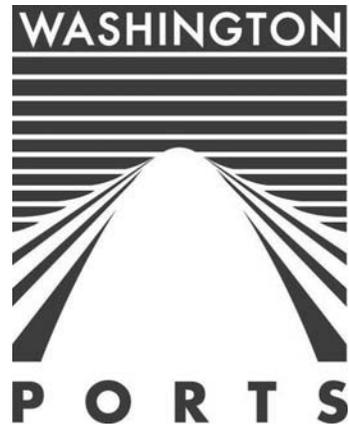


Personal Services Contracting Manual for Washington Ports

I Municipal Research and Services Center
I Washington Public Ports Association



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| Foreword

Section 13 of Second Substitute House Bill 3274 (Chapter 130, Laws of 2008) directed the Municipal Research and Services Center of Washington (MRSC), in cooperation with the Washington Public Ports Association (WPPA), to develop guidelines for the effective and efficient management of personal service contracts by port districts. We are pleased to present this **Personal Services Contracting Manual for Washington Ports**.

Principal authors of the manual are John Carpita, MRSC Public Works Consultant, and Janet Quimby, a consultant with 20-plus years of experience in contracting at public ports. We gratefully recognize our primary and secondary review committees (see also Appendix A2):

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In addition, we provided copies of all drafts to the State Auditor Office (SAO).

Bob Meinig, MRSC Legal Consultant, provided content review for legal issues and proofreading skills extraordinaire. Special acknowledgment is given to Holly Stewart, MRSC Desktop Publishing Specialist, for designing the publication.

This publication and associated online appendices can be found on the MRSC website at **Personal Services Contracting Manual for Washington Ports** and on the WPPA website.

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Appendices B – Included in Chapter 2 and on the Web Version or by Email from MRSC

- Appendix B1: Personal Services Contract Flow Chart
- Appendix B2: Personal Services Contract Size Chart
- Appendix B3: Sample Formal Competitive Selection Process Schedule
- Appendix B4: Personal Service Contract File Checklist

Appendices C through E – Only on Web Version or by Email from MRSC

- Appendix C: Annotated 2008 Legislation (SSHB 3274)
- Appendices D: Sample Policy and Procedure Documents
- Appendices E: Sample Personal Service Contracting Documents
- Appendices F: Sample Non-Port Reference Documents

Chapter 1

Executive Summary

Legislative Policy

In 2008, the Washington State Legislature adopted legislation designed to improve public contracting for port districts.¹ The focus of this legislation is personal service contracting by port districts:

The legislature hereby establishes a policy of open competition for all personal service contracts entered into by port districts unless specifically exempted under this chapter. It is further the intent to provide differentiation between the competitive procurement procedures for personal and professional services contracts. RCW 53.19.005.

Personal Service Contracting Guidelines, Adoption by Ports, and Training

RCW 53.19.080 directs the Municipal Research and Services Center (MRSC) to develop guidelines for the effective and efficient management of personal service contracts in cooperation with the Washington Public Ports Association (WPPA). MRSC recruited several port staff members from across the state, representing both large and small ports, to act as a Primary Review Team. In addition, representatives of city (Association of Washington Cities) and county (Washington State Association of Counties) associations, a public contracting consultant, an MRSC Legal Consultant, and representatives from the State Auditor's office (SAO) constitute a Secondary Review Team. Team members are shown in Appendix A2.

RCW 53.19.090 states that ports entering into or amending personal service contracts after January 1, 2010 must follow the policies adopted by their commission, which must be based on (these) guidelines developed pursuant to RCW 53.19.080. In addition, RCW 53.19.100 provides that the WPPA is to provide a training course for port personnel responsible for executing and managing personal service contracts. The course must contain training on effective and efficient contract management the guidelines established under RCW 53.19.080. Port districts must require port employees responsible for executing or managing personal service contracts to complete the training course to the satisfaction of the commission.

Port Districts

Port districts are special purpose districts created for the purpose of developing marine and air terminal transportation facilities and industrial improvements.² There are 70 ports within the State

¹Chapter 130, Laws of 2008. Portions of the legislation are codified in the RCW pertaining to public works and personal services. See Appendix C for the session law annotated with RCW codification.

²RCW 53.04.010. Port districts are hereby authorized to be established in the various counties of the state for the purposes of acquisition, construction, maintenance, operation, development and regulation within the district of harbor improvements, rail or motor vehicle transfer and terminal facilities, water transfer and terminal facilities, air transfer and terminal facilities, or any combination of such transfer and terminal facilities, and other commercial transportation, transfer, handling, storage and terminal facilities, and industrial improvements.

of Washington, ranging from small ports providing boat launch facilities, to large ports providing airports, marine terminals, and industrial parks.

Over half of Washington's ports have five or fewer employees and are located in more remote areas of the state with fewer consulting resources. Recognizing this range of resources available to Washington's ports, these personal service contracting guidelines address:

- basic compliance with laws applicable to personal service contracting;
- recommended best practices; and
- strategies for more complex procurements.³

Disclaimers

These personal service contracting guidelines are permissive and discretionary and are applicable to all ports, regardless of size, but not to other municipal corporations or to state agencies. Where the guidelines recommend particular practices using such terms as "should" or "may" the recommendation is permissive and not mandatory. In addition, ports must consider the statutes as well as their own commission resolutions, policies, and procedures to determine what requirements are truly mandatory for a given contracting scenario.

Chapter 53.19 RCW, the codification of most of SSHB 3274 – Chapter 130, Laws of 2008⁴ – is similar in several respects to chapter 39.29 RCW (Personal Service Contracts) that applies to state agencies and institutions of higher education, which has been in effect since 1987. The Office of Financial Management is charged in chapter 39.29 RCW with approving certain sole source and contract amendments and with publishing information regarding the contracting activity of state agencies and institutions of higher education. The most significant difference between the personal service contracting laws applicable to state agencies and to ports is that there is no central oversight of port contracts by a single state agency; instead, individual port commissions have the responsibility for oversight and disclosure of each port's contracts.

As ports are municipal corporations, many laws pertaining to other municipal corporations such as cities also apply to ports. However, since ports are special purpose districts, they do not have all the authority of cities and counties to provide a broad range of municipal services. Almost all public entities are subject to the competitive procurement laws applicable to public works in chapter 39.04 RCW and to architectural/engineering (A/E) services chapter 39.80 RCW. Bidding laws for purchasing services, materials, equipment, and some public works vary with the type and size of the public entity.⁵ Case law, new regulations, or audit findings for one type of municipal corporation will not necessarily apply to all municipal corporations since enabling statutes may differ. In addition to your port's counsel and the WPPA, MRSC provides resources and individual consultation to assist you.

³By analogy see the "Public Records Act Model Rules" developed by the Attorney General's Office: The model rules provide one approach (or, in some cases, alternate approaches) to processing public records requests. Agencies vary enormously in size, resources, and complexity of requests received. Any "one-size-fits-all" approach in the model rules, therefore, may not be best for requestors and agencies. Chapter 44-14 WAC.

⁴Appendices A and C.

⁵See *City Bidding Book, Washington State, MRSC*.

Chapter 2

Personal Services Contracting Quick Reference Guides

Quick Tips for Getting Started

So – your port needs to do a personal services contract? Follow these quick tips for getting started:

- Does your port’s projected need *feel* like a purchased service, personal service, or professional service?

Check out the *Definitions* in pages 13-15, the *Non-Exclusive List of Personal Service Examples* on page 15, and the *Service Contracts Comparison* chart on page 16.

- If it is indeed a personal service, then prepare a memo to file (or similar paper trail) documenting the need for the service.
- See if the proposed contract fits one of the *Exemptions to Competitive Solicitation* (emergency and sole source) or the *Does Not Apply To* provisions on page 20.
- If the service is reasonably required in connection with a public works project, review the discussion and practice tips on page 4.
- Do at least an order of magnitude cost estimate (look also at page 24) to determine if the proposed service contract will cost more than \$200,000 or if it will cost less than \$50,000.

Use the Personal Services Contracting Statutory Procedure Matrix on page 4 and/or the Personal Services Contract Flow Chart on page 6 to determine whether you must use a *Formal Competitive Solicitation* process (costs over \$200,000), provide *Evidence of Solicitation* (costs between \$50,000 and \$200,000), or simply follow your port’s procedures (costs under \$50,000). Also, review pages 19-21.

- Decide if you will use the port’s consulting personal services roster to short-list potential consultants or if you will issue an RFQ/RFP specific to the project.
- Adopt (or use) procedures similar to those in the Personal Services Contract Size Chart on page 7 for the three cost brackets. Page 8 shows a typical schedule for a project requiring competitive solicitation.
- Use the *Personal Service Contract File Checklist* on page 9 to document your processes and progress.

Statutory Procedure Matrix

Personal Services Contracting Statutory Procedure Matrix (Chapter 53.19 RCW)

Process Required			File Contract or Amendment with Commission and Make Available for Public Inspection	Commission Approval Required
Contract or Amendment Amount	Evidence of Solicitation Required	Formal Competitive Solicitation Required		
Above \$200K		Required		Recommended
\$50K to \$200K	Required			MBD*
Below \$50K				MBD*
Substantial Changes to Scope of Work			Required	Required
Amendment(s) Exceed 50% of Original Cost			Before Start of Work Under the Amendment	Recommended If Contract Over \$200,000
Emergency Contracts			Within 7 Days of Execution or Start of Work	
Sole Source Contracts Below \$50K			Before Start of Work	
Sole Source Contracts Above \$50K			Before Start of Work	Ensure Costs Are Reasonable
*MBD = May Be Delegated				

Service Contracts Reasonably Required in Connection with a Public Works Project

Personal services are defined in RCW 53.19.010(6) as professional or technical expertise provided by a consultant to accomplish a specific study, project, task, or other work statement, which may not reasonably be required in connection with a public works project meeting the definition in RCW 39.04.010(4). "Personal service" does not include purchased services as defined in RCW 53.19.010(8) or professional services procured using the competitive selection requirements in chapter 39.80 RCW (A&E).

Architectural/Engineering (A/E) services under chapter 39.80 RCW meet the general definitions of professional practice in chapters 18.08, 18.43, or 18.96 RCW, as referenced in RCW 39.80.020(5). So, the question is: how should a port district treat non-A/E services reasonably required in connection with a public works project, even if they would otherwise be considered personal services? (Examples: appraisals, wetland biologist reports, environmental consultant services and monitoring, etc.)

The answer is that non-A/E services reasonably required in connection with a public works project are not subject to competitive solicitation monetary limits, because they are not personal service contracts under RCW 53.19.010(6). At the same time, they are not subject to qualifications-based selection (QBS) requirements, so that price can be considered in initial selection (except, possibly, for funding agency restrictions on use of grant funds).

