for public contracting officers seeking to acquire A/E services to meet increasingly challenging infrastructure needs.

A specific study comparing costs between agencies that use QBS and those that select on price also found that the QBS process saves money. *Selecting Architects and Engineers for Public Building Projects: An Analysis and Comparison of the Maryland and Florida Systems* compared projects in Florida, which used QBS, with those in Maryland, which for a period of time employed price competition. The comparative study found Maryland’s A/E selection process was significantly more time consuming and expensive than Florida’s. In Maryland, the necessity of preparing detailed programs on which A/Es can base price proposals results in added expense to the state in the form of administrative staff, time delays and consultant costs, and overall budget. The increased administrative costs in Maryland resulted from the necessity of preparing detailed programs on which A/Es can submit price proposals. These additional system costs were not evident in Florida. While A/E fees were lower in Maryland than in Florida, the added costs of the Maryland process far outweighed the savings in A/E fees that resulted from a process in which the state developed detailed programs and A/E selections were made with price as an initial factor.

Since Maryland’s law requiring selection based on price went into effect, there was an 11.6 percent increase in personnel and a 17.9 percent increase in the budget (in constant dollars) for construction projects.

Maryland's A/E selection process took considerably longer to complete than Florida's. The total delay relating to the A/E portion of the capital construction process in Maryland was almost 10 months. The delays occurred while detailed program descriptions were being prepared, during the actual selection process and during the design and approval phase. The Maryland Department of General Services completed the A/E portion of the capital construction process, from the point that funds are approved to the beginning of the actual construction cycle, in 31 months. The same steps are completed, on average, in 21 months in Florida agencies.

The study concluded that Maryland's A/E selection process was significantly more time consuming and expensive than Florida's. In Maryland, the necessity of preparing detailed programs on which A/Es can base price proposals results in added expense to the state in the form of administrative staff, time delays and consultant costs. As a result, the Maryland legislature repealed its bidding law and enacted a state "mini-Brooks Act" or QBS statute.

John M. Palatiello, The Council on Federal Procurement of Architectural and Engineering Services (Emphasis added).

In short, QBS recognizes that when lowest design cost becomes a paramount and overriding consideration to a public owner, then quality, innovation, project outcome, and long-term project life-cycle cost can and often are all negatively impacted. This should not be surprising and it should also not be acceptable.

B. Washington State QBS Law

So how does Washington law address these policies in statute? The answer is that Washington law absolutely and fully embraces these policies.

RCW 39.80.010 clearly establishes the policy intent and directive that all levels of Washington government must implement and follow.

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.

Breaking this policy into its component parts leads one to several clear observations:

1. Selection of A/E services must be accomplished through evaluation of competence and qualifications.
2. The public owner must negotiate a contract,
3. The public owner is obligated to pay a fair and reasonable prices.

