



*American Council of Engineering Companies of New York*

**Recommendations of the  
American Council of Engineering Companies of New York/Metropolitan Region  
Regarding NYC Procurement and Coordination-Related Issues**

**Background**

The American Council of Engineering Companies of New York (ACEC New York) is the voice of the professional engineering community, representing 270 member firms throughout New York State that collectively employ close to 25,000 people statewide, with a concentrated presence of firms located within the five boroughs of New York City.

Our members are involved in all aspects of engineering for the public sector. We plan and design the structural, mechanical, electrical, civil, environmental, plumbing, fire protection and technology systems for the city's infrastructure, including transportation, energy, and wastewater treatment facilities, as well as public buildings, schools, residential buildings, museums and libraries. Our members are also involved in a host of planning, resiliency and environmental issues.

ACEC New York advocates on behalf of its members for public safety, design excellence, robust capital budgets and development policies, sustainability, efficiency in government and the full level of participation by all underrepresented minority groups. We continue to advocate for increased efficiency, reduced costs and increased transparency for engineering entities conducting business with the City of New York (City). We have prepared a summary of issues that we strongly recommend be addressed by the City administration, as well as a list of specific suggestions to improve the procurement and contracting environment.

**Procurement and Contracting Issues for Design Professionals**

Agency delay in processing change orders, processing payments and closing out projects creates potential cash flow, schedule and manpower issues, particularly for small- to-medium sized firms doing business with the City, and this adversely impacts the City, its Consultant/Engineers and their sub-consultants. For firms to operate efficiently and effectively, they must receive payments in a timely manner (i.e., within 30 days of invoicing); currently, some City agencies take more than one year to authorize payments, often because of excessive periods for negotiating scope of work and salary rates. This timeframe is often not achieved by the agencies because the clock is stopped and reset throughout the payment process. However, prime consultants must comply with subcontractor payment statutes in New York that may require payment to sub-consultants before payment is received from the agency. Even the best managed firms may be forced to price anticipated payment delays into the project cost, similar to accounting for risk, to the detriment of the agency and a higher cost to the City taxpayers.

There are many reasons for delays in the processing of change orders, payments and close outs, not least of which is the plethora of personnel that must review them before they can

be approved, with no clearly established timeline for each step in the approval process or incentive to complete the process in a timely fashion. For example, a discrepancy between the title or hourly rate listed for an employee on the invoice and the title or hourly rate listed for that same employee on the agency's approved salary roster often results in a payment delay or rejection of the invoice. Such discrepancies may occur due to errors in an agency's system or simply because an employee has received a promotion or raise; sometimes this occurs even if the new salary reported on the invoice comports with the percentage increase in salary provided for in the contract with the agency. Invoices may also be rejected because the agency has modified or added criteria for reviewing and clearing invoices for approval that have not been communicated to the Consultant/Engineer.

## **Recommendations**

Measures the City could take to streamline the procurement and contracting processes include:

### **Payment**

1. Adopt a new process that will expedite registration of projects, task orders and payments for on-call contracts. Many agencies now do a significant portion of their work through on-call contracts. Task orders are negotiated, and design Consultant/Engineers are often asked to proceed "at risk" (prior to formal registration by the Mayor's Office of Contract Services), during which time they cannot bill for the work. This creates a financial and administrative burden on firms, particularly on smaller firms. Additionally, the process of submitting proposals for task orders needs to be simplified. Consultant/Engineers incur large costs proposing on a task order contract. In some cases, they can incur more expense than the cost of the original proposal for the on-call or Requirements contracts, submitting multiple task order proposals, before getting any billable task order assignment.
2. Adopt the New York State Department of Transportation (NYSDOT) Consultant Out-of-Scope Work Request (COWR) methodology for change orders (see Appendix 1). NYSDOT uses COWR to expedite authorization of extra work on ongoing projects. This process allows the Consultant/Engineer and NYSDOT management to agree upon the scope of extra work and the hours to be allocated for that work in advance of putting funding in place. This process allows consultants and NYSDOT to reach agreement in principle on the effort involved in the extra work and helps clearly define the scope and expectations of both parties. Once signed, the Consultant/Engineer can continue to advance the project, including extra work tasks, while a Supplemental Agreement is being processed to cover the budget for the extra work, similar to the way private clients process additional services.