Note these differences between A/E and personal service selection procedures:

- A/E services must be selected via non-price proposals (i.e., qualifications-based selection (QBS)), with consideration of price only after selection of the most highly qualified consultant, while personal service proposals will normally include price as an initial consideration.
- Personal service contracts are subject to formal competitive solicitation if over \$200,000, and evidence of competition is required for contracts less than \$200,000, but more than \$50,000. There are no similar restrictions for A/E contracts.

Practice Tip:

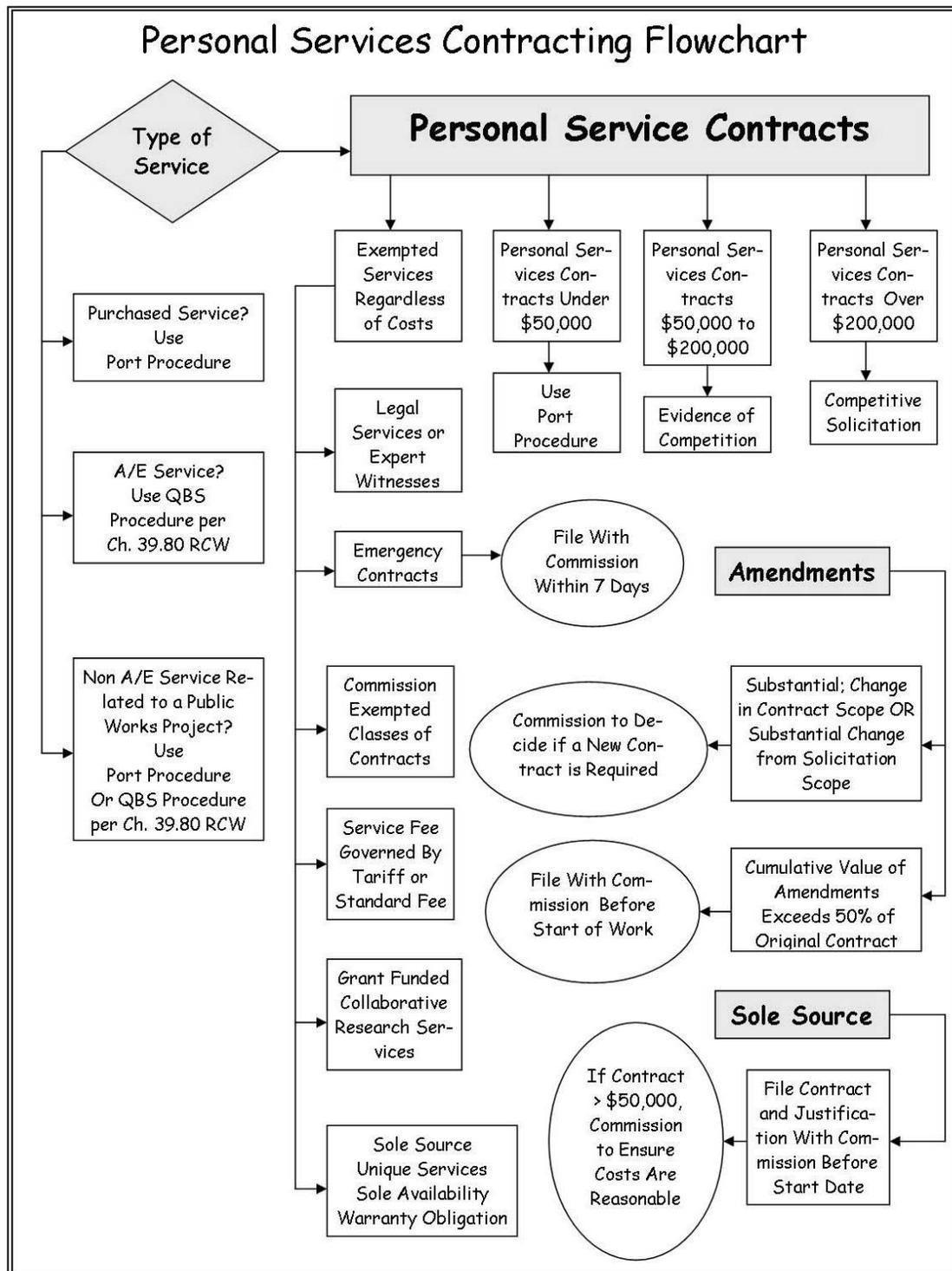
Carefully review your projected needs to determine if any element of the projected scope of services can be considered A/E services under the general definitions of professional practice in chapters 18.08, 18.43, or 18.96 RCW, as referenced in RCW 39.80.020(5). If so, then the selection process is subject to QBS requirements under chapter 39.80 RCW.

For example, RCW 18.43.020(5)(a) includes in the definition of the *practice of engineering*:

any professional service or creative work requiring engineering education, training, and experience and the application of special knowledge of the mathematical, physical, and engineering sciences to such professional services or creative work as consultation, investigation, evaluation, planning, design, and supervision of construction for the purpose of assuring compliance with specifications and design, in connection with any public or private utilities, structures, buildings, machines, equipment, processes, works, or projects.

Procurement policies and procedures for ports should address whether the port wishes to apply QBS procedures to all non-A/E services reasonably required in connection with a public works project, or if it will include price as an initial consideration.

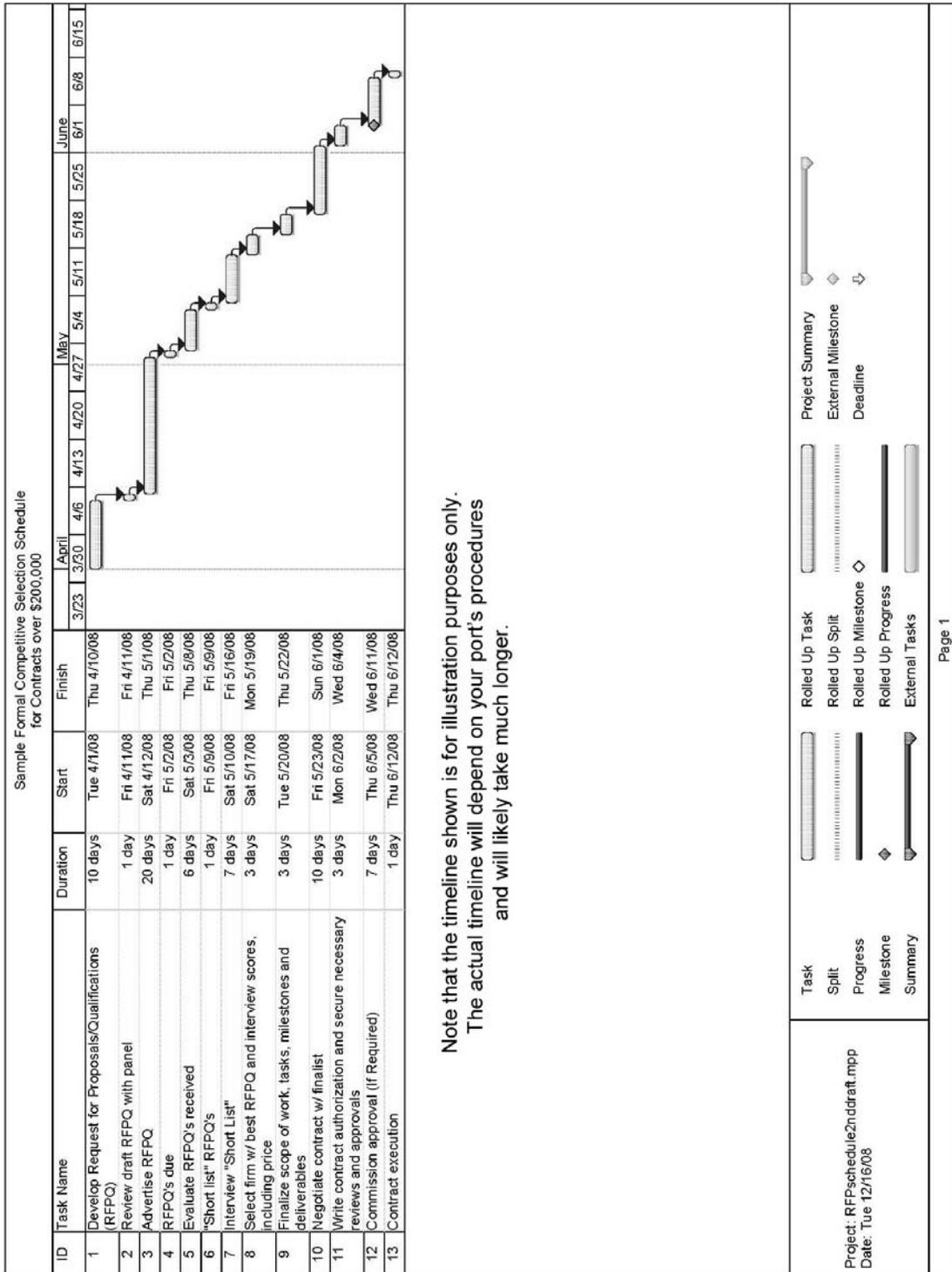
Personal Services Contract Flow Chart



Personal Services Contract Size Chart

	Large and/or Complex Contracts over \$200k	Medium Contracts Between \$200K and \$59K	Smaller/ Less Complex Contracts less than \$50k	Emergency Contracts	Sole Source Contracts	Contract Amendments
Establish and Use Rosters						
Adopt roster procedures	ONR	OR	O	O	O	NA
Advertise for rosters	ONR	OR	O	O	O	NA
Establish roster	ONR	OR	O	O	O	NA
Informal competitive solicitation (solicit RFPs from roster short list)	ONR	OR	O	O	O	NA
Establish on-call rosters	ONR	OR	O	O	O	NA
Solicitation Procedures						
Formal competitive solicitation process (advertised RFQ/RFP)	R	O	ONR	ONR	O	NA
Advertise and/or post on web site	R	O	ONR	NR	NR	NA
Set up committee and criteria for selection	OR	OR	ONR	NR	NR	NA
Evaluate RFQ/Ps received	R	OR	ONR	NR	NR	NA
"Short list" from RFPQs	OR	OR	ONR	NR	NR	NA
And/or interview "short list"	OR	OR	ONR	NR	NR	NA
Select highest ranked firm	OR	OR	ONR	NR	NR	NA
Finalize scope of work, tasks, milestones and products	R	R	R	R	R	R
Select compensation methods(s)	R	R	R	R	R	R
Negotiate contract with finalist	R	R	R	R	R	NA
Write contract and secure necessary reviews and approvals	R	R	R	R	R	R
Board/council approvals	MBD	MBD	MBD	MBD	MBD	NR
Board/council contract notice for amendments for scope and price more than 50 percent	R	R	R	R	R	R
R = Required NR = Not required O = Optional OR = Optional, recommended ONR = Optional, not recommended NA = Not applicable MBD = May be delegated						

Typical Formal Competitive Selection Process Schedule



Personal Service Contract File Checklist

Note – Use Not Applicable (NA) to mark those items that do not pertain to a given contract.

Date	By	Procedure or Document	
Process Checklist			
		A	Document need and identify personal service
		B1	Project is reasonably related to a public works project (if, so it is not a personal service)
		B2	Project is not reasonably related to a public works project
		C	Exception from competitive solicitation documentation <input type="checkbox"/> Sole source <input type="checkbox"/> Emergency
		D	<i>Does Not Apply To Documentation (RCW 53.19.060)</i> List reason
		E	Initial order of magnitude cost estimate <input type="checkbox"/> More than \$200,000 <input type="checkbox"/> Less than \$500,000
Solicitation Procurement Checklist			
		F1	Documentation of formal competitive solicitation process if more than \$200,000
		F2	Documentation of informal competitive solicitation process, including request for proposals from multiple firms, if more than \$50,000 but less than \$200,000
		F3	Documentation of process followed if less than \$50,000
		G	Procurement selection rationale (e.g. Roster, RFQ, RFP, State contract)
		H	RFQ/RFP and addenda (formal or informal)
		I	Cost estimate
		J	Evidence of sources solicited (e.g. advertisement, email)
		K	Proposals
		L	Evaluation worksheet(s)
		M	Reference check documentation
		N	Recommendation to award with selection rationale
		O	Internal approvals, including Port Commission if needed
		P	Notice of selection to other proposers
		Q	Signed agreement
Contract Administration Checklist			
		R	Deliverables – or reference to their location
		S	Progress invoices
		T1	Contract amendments due to scope changes and approvals as needed
		T2	Contract amendments due to price adjustments and approvals as needed
		U	Final cost summary and report to Commission/Director, if needed
		V	Evaluation of contract process and/or consultant, if done

Chapter 3

Ethics in Contracting

Organizational Conflicts of Interest

An organizational conflict of interest exists when the services to be performed by the consultant may, without some restrictions on future participation by the consultant in additional contracting activities, result in an unfair competitive advantage to the consultant or impair its objectivity in performing the services. As examples:

- A consultant paid to identify software solutions recommends only those software systems it is certified to install.
- A consultant paid to design a system, then proposes to install the system.
- A firm providing audit services recommends follow-on management improvements to be provided by a related entity.

Practice Tip:

In your request for proposals (RFP) address possible follow-on work and whether the selected consultant will be precluded from performing the follow-on work. This will allow consultants to determine which portions of the work will afford it the best business opportunity. If the port wants the flexibility to have the same firm that designed the solution to install the solution, write the RFP to include installation within the scope of possible, but not guaranteed, services. However, if the installation work meets the definition of a public works project under RCW 39.04.010, legal procedures for public works must be followed.

Personal Conflicts of Interest

Ports are subject to the “Code of Ethics for Municipal Officers” in chapter 42.23 RCW. “Municipal officer” is defined in that code to include “all elected and appointed officers of a municipality, together with all deputies and assistants of such an officer, and all persons exercising or undertaking to exercise any of the powers or functions of a municipal officer.”

Briefly, the Code prohibits a municipal officer from having a beneficial (financial) interest in a contract made under the municipal officer’s supervision or for the benefit of his or her office. RCW 42.23.030. Contracts made in violation of this statutory conflict of interest law are void. RCW 42.23.050. Certain interests in contracts are deemed “remote interests” and are not prohibited; however, an official with a remote interest must not participate in selecting the contractor. RCW 42.23.040.

The Code’s conflict of interest prohibition contains several exemptions, including one applicable to port districts:

The letting of any other contract in which the total amount received under the contract or contracts by the municipal officer or the municipal officer's business does not exceed one thousand five hundred dollars in any calendar month. RCW 42.23.030.

However, a port officer should not participate in any decision to award a contract to him/herself that is subject to this exemption. See RCW 42.23.030 for other procedural requirements. For more information on statutory conflicts of interest, see the MRSC web page entitled *Conflicts of Interest*.

The Code also identifies for municipal officers certain “prohibited acts”:

- Using his or her position to obtain special privileges;
- Accepting any compensation, gratuity, or reward from a source other than the employing municipality in connection with the officer’s duties;
- Engaging in a business or professional activity that the officer might reasonably expect would induce him or her to disclose confidential information gained by virtue of his or her official position; and
- Disclosing confidential information or using such information for personal gain. RCW 42.23.070.

Practice Tip:

Ports should provide clear guidance to their employees and commissioners by adopting a detailed code of ethics. The code of ethics, among other things, should address participation by port staff in consultant-sponsored seminars and post-port employment with consultants performing services for ports. The Port of Seattle’s recently updated code of ethics provides a detailed example. Other examples are available from the National Institute of Governmental Purchasing, Inc. (NIGP) web site.

Appearance of Fairness

In addition to ensuring the actual fairness of the selection process, the port should ensure that the process appears fair to the proposers and the port’s stakeholders. By conducting an open competition with a transparent, documented selection process, both proposers and stakeholders can verify that all qualified proposers received fair consideration and that the selection was based on the published evaluation criteria.

Because of its prior experience with the port, a firm may have a competitive advantage; but this is not of itself an unfair advantage. Just make sure that firms currently working with the port are not given advance information about future projects, which would give these firms extra time to develop proposals. Also, be careful to not structure selection processes to give those firms an unfair advantage.

Practice Tips:

The port may maintain a central clearinghouse (roster) of consultant statements of qualifications (SOQs) or use a shared roster such as MRSC's or similar roster.

Ensure that consultants who have demonstrated an interest in working with the port are solicited when appropriate.

All potential proposers should be given equal access to the RFP and related information. Consider implementation of a policy of electronic distribution of RFP's, reference documents, and addenda so that all parties receive the same information at the same time.

Strive for consistent contract administration procedures within the port, including invoicing payment procedures and performance evaluation practices.

Chapter 4

What are Personal Services Contracts?

Definitions

In order to understand personal services contracts, it is important to know how they fit in with other types of contracts. The following definitions help set the context. Where noted, these definitions are from applicable RCWs.

General Definitions

Consultant – A consultant is an independent individual or firm contracting with a port to perform a service or render an opinion or recommendation according to the consultant’s methods and without being subject to the control of the port except as to the result of the work. RCW 53.19.010(3).

Emergency – Set of unforeseen circumstances beyond the control of the port that either: present a real, immediate threat to the proper performance of essential functions; or may result in material loss or damage to property, bodily injury, or loss of life if immediate action is not taken. RCW 53.19.010(4).

Evidence of Competition – Documentation demonstrating that the port has solicited responses from multiple firms in selecting a consultant. RCW 53.19.010(5). (The port district’s own policies and procedures may be more restrictive than statutory requirements, but not less restrictive.)

Public Work – Public work means all work, construction, alteration, repair, or improvement other than ordinary maintenance, executed at the cost of the state or of any municipality, or which is by law a lien or charge on any property therein. RCW 39.04.010(4).

Personal Services

Application (Proposal/Submittal) – An application means a completed statement of qualifications or proposal, together with a request to be considered for the award of one or more contracts for personal services, submitted in response to either a request for qualifications/proposals or in response to a notice or advertisement for a consultant services roster. Can also be called a proposal or submittal.

Competitive Solicitation for Personal Services – Documented formal process providing an equal and open opportunity to qualified parties and culminating in a selection based on criteria, in which criteria other than price may be the primary basis for consideration. The criteria may include such factors as the consultant’s fees or costs, ability, capacity, experience, reputation, responsiveness to time limitations, responsiveness to solicitation requirements, quality of previous performance, and compliance with statutes and rules relating to contracts or services. RCW 53.19.010(2).

Personal Services Roster – A database of consultants desiring to provide personal services to a port district established in response to notice or advertisement that contains statements of qualification (SOQs) that a port district can use to evaluate consultants for services that a port district wishes to

obtain. This database may be provided and maintained by a single agency, group of agencies, or a non-agency service provider, with interlocal agreements or other appropriate documents. The consulting services roster may also be used in conjunction with criteria established by the agency to further select a group of consultants for an “on-call” roster.

Personal Services – Professional or technical expertise provided by a consultant to accomplish a specific study, project, task, or other work statement, which may not reasonably be required in connection with a public works project meeting the definition in RCW 39.04.010(4). “Personal service” does not include purchased services as defined in RCW 53.19.010(8) or professional services procured using the competitive selection requirements in chapter 39.80 RCW (A&E). RCW 53.19.010(6).

Services Reasonably Required in Connection with a Public Works Project – There are many services that would otherwise be considered as personal services that are reasonably required in connection with a public works project and that do not meet the general definitions of professional practice in chapters 18.08, 18.43, or 18.96 RCW, as referenced in RCW 39.80.020(5). See the discussion and practice tip on pages 4-5 for more information on these non-A/E services.

Sole Source Consultant – A consultant providing professional or technical expertise of such a unique nature that the consultant is clearly and justifiably the only practicable source to provide the personal service. The justification shall be based on the uniqueness of the service, sole availability at the location required, or warranty or defect correction service obligations of the consultant. RCW 53.19.010(9).

Professional Services

Application (Proposal/Submittal) – An application means a completed statement of qualifications or proposal, together with a request to be considered for the award of one or more contracts for professional services, submitted in response to either a request for qualifications/proposals or in response to a notice or advertisement for a professional services roster. Can also be called a proposal or submittal.

Competitive Solicitation for Professional Services – Documented, formal process providing an equal and open opportunity to qualified parties and culminating in a selection of the firm deemed to be the most highly qualified to provide the services required for the proposed project, based on criteria established by a port district. These criteria may include ability, capacity, experience, reputation, responsiveness to time limitations, responsiveness to solicitation requirements, quality of previous performance, and compliance with statutes and rules relating to contracts or services. The criteria may not include price. After selection of the most highly qualified firm, a port should enter into price negotiations with the selected firm.

Professional Services Roster – A database of consultants desiring to provide professional services to a port district established in response to notice or advertisement that contains statements of qualification (SOQs) that a port district can use to evaluate a consultant or consultants for professional services that a port district wishes to obtain. This database may be provided and maintained by a single agency, group of agencies, or a non-agency service provider, with interlocal agreements or other appropriate documents.

Professional Services (A&E) – Professional services rendered by any person, other than as an employee of the agency, contracting to perform activities within the scope of the general definition of professional practice in chapters 18.08 (Architects), 18.43 (Engineers and Land Surveyors), or

18.96 (Landscape Architects) RCW. RCW 39.80.020(5). Professional services are procured using the qualifications based selection requirements in chapter 39.80 RCW

Qualifications-Based-Selection (QBS) – QBS is a competitive procurement process in which consulting firms submit qualifications and/or a non-cost proposal to the port district. The distinguishing feature of QBS over other types of consultant selection is that price is not used as a selection criterion. The port district assesses the expertise of competing firms and selects the most highly qualified firm to negotiate the project scope and associated fee. If the port district and most highly qualified firm cannot reach an agreement on project scope, schedule, and budget, the port district then negotiates with the next most highly qualified firm.