This process is particularly useful for ongoing projects with available funding allocated to other future tasks. The Consultant/Engineer can continue to bill contemporaneously, and work can proceed uninterrupted while utilizing available funding from other tasks. The borrowed funds are then replenished

once the Supplemental Agreement is processed. Another advantage to this process is the simplification of paperwork. COWR's may be processed for smaller individual extra work tasks and then later multiple smaller COWR's may be combined into a single Supplemental Agreement.

- 2a. It should also be recognized that some ongoing projects may not have available funding to cover out-of-scope work. The Consultant/Engineer may be obligated by the contract or by the agency to continue to work during fee negotiations. This process should therefore be streamlined and accelerated to minimize the duration during which the project cannot be invoiced. A timeline should be mandated, starting with notification by the Engineer of out-of-scope work, For example:
  - Day 0: Notification, including as much general description as possible
  - Day 7: Agency acknowledgement
  - Day 27: Submit scope and proposed fee
  - Day 40: Complete review by Agency
  - Day 47: Complete negotiations
  - Day 60: Register change order
3. Eliminate salary caps on all personnel, including principals, and limit total personnel costs by an inflation factor. For contracts based on labor with a "not-to-exceed" provision or a specified inflation factor, remove any limitation on salary increases while holding to the "not-to-exceed" cost and inflation factor. It is a needless complication for the City and the Engineer to monitor and obtain individual salary increase approvals. It hurts the City in the long run when a consultant is forced to reassign an engineer from a City project to a different client solely in order to cover a salary increase. City agencies expect the "best and brightest" to be assigned to their projects, particularly for key positions. The best staff may earn promotions and above-average raises over the life of a multi-year project. If such individuals stay assigned to the project, the City benefits from the best while paying for the average.
- 3a. Additionally, certain agencies have a particularly time-consuming process for approval of proposed staff and their proposed billing rates. For example, NYCDOT requires approval of an SI 2000 form for each employee who begins works on a project or task order assignment and for annual increases thereafter. Simply adding one new employee to a project (for example, where an employee is assigned to help out on a large project for a few hours), can hold up processing of an invoice by several months. The subsequent invoice will be held pending approval of this employee's rate, a process which can take months.
4. Extended contracts for design projects can adversely impact the Consultant/Engineer's bottom line. Consultant/Engineers are paid based on the rates and construction cost estimates approved by the agency, with annual increases to base hourly rates made in accordance with the contract terms

(e.g., using the Employment Cost Index [ECI]). However, with prolonged schedules over time, the annual increase approved by the agency may not keep pace with cost of living increases and raises that consulting firms provide to their employees needed to maintain the quality of staff required for the project. Consulting firms must absorb the difference and bear the cost of these salary caps, which becomes even more burdensome with repeated contract extensions. The more instances that a contract is extended beyond its original contract term, the more opportunity there is for employee turnover at the firm. Here, too, an agency's policy could be problematic for the Consultant/Engineer. When a Consultant/Engineer hires a new employee, an agency typically permits a salary increase of up to a certain percentage over the previous employee's contract rate. This may not be sufficient to cover the new employee's salary. Consultant/Engineers should be allowed to renegotiate new multipliers *and* rates before each new contract extension or every 24 months.

Design projects for some agencies can extend far beyond the original contract period because a project has been put on hold for various reasons, such as delays in funding, approvals or construction. For example, Project A is put on hold because it would impact Project B technically, geometrically, and/or environmentally. By the time work on Project A resumes, standards and building codes used for the original design may have changed or become obsolete, so the Consultant/Engineer must revise and update the design to reflect current standards and code requirements. In addition, because certain approvals may have expired during the period that Project A was on hold, those approvals would have to be obtained once again. The City should review its methodologies for understanding the impact of one project on another and establish a timeline for larger projects that require approvals from multiple agencies.

5. Establish a better process for submitting salary roster updates to the agency on a regular basis or at the time of invoicing, and give agency staff responsible for processing the invoices the authority to clear salary roster updates that are consistent with the contract and contract documents.
6. Instead of rejecting an invoice in its entirety, agencies should make payments on agreed amounts and then work with the Consultant/Engineer to resolve issues on any remaining/disputed amounts.
7. Increase lump sum projects in order to save paperwork and expedite processing invoices. Invoice preparation is a laborious effort and should be performed on an Earned Value basis. It is important to note that the designation of a lump sum project requires a well developed scope of work. Hourly rates should be included in the Agreement to address any change in work that may come later.