Purchased Services

Purchased Services – Services provided by a vendor to accomplish routine, continuing, and necessary functions. “Purchased services” includes, but is not limited to: services for equipment maintenance and repair; operation of a physical plant; security; computer hardware and software maintenance; data entry; key punch services; and computer time-sharing, contract programming, and analysis. RCW 53.19.010(8).

Examples of Personal Service Contracts

Non-Exclusive List of Personal Service Examples

- Accounting services
- Aerial photography (if not related to a public works project)
- Analysis and assessment of processes, programs, fiscal impact, compliance, systems, etc.
- Appraisal services
- Economic analysis and consultation
- Environmental planning, technology, studies (except when part of a public works project)
- Executive recruitment
- Financial advisor services
- Feasibility study services (if not related to public works project)
- Foreign trade representative services
- Grant writing
- Graphic design services
- Lobbying services
- Labor negotiations and labor relations services
- Management consulting marketing services to include identifying market opportunities, conduct marketing programs, planning, promotion, market research surveys, etc.
- Medical and psychological services
- Organization development
- Public relations services
- Promotional services
- Strategic planning
- Training

Comparison with Other Types of Contracts

Purchased Services	Personal Services	Non A/E Services Reasonably Required In Connection With a Public Works Project	Professional Services Under Chapter 39.80 RCW
Cost or Price	Fees or costs	Qualifications and fees or costs	Qualifications first, then price - after selection
Quality of previous performance	Quality of previous performance	Quality of previous performance	Quality of previous performance
Ability to meet deadlines for contract performance	Ability to meet deadlines for contract performance	Ability to meet deadlines for contract performance	Ability to meet deadlines for contract performance
Responsiveness to solicitation requirements	Responsiveness to solicitation requirements	Responsiveness to solicitation requirements	Responsiveness to solicitation requirements
Demonstrated compliance with employment security and sales tax requirements (all as applicable)	Compliance with statutes and rules relating to contracts or services	Compliance with statutes and rules relating to contracts or services	Compliance with statutes and rules relating to contracts or services
Ability, experience, and reputation	Ability, experience, and reputation	Ability, experience, and reputation	Ability, experience, and reputation
References	References	References	References
Staff readily available for the project	Staff readily available for the project	Staff readily available for the project	Staff readily available for the project
Financial capacity	Financial capacity	Financial capacity	Financial capacity
Meets applicable licensing requirements	Meets applicable licensing requirements	Meets applicable licensing requirements	Meets applicable licensing requirements
Safety record	Safety record	Safety record	Safety record
Ability to meet necessary response times for unscheduled work and emergencies	Ability to meet necessary response times for unscheduled work and emergencies	Ability to meet necessary response times for unscheduled work and emergencies	Ability to meet necessary response times for unscheduled work and emergencies
N/A	History of Errors and Omissions	History of Errors and Omissions	History of Errors and Omissions
N/A	N/A	N/A	Construction Change Order History

Consultant vs. Employee

Before contracting for personal services, consider including language in the contract and procedures for monitoring the contract to help ensure that the consultant is in fact an independent contractor and will not be considered a port employee. This issue is enough of a problem that specific legislation was enacted in 2002 making it an unfair practice to misclassify an employee to avoid providing or continuing to provide employment-based benefits. See RCW 49.44.170. The general rule (according to the IRS) is that an individual is an independent contractor if the person for whom the services are performed has the right to control or direct only the result of the work, and not what will be done or how it will be done or the method of accomplishing the result.

This issue arises in numerous contexts, including:

- Internal Revenue Service – Taxes
- Fair Labor Standards Act
- Social Security
- Liability for acts or accidents
- Workers' compensation
- Laws against discrimination

If a consultant is found (in actuality) to be an employee, the port (the employer) is responsible to pay workers' compensation, to meet wage and hour requirements, to pay unemployment taxes, to make deductions for IRS and social security, to provide benefits based on personnel policies, and to maintain a safe work site.

Note that titles and labels in a contract are not governing, and objective standards are used to determine if a person is in fact an employee or independent contractor. To misclassify is to label a permanent employee as "temporary," "seasonal," "intermittent," "leased," or "contract." RCW 49.44.170(2)(d). There is no one single test or factor that is controlling - it is the total activity or situation that controls and the burden of proof is on the employer. The single most important factor is the nature and degree of control exercised by the employer over the person performing the work:

- Does the employer control not only the work product, but also details of how the work is performed?
- Who provides the workplace and the tools to perform the work?
- The duration of the work - independent contractors usually perform for a relatively short time.
- Is this work usually performed by a specialist without supervision or usually under direction of a supervisor?
- Independent contractors usually are sole proprietors that bid to perform specific work and are evaluated on results and on not day-to-day work.
- Do they have and maintain a separate place of business?
- Independent contractors are usually paid by job, sometimes by time and materials.

It is best to err in favor of the person being an employee rather than an independent contractor. All the liabilities, which may include penalties and back taxes, are present with the opposite mischaracterization – that the person is an independent contractor when he/she is really an employee.

Resources you may wish to look at include:

- IRS article, "Employee or Independent Contractor?"
- RCW 51.08.195
- "A Guide to Hiring Independent Contractors in Washington State," Washington Department of Labor & Industries
- "Industrial Insurance - Exempt Independent Contractor," Washington Department of Labor & Industries
- U.S. Dept. of Labor, "Fact Sheet #13: Employment Relationship Under the Fair Labor Standards Act (FLSA)", <http://www.dol.gov/whd/regs/compliance/whdfs13.pdf>

Practice Tips:

Consultant contracts should have a definite date of completion and specify that time extensions must be approved by an appropriate port official;

Establish objective standards for your definitions of employees and consultants;

Establish a review process to ensure that these standards are being followed;

Review current consultant contracting and employment for compliance with these standards;

Be cautious when contracting for services normally performed by public employees.

Contracts for Staff Augmentation

While several studies have shown that design work can be performed more economically in-house,⁶ the use of consultants offers several advantages:

- Consultants have a broader array of resources and expertise.
- Consultants have more flexible staffing options and can work non-standard hours.
- Consultants are sensitive to meeting deadlines since past performance influences future work.

⁶Deis, Donald R. "A Simulation Approach to In-House Versus Contracted Out Cost Comparisons," *Journal of Public Procurement* Vol. 4-1(2004).

Chapter 5

Basic Requirements and Exceptions

(See also pages 4 and 6, and chapter 53.19 RCW.)

Solicitation and Reporting Requirements

Contracts of more than \$200,000 –

- If the personal services contract amount is over \$200,000, a formal competitive solicitation process (e.g., advertise in a newspaper and/or post on a web site) must be followed.
- Documentation of this formal competitive solicitation process must be maintained.
- While not directly addressed in chapter 53.19 RCW, the commission may approve all contracts over \$200,000, but it can delegate this authority to the port's executive director, chief finance officer, or similar staff person. Any such delegation should be formalized in a written delegation of authority.

Contracts of less than \$200,000 but more than \$50,000 –

- If the personal services contract amount is more than \$50,000 but less than \$200,000, an informal competitive solicitation process may be followed in lieu of advertising, except that the port must request proposals from and/or conduct interviews with multiple firms.
- Documentation of this informal process must be maintained.
- While not directly addressed in chapter 53.19 RCW, the commission may approve all contracts over \$50,000 but less than \$200,000, but it can delegate this authority to the port's executive director, chief finance officer, or similar staff person. Any such delegation should be formalized in a written delegation of authority.

Contracts less than \$50,000 –

- If the personal services contract amount is less than \$50,000, the statutes dictate no formal or informal process, so the port's adopted procedures will govern.
- While not directly addressed in chapter 53.19 RCW, the commission may approve all contracts less than \$50,000, but it can delegate this authority to the port's executive director, chief finance officer, or similar staff person. Any such delegation should be formalized in a written delegation of authority.

Exemptions from the Competitive Solicitation Process (RCW 53.19.020)

Regardless of estimated contract amount, the commission may exempt specific contracts or classes or groups of contracts from the competitive solicitation process, when it has been determined such process would not be appropriate or cost effective. Other exemptions include emergency contracts and sole source contracts.

- Emergency personal services contracts must be filed with the commission and made available for public inspection within seven working days following the commencement of work or execution of the contract, whichever occurs first. RCW 53.19.030. Documented justification for emergency contracts must be provided to the commission when the contract is filed. (Note that this seven-day requirement is more stringent than that of RCW 39.04.280 addressing public works, which requires adoption of written findings of the existence of the emergency no later than 14 days after contract award.)
- Sole source personal services contracts must be filed with the commission and made available for public inspection prior to the proposed starting date of the contract. Documented justification for sole source contracts must be provided to the commission when the contract is filed. For sole source contracts of \$50,000 or more, documented justification must include evidence that the port attempted to identify potential consultants. The commission must ensure that the costs, fees, or rates negotiated in filed sole source contracts of \$50,000 or more are reasonable. RCW 53.19.040.

Contract Amendments (RCW 53.19.060)

If the value of an amendment or amendments, whether singly or cumulatively, exceeds 50 percent of the value of the original contract, the amendment must be filed with the commission and made available for public inspection prior to the proposed starting date of services under the amendment.

Substantial changes in the scope of work specified in the contract or which are substantial additions to the scope of work specified in the formal solicitation document must be submitted to the commission for a determination as to whether the change warrants the work to be awarded as a new contract. This is true even if the original contract did not require commission approval.

Does Not Apply To (RCW 53.19.070)

Chapter 53.19 RCW does not apply to:

- Contracts awarded to companies that furnish a service where the tariff is established by the Utilities and Transportation Commission or other public entity.
- Intergovernmental agreements awarded to any governmental entity, whether federal, state, or local and any department, division, or subdivision thereof.
- Contracts awarded for services to be performed for a standard fee, when the standard fee is established by the contracting agency or any other governmental entity and a like contract is available to all qualified applicants.

- Contracts for services that are necessary to the conduct of collaborative research if prior approval is granted by the funding source.
- Contracts for professional services which are entered into under chapter 39.80 RCW.
- Contracts for the employment of expert witnesses for the purposes of litigation or legal services to supplement the expertise of port staff.

Note – The next three chapters address the process of consultant selection and contract execution. Chapter 6 discusses scope definition, cost estimates, choice of selection process, and sources of consultants. Chapter 7 discusses development of the solicitation documents and detailed steps of the selection and contract award process. Chapter 8 addresses contract administration, including performance monitoring, payment, contract amendments and remedies, and consultant evaluations. The discussion includes strategies for more complex procurements. Not all of the steps discussed are required for lower-cost services or where time requirements warrant an expedited process. See page 9 for a checklist of needed documentation for a personal services contract. See page 8 for a very aggressive competitive solicitation selection process (over \$200K) schedule.

Chapter 6

Pre-Contract Procedures

Preliminary Decisions and Risk Assessment

When a port has identified the need for a personal service, it should work through a decision tree of the following preliminary decisions (written documentation of this process is not necessarily needed):

1. Is the needed expertise available in-house or from another public agency via an interagency agreement?
2. Is the expertise available from one of the port's existing personal services agreements?
3. Is the type of service exempt from the personal service contracting requirements, such as legal services?
4. Should the port utilize its consultant roster to obtain proposals or publish a new solicitation?

Whether the consultant selection is made through a formal or informal process, or is exempt from the competitive selection requirement, the remaining sections of this Guidance apply to the Port's execution and administration of the consultant contract.

When deciding whether to engage a consultant, the port is essentially performing a risk assessment. A risk assessment need not be in writing⁷ but should consider such factors as:

- The port's ability to evaluate proposals, develop performance measurements, and monitor consultant performance;
- The port's exposure to harm or loss whether the task is performed by port staff or consultants;
- Ability to meet and enforce deadlines;
- Ability to enforce cost controls;
- Whether the consultant's performance will affect core port operations;
- Whether the proposed solution will actually satisfy the needs of the port.

Especially for information technology consulting (IT) contracts, risk can be mitigated by using the following techniques:

- Require a migration plan, proof of concept, and proven data conversion before actual software purchase;

⁷OFM, 15.40 – Personal Services Contracts – Contract Award, Management, and Monitoring.

- Implement disaster/data recovery;
- Require acceptance tests by users prior to start date;
- Tie progress payments to performance milestones;
- Cap increases in future maintenance and support annual contracts.

Practice Tips:

Allocate the risk to the party best able to manage the risk, recognizing that professional liability insurance excludes certain common risks from coverage. The party “best able” to manage the risk is not the party with the deepest pockets, it is the party with the knowledge, expertise, and capability to control performance of the particular service.

To help determine the cost/benefit of contracting for service needs, ports should consider collecting information on fully-loaded hourly rates for port employment classifications involved in consultant selection and contract administration. Port staff can then better forecast the cost in staff time to conduct formal and informal competitive selection processes. These rates and forecasts have continuing value in determining whether conducting a competitive selection process is cost-effective for a particular need, in comparing performance costs between employees and consultants, and in determining whether proposed consultant fees are fair and reasonable.

Scope of Services Development

Personal service contracts are often required because a port typically does not have sufficient in-house expertise, yet the scarceness of expertise compounds the challenge of evaluating qualifications and costs. In developing the scope of services, consider obtaining assistance from another public entity with expertise in the required field, or research solicitations issued by other public entities for similar services. Resources include:

- Solicitations issued by the Washington State Department of General Administration or Department of Information Services;
- Listing of all State Agency contracts reported to DES on an annual fiscal year basis. You can then search for applicable contracts and then contact the awarding agency to review the actual contract. <http://des.wa.gov/services/ContractingPurchasing/PoliciesTraining/Pages/ContractsTransparency.aspx>;
- MRSC research tools <http://mrsc.org/Research-Tools.aspx>;
- Trade publications.

Is the port’s need sufficiently defined to allow consultants to prepare specific proposals? If not, consider issuing a request for qualifications, a request for information, or a request for proposals without pricing in order to better refine the requirements while minimizing the burden on consultants. Describe the problem to be solved and ask the consultants to propose a solution. Such descriptions enable the consultants to devise creative solutions and allow the port to focus its resources on choosing the best proposal, not the closest match to a preconceived specification.

Once the need is defined, ensure that the market is available to fulfill the need. Consider:

- seasonality of demand, e.g., an RFP for accounting services issued during peak tax season may yield little response;
- cost/benefit to the consultant and port, e.g., customizing software to track payroll for a small port may not be cost effective.

Estimate of Costs

A port should always develop an estimate of personal service contract costs, including labor costs, contingency, and reimbursable expenses, early in the solicitation process so that the appropriate selection procedure is followed.

Resources for developing cost estimates include:

- Comparable project contracts of the port or other entities, adjusted for inflation and regional cost factors;
- Rates paid by other public entities, adjusted for regional cost factors;
- Service contracts for the same specialty;
- State master contracts;
- Separate estimates prepared based on historical costs.

Identify Competitive Procedure to be Used, If Any

Getting an accurate, conservative cost estimate is critical because selection procedures vary according to the contract amount, and the solicitation thresholds are based on the actual contract amount, including possible amendments, not estimates. So, if a port conducts an informal solicitation because the estimate is \$180,000 and all proposals received exceed \$200,000, the port must start over and conduct a formal solicitation.

If the personal services desired fall under one of the “Exceptions” or “Does Not Apply To” categories as described in Chapter 5, a “memo to file” documenting that fact is a good idea. However, during contract negotiation and administration, ensure that the scope does not expand to include services that are not exempt from the statute’s requirements.

Practice Tips:

The fail-safe default position is always to conduct a formal solicitation process if you are unsure of estimated costs or if they are “borderline.”

A port should adopt procedures and thresholds for formal and informal solicitations.

Sources of Consultant Services

Ports may establish a roster of consultants. Applicants provide basic information, such as their registration and tax information, service categories provided, references, experience, and financial capacity. For contracts under \$200,000, the port district may ask for quotes or proposals directly from firms within the applicable service category on the roster or may interview them.

Ports may enter into interlocal agreements with other public entities to share consultant rosters. These arrangements are particularly effective when the service need is ongoing. The port district should ensure that the selection process used by the other public agency meets the selection requirements that port districts are obligated to undertake for personal service contracts. Interlocal agreements should also be considered when the port has an isolated need and another government entity has the expertise in-house.

The Washington State Department of Information Services (DIS) administers Master Contracts for IT goods and services, including system administration, IT project management, and web services. Ports may use these contracts after executing a customer service agreement with DIS. Master Contracts are established following a competitive process required of state agencies which should also meet port requirements. To see the available consultant service contracts, go to <http://des.wa.gov/services/ContractingPurchasing/ITContracts/Pages/default.aspx>.

DIS contracts offer two additional advantages, which may result in the best value for the port:

- Volume pricing; and
- DIS standard terms and conditions which protect public resources.

Some service contracts offering the same advantages are managed through the Office of State Procurement of the Department of General Administration, which municipalities may use after entering into an intergovernmental cooperative purchasing agreement. However, ensure that the contract was awarded following a competitive process that meets the minimum requirements applicable to your port. Active contracts managed by General Administration can be viewed at Contract Search Results. Also, if a state contract is used, the port may want the consultant to provide an insurance certificate naming the port as an additional insured.

The Office of Minority and Women's Business Enterprise (OMWBE) maintains BizNet, which is an online directory of certified minority-owned and women-owned businesses that are willing and able to do business with the state. A listing of available businesses by service type is available through the OMWBE web site at OMWBE Directory. No preferences may be included in the scoring of proposals for M/WBE participants and no minimum level of M/WBE participation may be required as a condition of being awarded a contract.

Chapter 7

Competitive Solicitation and Contracting Procedures

RFQ, RFI, and RFP Solicitations

Request for qualifications (RFQ) and request for proposals (RFP) procedures ask proposers to submit qualifications in response to the specific need or scope of services. Both may ask for certain “proposal elements” such as an RFQ that asks for consultants to identify key personnel proposed for the services and their availability, or for a general description of the firm’s service approach. The RFP typically requires a more specific response to the specific need, including experience of key personnel, schedule, and deliverables. Proposed pricing may be required by the RFP or may be deferred until the need is refined or finalists selected. When drafting the solicitation, consider asking for only the minimum information needed to move to the next decision stage in order to minimize the burden on potential proposers. In this Guidance, discussion the term “RFP” is used when specific proposal elements are requested such as the identification of key personnel and the consultant’s approach to the stated need.

RFQ

An RFQ is used to identify consultants available to address the port’s stated need or generally qualified to perform a category of services. Price is not a factor in the initial screening of qualifications. The RFQ may request consultants to provide a specific proposal or may simply request a statement of the firm’s overall capabilities and qualifications of personnel. An RFQ process may also be used as a preliminary evaluation procedure for complex personal service procurements, in which the most qualified firms are selected and then requested to submit price proposals. The final selection may be based on a combination of price and qualifications. (RFQ is also an acronym for “request for quote” used in small purchases of goods.)

RFP

An RFP is the most common procedure used in the competitive solicitation of personal services. An RFP asks consultants to submit a specific approach or proposal meeting the port’s stated need, and may request identification of key personnel, price, and schedule information. Proposals are evaluated based upon a combination of price, qualifications, and quality factors.

RFI

A request for information process is useful when the possible solutions to the port’s need are variable or when the market for solutions is unknown. For example, a small port may want to automate its time and attendance system but does not know if cost-effective solutions are available. The process gives consultants the opportunity to describe their qualifications, available products, and cost ranges without having to develop detailed proposals. The information received from the RFI process may then result in a more detailed RFP process.

RFP Development and Process

Every RFP should include

- Statement of need (scope);
- Estimated cost of services;
- Estimated schedule;
- Evaluation criteria;
- Proposal elements (information needed to be submitted);
- Deadline for acceptance of proposal;
- Port's standard terms and conditions;
- Time and place for submission of proposals.

An annotated sample of Standard Terms and Conditions for Personal Services Agreements is in Appendix A3. The sample reflects the minimum protections for the port and an appropriate risk allocation for most personal and professional service contracts. The annotations offer guidance on frequently requested revisions. The port's Standard Terms and Conditions, and any revisions thereto, should be approved by the port's attorney. In its policies and procedures the port should require the inclusion of such Standard Terms and Conditions in all of its contracts, address the process for authorizing revisions, and identify when port staff may authorize specific waivers, such as reducing the amount of required insurance coverage. For personal service contracts relative to multi-million dollar complex projects the Standard Terms and Conditions should be enhanced to address specific project requirements.

For informal solicitations an RFP does not have to be a formal document. A brief email to potential consultants is sufficient, as in the following example:

The Port needs a grant writer to prepare an application for round 17 of the Homeland Security grant program for ports. The application must be submitted by May 31, 2009. If a grant is awarded, the selected consultant may be asked to also provide grant management services. Consultant selection will be based upon previous grant writing and management experience, demonstrated familiarity with the Homeland Security grant program or similar programs, ability to meet deadline and proposed cost. Please submit via email response a proposal addressing these equally-weighted criteria, including an hourly rate and proposed not-to-exceed amount to complete the grant application. The Port's Standard Terms and Conditions for Professional Services Agreements are attached and will be incorporated in the contract with the selected consultant. The Port may accept a proposal at any time within 60 days of submittal. Submit proposals by 4:00 PM January 31, 2009.