8. All agencies should adopt electronic invoicing as soon as possible and be provided with the budget and technical resources necessary to do so, in accordance with the policy set forth in Local Law 192, signed by Mayor de Blasio on October 16, 2017 requiring all agencies, whenever practical, to develop and implement programs to accept electronic invoices. By adopting electronic invoicing, agencies can modernize, streamline and make more-efficient their interaction with Consultant/Engineers. The Mayor's Office of Contract Services (MOCS), the City Office of Management and Budget, the City Law Department and the Comptroller should create a Task Force to establish goals and milestones for accomplishing electronic invoicing. In August 2017, the MOCS launched PASSPort (i.e. "Procurement and Sourcing Solutions Portal"), the City's new online procurement portal, initially with Vendex and now entirely online. The PASSPort platform could accommodate electronic invoicing, and agencies could take advantage of this new technology.
9. When contracts restrict salary increases to once per year, the annual increases should be allowed on a calendar date established in the contract that correlates to the Consultant/Engineer's policy for annual increases. Allowing increases only on dates tied to anniversary of contract notice to proceed can result in a Consultant/Engineer being forced to bill at less than actual salary costs for significant portions of the contract term.
10. Eliminate the retainage of funds on all Consultant/Engineer contracts. NYSDOT eliminated retainage from consultant contracts in 2000. It was recognized that invoice adjustments due to disallowances and overhead adjustments could still be made and did not warrant the holding of retainage for prime consultants and sub consultants. Retainage is sometimes held for an extended period of time. This is especially true on projects that experience delays (e.g. due to lengthy Change Order processes) or that take a long time to be completed. Retainage is even sometimes withheld from Consultant/Engineers by agencies for years after a project has been completed. Retainage creates a financial hardship for all firms, and it is especially burdensome for medium- and small-sized firms and sub-consultants. In some cases, the amount of funds retained from the Consultant/Engineer is greater than the amount the firm stands to profit on the project.

### **Contract Execution**

1. New York City agencies that maintain pre-qualified lists can accelerate contract execution by adopting a policy similar to the Port Authority and MTA agencies, in which firms that are pre-qualified receive a \$0 contract that passes through the scrutiny of Vendex/PASSPort, insurance, etc. (see Appendix 2). Procurements from these pre-qualified lists can be awarded

within 60-90 days rather than one year or longer. Firms not on the pre-qualified list can become eligible for procurement by applying to the agency short list on a rolling basis.

2. A top-down re-evaluation of the procurement process for City agencies should be conducted, including a re-write of RFPs. A NYCDOT submittal may be hundreds of pages, with many redundant requests. RFP forms in each agency vary and have been written, edited and added to for years; however, rarely is anything removed.
3. No agency should request nor should a submitting firm have to provide a cost proposal — even indirectly in the form of anticipated number of hours to be worked by various levels of professionals — at the time of initial response when Qualifications-Based Selection (QBS) is utilized. QBS allows the City to procure design services by first considering the technical qualifications and approaches of the design firm and negotiating a fair price with the most qualified proposer. It provides the public owner/agency with the most qualified firm that can deliver the best design to meet the needs of the project.
4. For every proposal submitted, there are many standard form requirements, such as lobbying, Equal Employment Opportunity data, Iran Divestment etc. This consumes an extensive amount of time and wastes resources. Firms should be allowed to submit the package electronically once a year through PASSPort, and the respective agencies can access the firm's data as needed for that year. The Consultant/Engineer can update the file as required.
5. All agencies should be required to accept overhead rates that conform to Federal Acquisition Regulation (FAR), which is widely accepted by governmental agencies across the country. Applying additional exceptions and exclusions, driving down allowable overhead on a NYC contract is unfair, causing Consultants/Engineers to have to recover higher overhead from other clients. A substantial amount of time is also expended by both the City agencies and the Consultant/Engineers in the process of conducting overhead audits by a set of rules that varies from FAR.
6. Upon notice of selection of a Consultant/Engineer by submission of proposals, there should be a reasonably short time period in which all scope and fee negotiations are completed and the contract is finalized and registered. This process can take over a year, resulting in large non-billable costs for the Consultant/Engineers over and above the cost of the proposal. Consultant/Engineers can also end up a year behind on escalation before getting a Notice to Proceed.

**Contract Close Out**

1. Contract documents should stipulate that close-out will occur within three months of substantial completion of the construction of a project, with damages paid for owner-delayed close-out.

We look forward to working with the Mayor’s Office of Contract Services, the Comptroller, the various city agencies and the Law Department. Please let us know if we can provide any further information, and thank you for your consideration.

Attachments:

- Appendix 1 – Consultant Out-of-Scope Work Request (COWR)
- Appendix 2 – Port Authority RFP for \$0 Contract

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