In addition to the basics, other common RFP elements include:

- Background on the port and its need;
- Reference documents – large files may be posted to a web site for consultant access;
- Whether interviews will be scheduled or whether the selection may be based on the submitted proposals without interviews;
- Pre-proposal conference schedule;
- Page limits;

- Public disclosure guidance;
- Formal certification by the proposer of its authorization to submit the proposal, time validity of proposal, non-collusion, etc.;
- Cost incurred in the development of proposals and participation in the selection process shall be borne by proposers.

Duration of Services

For project related services, the contract duration is driven by the project schedule, but every contract should have an end date, e.g., “completion of the project or December 31, 2010, whichever occurs first.” When determining the maximum contract duration for routine services in support of port operations, consider developing trends in the field and the historic change in the availability of consultants – IT services change much more rapidly than appraisal services. In most cases, re-solicitation after three years is recommended to retain a competitive advantage and to ensure that the best value is obtained. As an example, the Federal Acquisition Regulations (FARS) limit advisory or assistance service contracts to 3 years (FAC 16.504; 48 CFR 16.504).

When the personal service contract is for routine services, the port should specify the initial term plus extensions at the port’s option. Otherwise, a time extension beyond the contract term and any option periods may be viewed as a substantial change in scope.

Basis of Compensation

The selection of the basis of compensation is within the port’s discretion and should be addressed in the RFP, because it affects the risk allocation between the port and consultant. Consultants may suggest alternative arrangements in their proposals. If those alternative arrangements are acceptable to the port, all finalists should be afforded the opportunity to provide revised pricing based on the compensation options.

Common compensation arrangements include

- Time and material;
- Fixed price;
- Cost plus fixed fee;
- Fee per transaction;
- Fee plus expenses.

Each is described below:

Time and material contracts are convenient for getting the work started quickly, but they offer the least accountability for the consultant because payment is not tied to deliverables or project completion. Essentially, all risk is allocated to the port. If a time and material contract is requested, it may indicate that fixed pricing of the scope is difficult. Consider a startup contract to better define scope, or budget a sizeable contingency. Proper management of time and materials contracts requires prompt, detailed review of the consultant’s time sheets and use of resources. At a minimum, a time and material contract should also include a not-to-exceed amount and milestone deliverables.

Fixed price contracts offer greater certainty/lower risk to the port but may result in an overall greater cost because the consultant needs to include a larger contingency. Also, consultants resist providing

a detailed breakdown of a fixed cost proposal. As an alternative, request a preliminary price proposal from firms but also ask them to identify what additional information would allow them to propose a firm fixed price, e.g., historical information, port practices.

Cost plus arrangements offer low risk to the consultant and medium risk to the port; payment is based on the consultant's actual costs plus a fixed fee upon completion of deliverables. For larger contracts, a cost analysis should be performed; this requires detailed scrutiny of the consultant's accounts. See page 38. Cost plus compensation arrangements offer no incentive to explore cost-saving innovations. A definition of compensable expenses and a limit on overall cost and fee should always be included. Note that cost plus a percentage of the cost arrangements create an incentive for consultants to increase overall costs and are prohibited in federally-funded contracts.

Fee per transaction is a low risk arrangement for both port and consultant so long as the transaction services are well-defined both in the contract and in business culture.

Fee plus expenses arrangements are typically used with search firms, with the fee being around one-third of the annual salary. However, if the search firm's scope of work also includes evaluating the competitiveness of the position's compensation package, a conflict of interest is created. Fee plus expenses may also be used in certain litigation arrangements. In any case, always define allowable expenses and establish a dollar limit.

Requiring a proposal bond is not recommended for most solicitations because it reduces the field of potential consultants and restricts the port's ability to negotiate changes to the proposal before acceptance.

There is some debate over whether to include the port's budget in the RFP. Inclusion provides a reality check especially when the port's need is relatively undefined. However, inclusion may encourage consultants to price their proposals up to the budgeted amount. Remember that budget information is usually available from the port's published annual budget – a public document – so astute consultants will likely find it anyway.

Proposal Evaluation Criteria

Criteria listed in the definition of "competitive solicitation" include:

- Fees or costs;
- Ability;
- Capacity;
- Experience;
- Reputation;
- Responsiveness to solicitation requirements;
- Responsiveness to time limitations;
- Quality of previous performance;
- Compliance with statutes and rules relating to contracts or services. RCW 53.19.010(2).

Some or all of these criteria may be used and relative weights assigned as appropriate for the specific solicitation.

Additional criteria may be included to address specific requirements. Residency or location criteria are usually viewed as an arbitrary classification and a restraint on open competition.⁸ However,

⁸See AGO 61-62 No. 41.

where response time is important – such as in accident investigation services - the consultant’s ability to respond within a specified time period is an acceptable criterion. Working familiarity with local zoning and building codes is also an acceptable criterion.

Practice Tips:

Always require a consultant to disclose contracts terminated before completion, pending litigation, and claims within an appropriate time frame, e.g., past two years. This should always be asked, not to disqualify necessarily, but to understand the firm’s current financial standing and capacity. What is key is how the firm has responded to claims – has a new quality assurance program been instituted or certain personnel replaced?

To evaluate the “quality of previous performance,” specify whether both the firm and its key personnel will be evaluated. Request a complete list of relevant recent services provided by the firm and its key personnel, not just references selected by the consultant. Remember, the key personnel may have just joined the firm. Indicate that the port may contact other references not listed by the consultant.

Take care that criteria based on required years of experience do not exclude newly-formed firms of experienced personnel. The quality of the experience of the people, not the firm, should be paramount. One alternative is to require a certain level of experience of the key personnel, e.g., similar engagements within the same regulatory environment.

Public Disclosure Considerations

Submitted proposals become property of the port and are considered public records that may be subject to disclosure in accordance with Washington State public disclosure laws. Language similar to this should be included in the RFP:

Proposer shall mark any pages of its proposal that it considers to contain proprietary or confidential information. However, the Port cannot insure that this information would not be subject to disclosure pursuant to a public disclosure request. In the event the Port receives a request for disclosure of such information, the Port will notify the Proposer of the request and will not release the marked documents for a period of not less than ten days after the notice is provided in order to give the Proposer an opportunity to obtain a court order prohibiting the release of the information in response to the public disclosure request. The Port shall not be liable for good faith disclosure of documents marked proprietary or confidential nor for failure to notify proposers of public disclosure requests.

If a port receives a public disclosure request for proposals, it must respond to that request within five business days, and that response, if it does not provide the requested documents, must provide a reasonable estimate of the time it will take to fully respond to the request. RCW 42.56.520. So, the port’s estimate of the time it will need to fully respond should be sufficient to accommodate the length of the waiting period provided to proposers to allow them to challenge disclosure in court.

Note that, under RCW 42.56.060, public entities and employees are not liable for any loss or damage based on disclosure of records if the agency/employee “acted in good faith in attempting to comply with the provisions of this chapter.”

Weighting Evaluation Criteria

For the most basic RFP the basis for evaluation may simply state that the proposals will be ranked as “1st, 2nd, and 3rd” based on the proposal’s overall quality, price, and reference checks. A simple ranking process presumes that all criteria are weighted equally. Ranking provides clear guidance to reviewers, precludes one reviewer’s scores from having undue influence, and precludes ties. However, it does not work as well with numerous proposals or if individual criteria are weighted differently.

For more complex procurements, identify the weight to be accorded quality and price factors. Complex evaluations may include both a score and a weight to be assigned to each factor, but avoid turning the evaluation into a mathematical challenge for reviewers.

Address whether interviews will be a separate part of the score or whether the interview serves as part of the information the evaluators will use in evaluating the proposal. Compare the following examples:

Example 1 – Basis of Selection

The selection panel will consider the information provided in the proposal, interview, and references based on the following criteria:

- Experience of key personnel – 40%
- Ability to meet schedule – 20%
- Cost – 40%

Note that this example commits the port to interviewing and checking references of all proposers, not just the finalist.

Example 2 – Basis of Selection

The selection panel will consider the information provided in the proposal based on the following criteria:

- Experience of key personnel – 40%
- Ability to meet schedule – 20%
- Cost – 40%

The port may then interview and check references of one or more firms before finalizing the evaluation.

Note that this example also commits the port to interviewing and checking references of all proposers, not just the finalist.

Example 3 – Basis of selection

Selection will be based on:

- Experience of key personnel – 20%
- Ability to meet schedule – 20%
- Cost – 40%

- Interview – 20%

When assigning relative weights, consider the implications with hypothetical proposals. For example, consider the challenge a lower-priced proposal would have to overcome if past experience is heavily weighted. Conversely, assigning a greater weight to past experience is fully justified if the service required affects core port operations.

The following examples should help you determine what evaluation criteria scoring is suitable for your specific RFP. The table below shows the prices quoted and the quality points assigned to four proposals submitted in response to an RFP.

Criteria	Proposer A	Proposer B	Proposer C	Proposer D
Quality points 100max	90	78	70	80
Price	\$160,000	\$140,000	\$90,000	\$120,000

Common scoring methods are illustrated below using the four proposals:

Best quality within budget: The port has not announced a budget figure and intends to award to the highest quality proposal within budget. The budget is \$150,000, so award is to Proposer D. Drawbacks to this scoring method include the lack of guidance given to consultants by the absence of a budget and the inability to accept a cheaper proposal of acceptable quality.

Price/value scoring: Non-price factors are scored. A firm price is finalized if necessary. The total quality score is divided by the proposer’s price to arrive at a price/value ratio. Proposer C has the best ratio as shown below:

Criteria	Proposer A	Proposer B	Proposer C	Proposer D
Quality points 100 max	90	78	70	80
Price	\$160,000	\$140,000	\$90,000	\$120,000
Cost-value ratio	56	56	78	66

Weighted price scoring: Points are assigned to price and quality factors. The lowest priced proposal is the baseline and receives the maximum number of price points, i.e., 100. For each higher-priced proposal divide the lowest price by the price proposal. Proposer C has the most points as shown below:

Criteria	Proposer A	Proposer B	Proposer C	Proposer D
Quality points 100 max	90	78	70	80
Price	\$160,000	\$140,000	\$90,000	\$120,000
Price points 100 max	56	64	100	75
Total points	146	142	170	155

The weighted price scoring process works well when all proposers are expected to be close in price and/or a budget has been published. If price is assigned a weight significantly less than 50 percent, the quality points will control selection.

Best value narrative: Instead of assigning points to the price proposal, the port performs a technical analysis of the price/quality tradeoff. The port prepares a narrative explaining why the selected proposal represents the best value.

Solicitation Process

Ports may wish to post the solicitations and conduct the solicitation process entirely through the internet whenever feasible because of efficiency, cost savings, and automatic documentation. A formal competitive process may be initiated via a published advertisement in a newspaper of general circulation and/or via posting on the port's web site and other web sites serving the contracting community, such as Washington's Electronic Business Solutions (WEBS) sponsored by the Department of General Administration.

Practice Tip:

If the port allows or requires submittals in electronic format, Adobe PDF files are preferable because the original document formats are preserved.

In addition, an email notification to potential consultants, from a roster or other source, is also acceptable, but email alone is not a substitute for an advertisement or web posting because it does not ensure "an equal and open opportunity to qualified parties."⁹

When "evidence of competition" is required (contracts not exceeding \$200,000), the solicitation may be accomplished via email to potential consultants identified either from a roster or other sources identified on page 25.

Practice Tip:

Notify your executive director and commissioners before issuing solicitation documents, whether or not prior approval is required. The commissioners, executive director and port staff should not discuss pending procurements; all questions should be directed to the staff responsible for the competitive selection process. Prior notification also helps to maintain the appearance of fairness of the selection process.

Pre-Proposal Meeting

While a pre-proposal meeting can produce a useful exchange of information, attendance should not be mandatory. Information important enough to impart to proposers should be in the written RFP or addenda. A pre-proposal meeting affords small businesses the opportunity to network and facilitates the formation of consultant teams. The port should acknowledge the expertise of the consulting community and invite suggestions aimed at helping the port obtain the best value. All such feedback should be incorporated into an addendum if changes to the RFP result.

⁹See RCW 53.19.010(2).

Practice Tip:

Too often, the RFP statement of need is brief but the description given at the pre-proposal meeting is expansive. When writing the RFP statement of need or scope, imagine that you are talking to the potential consultants at the pre-proposal meeting about your requirements. More information usually results in better proposals.

Tips for a successful pre-proposal meeting:

- Have a sign-in sheet; copy and distribute as part of an addendum.
- In the RFP, request that questions or comments be submitted before the meeting in order to better prepare responses.
- If participation is available by call-in teleconference capability, provide this information in the RFP.
- Document information and answers provided in an addenda.
- Remind attendees that statements made at the meeting are not part of the RFP; a future addendum is required.
- Don't try to answer complex questions that cannot be answered by referencing the RFP; instead, advise attendees that responses will be provided in a future addendum.

Deadline for Submitting Proposals

Allow sufficient time for consultants to prepare their proposals, especially if the RFP requests project pricing as opposed to hourly rates. When the time allowed is unrealistically short, the port runs the risk of losing potential proposers who decide that the time allowed is insufficient.

Specify a time as well as date as the deadline for submission. Since your goal is to receive as many proposals as possible, consider ways to make the submission process easier on consultants. Depending on the complexity and estimated cost of the consultant service consider:

- Allowing electronic or fax submissions (and don't require six bound copies).
- If physical delivery is required, avoiding a Monday deadline that presents delivery challenges for courier services.
- Specifying a later afternoon delivery deadline as opposed to a morning deadline.

Receipt of Proposals

Proposals should be logged in and a receipt or an electronic acknowledgement may be provided. Proposals should not be opened until after the deadline for receipt. Proposals do not need to be publicly opened. Each proposal should be opened, or electronic transmittals printed, and verified for completeness before proposals are copied or distributed to the reviewers.

specifically address whether to have deadline waiver criteria and should ensure consistent application of such criteria. A determination to waive a deadline based on established criteria should be made before the late proposal is opened.

Unlike public works bids where a bid received after the deadline is rejected as non-responsive, some latitude is permitted with the deadline for submission of proposals. Criteria to consider when deciding whether to accept a late submittal include: is the late submittal the best value for the port; and, did the proposer received a competitive advantage?

An example of a competitive advantage would be if proposals require a detailed budget and are due Friday at 4:00 p.m., but one proposer turns in the proposal the next Monday morning. An example of a non-competitive advantage is if the proposer sent the proposal by courier allowing sufficient time for the proposal to be received by the port before the deadline but the proposal is not delivered on time. The proposer did not gain a competitive advantage by having more time to work on the proposal.

What if only one proposal is received? While you can proceed with evaluation and award, you will want to determine the reasons for receiving just one proposal, if only to ensure that the port is obtaining the best value. Consider:

- Sufficient time allowed for proposals?
- Restrictive or proprietary specifications?
- Seasonal workload of proposers?

Discuss the reasons with other potential proposers. If time permits and the port's requirements can be made less restrictive, the RFP can be canceled and reissued.

If the port's time constraints and objectives warrant proceeding with the single proposal, the port may perform a price analysis to determine whether the cost is fair and reasonable or it may simply rely on the port's own estimate to negotiate a fair and reasonable price with the proposer.

Evaluation Process

A single port representative may evaluate proposals and recommend award of contract. A review panel of three persons is typically required as the value and complexity of the service increases. The panel may include non-port employees who offer subject matter expertise, such as the port's terminal operator, outside accountant, or the county's public works director.

Participation by port commissioners on a consultant evaluation panel presents open public meetings implications. If a quorum of commissioners participates on a consultant selection panel, the activity would be considered a meeting subject to the Open Public Meetings Act.¹⁰

Ensure a level playing field among proposers during the evaluation process. Ensure that all proposers are basing their pricing on the same assumptions and risk allocation. Incorporate the port's standard contract terms and conditions in the RFP. Address a proposer's objections to the port's standard contract terms and conditions before conducting price evaluations, because agreeing to a waiver of certain terms, such as providing professional liability insurance, creates a competitive advantage to the requesting consultant. Other frequent requests are:

¹⁰RCW 42.30.020(3); See "The Open Public Meetings Act," MRSC.

to a waiver of certain terms, such as providing professional liability insurance, creates a competitive advantage to the requesting consultant. Other frequent requests are:

- Consultant requests to cap liability to the amount of the fee.
- Consultant requests to shorten the statute of limitations.

One alternative available to the port is to communicate to proposers any changes to the standard terms and conditions and request final price proposals based on those changes. The port may then make a business decision based on the risk/price tradeoff. Larger agencies frequently announce in the RFP that the agency's standard terms are not subject to negotiation.

One panel member should be responsible for reference checks and should document all communications with references. Reference checks should address the firm and the key personnel proposed to do the work; check the individuals assigned to the project and how long they have been with the firm. The RFP should require disclosure of all relevant contracts performed during the identified period or the last relevant contracts performed by the entity. When several proposals are received, reference checks may be deferred until finalists are identified, or just the finalist(s) references may be checked.

Practice Tip:

References should be used to validate the information submitted by the finalist(s). References should not be a separately-scored element of the evaluation criteria unless the port plans to check references for all proposals submitted. Include in the RFP language affirming the port's right to select consultants based on the results of reference checks, affirming the port's right to consider previous services performed by the consultant for the port and to consider references in addition to those listed in the proposal.

Panel members should individually review the proposals and complete the evaluation worksheets before the panel meets. If the evaluation process assigns points to both quality and pricing, panel members can just score the quality elements; pricing can then be scored collectively during the panel meeting. The panel meeting should be postponed if panel members have not completed this individual review. Each panel member should describe his or her evaluations. Preliminary scores can be adjusted based on the panel discussion, interviews (if any), and the results of reference checks. Then, the panel members may finalize their respective scores and the panel may reach a consensus ranking. One panel member should prepare a summary of the panel's deliberations for incorporation into the recommendation to award.

Interviews

Should you interview finalists? There are pros and cons:

Pro –

- Interviews can streamline the process and assist the port in understanding the technical proposals.
- Interviews can provide greater opportunities to identify the best value based on all the proposals received.

Con –

- When time is a factor, scheduling all panel members and consultants becomes a challenge.
- When the interview becomes the deciding selection factor, the absence of a record of what transpired may preclude meaningful review of the selection rationale. To mitigate against the lack of a record of what transpired, have specific evaluation criteria worksheets for the interview panel. Consider developing scripted questions or scenarios to distribute before the interviews.

If interviews are held, it is important for panel members to weigh the interview consistent with the selection criteria in the RFP or, possibly, selection criteria developed specifically for the interview process. The preliminary scores from the written proposals may carry over to the interview to ensure that the final selection is not based on presentation skills.

The most frequent reason why consultant selection is successfully challenged is that the evaluation was not consistent with the stated evaluation criteria.¹¹

Practice Tips:

Have review panel members read the RFP, understand the criteria and selection process.

Review proposed evaluation criteria with panel members before RFP issuance.

Tailor general criteria to the specific requirements.

Document references, preferably from two contacts at each reference.

State whether the port will consider references other than those listed by the proposer.

Debriefings

Other finalists should be notified prior to contract execution and given an opportunity to request a debriefing. Debriefings should focus on the requester's proposal and the selection process, not on a detailed comparison of the finalists' proposals.

Protests

Port policy should address whether an internal protest procedure of the consultant selection is offered; otherwise a consultant's remedy is filing suit in superior court.

Disclosure of Evaluation Documents

Documents and worksheets prepared by evaluators may be exempt from disclosure but only until a contract is recommended for award.¹² Seek legal advice in the event of a records request.

¹¹Snyder, Keith F. & Walker, Mark F., "Best Practices and Protests: Toward Effective Use of Past Performance As a Criterion in Source Selections," *Journal of Public Procurement*, Vol. 1.1 (2001).

¹²Public Records Act Model Rules, WAC 44-14-06002(4).

Cancelling the Solicitation

While a carefully drafted RFP and a price estimate developed independently by the port should result in a successful competitive selection process, a solicitation may be cancelled at any time before contract execution due to factors such as:

- The port's requirements have changed;
- All proposals exceeded the budget;
- Change in funding;
- The port discovered it could contract with another public entity for the service.

If a solicitation is canceled, all proposers should be notified. Proposers do not have the legal right to compel award of a personal services contract.

Finalize Contract

The port may negotiate with one or more finalists to refine the scope of work, schedule, deliverables, and final price, all with the objective of obtaining the best value for the port. The port must ensure that the final scope is consistent with the services described in the formal solicitation document. A substantial change, regardless of the cost of the change, must be submitted to the port commission for a determination as to whether the change warrants the work to be awarded as a new contract. RCW 53.19.050.

It is incumbent on the port to resolve conflicts between the contract forms and the proposal. Ambiguities are construed against the drafter of the contract, i.e., the port.

The port should not simply incorporate the consultant's proposal by reference in the final contract, because the proposal may include contracting provisions that conflict with the port's standard terms and conditions. The better practice is to review an electronic version of the consultant's proposal and include in the final contract only those portions specific to the consultant's scope of services. The best practice is to integrate relevant portions of the consultant's proposal into an overall port template scope of services to ensure that standard key tasks and deliverables are required. As a safeguard, the port's standard contract should include an order of precedence clause, giving lower priority to the proposal as opposed to the final contract scope or port's standard terms and conditions.

Determine Whether the Price Is Fair and Reasonable

When determining whether a fee is fair and reasonable, consider such factors as:

- Risk assumed by the consultant;
- Nature of the services performed;
- Management of any sub-consultants;
- Time for performance.

When price is an evaluation factor, an open competitive solicitation is presumed to result in competitive pricing. So long as the price proposals are all based on the same RFP scope and risk allocation, the competitive process is sufficient documentation that the price is fair and reasonable. At a minimum, adequate price competition exists if you receive two or more proposals responsive to the RFP from responsible firms competing independently.

However, if price is not a factor, if the prices exceed the anticipated budget, if the prices reflect a wide variation, or if only one proposal is received, a price or cost analysis should be performed. Price analysis is a process of examining and analyzing a proposed price without evaluating separate cost elements and proposed profit/fee. Methods include:

- Comparison of prior proposed prices and contract prices with current proposed prices for the same or similar end items and services in comparable quantities;
- Comparison of contract pricing of other public agencies for similar scopes of services;
- Application of rough yardsticks (fee per lab test or hourly fee) to highlight significant inconsistencies that warrant additional pricing inquiry;
- Comparison with competitive published catalogs or lists, published market prices or commodities, similar indexes, and discount or rebate arrangements;
- Comparison of proposed prices with cost estimate developed independently by the port;
- Ascertaining that the price is set by law or regulation;
- Comparison with the port's own estimate.

By comparison, cost analysis is the review and evaluation of the separate cost elements including base labor rates, overhead, and proposed profit/fee of a proposal.¹³ The process requires greater knowledge of the consulting field, detailed examination of the consultant's accounts (both as to amounts and allocation), and analysis of risk factors. Firms that perform a significant number of federally-funded contracts will have an indirect cost or overhead rate established after federal audit.

In either case, the objective is a finding that the proposed price is reasonable in comparison with current or recent prices for the same or similar services procured in comparable amounts, and under comparable terms and conditions under contracts that resulted from adequate price competition.

Price and cost data are available at:

- National indexes such as Engineering News Record, but use with caution given the economy and geographic region;
- Other public entity contract rates such as WSDOT and King County;
- The Department of Information Services posts rates for its master contracts by service and skill category. See <http://des.wa.gov/services/ContractingPurchasing/ITContracts/Pages/default.aspx>.

As an alternative, the port may obtain a cost estimate from someone outside the port to validate the cost to perform the services.

Finally, every personal service contract must be in writing, including at a minimum:

- Description of parties;
- Scope of services, milestones, deliverables, etc.;
- Maximum payment and payment terms;

¹³FAA Procurement Guidance, Cost and Price Methodology (revised 7/2008).

- Contract time;
- Signatures of all parties, as required;
- Every contract should also include the port's standard terms and conditions.

Contract Approval

Every port should have a master policy resolution that identifies which contract actions require commission approval and which are delegated to staff. The master policy resolution should also address who is authorized to sign contracts after approval has been given. In this Guidance document, the terms "approve" and "authorize" refer to the action of committing port funds for the proposed consultant services as reflected in a motion passed by the commission or an authorization memo signed by the executive director or designee. The terms "execute" or "sign" mean the physical signing of the contract document, typically by the executive director or procurement staff who review the specific language of the contract, compare the contract scope with the scope included in the formal solicitation document, and verify appropriate authorization.

The port personal service contract legislation does not specify a dollar threshold for commission authorizations. However, a substantial change, regardless of the cost of the change, must be submitted to the port commission for a determination as to whether the change warrants the work to be awarded as a new contract. RCW 53.19.050.

For many ports, personal service contracts subject to the competitive solicitation requirements of RCW 53.19.020, i.e., cost exceeding \$50,000, will require authorization from the commission. Consider requesting commission authorization of a contingency in addition to the contract amount to be able to respond to necessary or desirable additional services, subject to the requirement of commission approval for substantial changes in scope. A typical contingency for a contract in excess of \$200,000 is 10 percent or \$25,000, whichever is less. Commissioners can be apprised of contingency expenditures via a weekly report to commissioners, specific email, or other port communication practices.

The master policy resolution should also address approval of time extensions.

Practice Tip:

Ensure that any issues regarding scope, costs, or terms and conditions have been resolved with the proposed consultant before the contract goes to your commission or executive director (if required) for execution.

Ports should provide clear guidance regarding which staff members are authorized to execute and sign personal service contracts - as opposed to authorizing funds. For some ports, the commission and/or executive director delegate contract signing to the purchasing or contracts director. This practice has two benefits:

- Maintaining the separation between the contracting and receiving function (see Section 8.2);
- Ensuring that the final contract is reviewed and signed by the person with the best expertise in contracting.

A common practice among consultants is to submit a proposal for services directed to the functional department head, with a signature line for acceptance by the department head. From the consultant's perspective, the signed proposal represents a contract. For the port, it creates problems of apparent authority, audit trail, non-compliance with statutes, and protection of port resources.

Practice Tips:

For how long can I rely on an earlier RFP process? – The RFP process typically addresses a specific scope. You may, but are not required to, rely on the earlier RFP process for replacing a defaulting consultant with the next most qualified or for awarding services that were included within the initial solicitation documents. However, if significant time has elapsed, e.g., one year, or technology has changed, issue a new RFP.

What about awarding annual contracts under \$50,000 for routine services? – Such awards are appropriate for services funded from the annual budget, so long as they are not structured for the purpose of evading the competitive solicitation requirements. As an alternative, conduct a formal or informal selection process and then award a one-year contract with annual renewals at the port's option. The port's master policy resolution should specifically address whether staff is delegated the authority to award annual contracts for routine services.

Generally, contracts for non-routine services are awarded for a finite period to match a specific scope of services. Renewal clauses for these contracts are not usually appropriate.

Ensure that an annual contract is not used to cover a dollar shortfall for a contract awarded for a specific scope of services.

Chapter 8

Contract Administration

Monitoring Contract Performance

A port representative should be designated as the sole contact for the consultant and should be responsible for coordinating the consultant's services with other port personnel, be it operations interface or invoice payment. Even with a signed contract, the port representative should monitor performance to ensure that the consultant is performing the defined scope on time and within budget.

The port representative should understand and honor the differences in roles between the consultant and port employees, and maintain a clear separation of responsibilities.

Monitoring activities should be tied to specified milestones for either deliverables or progress payments. The port representative should review the original contract plus any amendments, compare task progress with payment applications, check to see who is actually performing the services, and compare schedule to progress. For larger contracts, convene periodic meetings with the consultant to discuss administrative matters, schedule, future requirements, and suggested improvements to both the consultant's and port's performance.

Ports should attempt to resolve contract problems or issues at the lowest level, with the port representative encouraged to promptly elevate any unresolved matters. Ports should consider delegating to the port representative authorization to approve scope or cost changes within clear limits in order to maintain schedule or resolve disputes promptly.

Contract Time

Work cannot start until the contract is signed by all parties. All services must be completed on or before the contract end date, unless the contract provides otherwise. Payments can be made after the contract expiration date. An amendment extending the time for performance may be signed at any time before contract expiration. An expired contract cannot be revived, except with commission approval. Issuing a new contract creates issues of competitive selection, so track contract expiration dates!

Proposed automatic renewals (with a commitment for the next year's service fee) are a common technique seen most often in IT service contracts. Beware of these provisions because:

- Commission or executive approval may be required for any amendment; and
- Such provisions usually include a full year's service commitment with no proration of cost.

Contract Administration File

Contract documents and communications should be maintained by the port in consistent formats. Page 9 is a checklist of items that the port should consider retaining in its files. Ports should

customize the checklist on Page 9 to identify documentation required for small-dollar or exempted contracts, or for other requirements exclusive to the port.

Ensure that required insurance documentation is provided before work begins. Additional insured endorsements are required in order to ensure that any claims would be addressed directly by the consultant's insurance carriers. If the contract requires the consultant to have insurance and to provide the port with a certificate of insurance naming the port as an additional insured, the port needs to ensure that the insurance certificate is in the file and meets the requirements of the contract. The port should also have a tickler file for contracts longer than a year to ensure insurance does not expire. The insurance certificate should be obtained before the consultant starts work.

Record Retention and Access

Since the statute of limitations for written contracts is six years,¹⁴ the personal services contract records should be retained for a minimum six-year period after completion of services. For personal services contracts associated with real property transactions, the port may wish to retain the records so long as the port owns the property. Your port's retention schedule may be less; consult with your records manager or the State Archivist who publishes the records retention schedule as required by law.¹⁵

Payment Procedures

As with all procurements, ports should identify separate port personnel responsible for contract authorization and separate port personnel responsible for contract payment. For most ports, contract approval and signing is accomplished by the commission and executive or procurement personnel. The project manager then reviews and approves invoices before review and payment by accounts payable. Contract amendments are negotiated by the project manager and approved and signed by the commission and/or executive or procurement personnel.

Invoicing Guidance

Ports should develop and publish guidance to their consultants regarding invoice payment requirements and schedules. Ports should address:

- Information required before first payment is issued, e.g., tax information;
- Monthly schedules for invoice receipt and check issuance;
- Electronic invoicing and payment options;
- Documentation required for expenses;
- How to reach port contacts for accounts payable.

Invoice Documentation

The contract should also define the documentation required to authorize payment, to assist the contractor in invoicing correctly so that the port can expedite approval of the invoice for payment. At a minimum, invoices submitted should include the contract number, date(s) service was provided and a description of services provided or received. The approval for payment can be documented by the initials of the approving staff and the date on the contractor's invoice, or by an electronic approval process.

¹⁴RCW 4.16.040(1).

¹⁵See Secretary of State "Records and Information Management Publications for Local Governments."

Expense documentation can result in voluminous paperwork and delays in payment. Some ports have adopted expenses guidelines that encourage consultants to incorporate most routine expenses into their hourly rates so that invoice approval is expedited.

Practice Tips:

Tie progress payments to actual progress as defined by milestones or deliverables. Specify a final payment after all deliverables are submitted.

Always establish a limit on fees and on expenses. If necessary, budget a contingency or develop a contract amendment process, but always establish written spending controls.

Institute invoice tracking to record receipt, routing, and approval actions to ensure that consultants are either paid promptly or promptly advised of invoicing omissions.

Contract Overpayment

Overpayment can occur if the total payments exceed the contract amount or, more likely, if progress payments exceed services performed to date. If progress payments exceed services, the port representative should meet with the consultant to address future performance expectations tied to payments. If a total contract overpayment or payment for disallowed costs is discovered, the port must take appropriate action. Consult with accounting or auditing staff and port legal counsel for guidance. Contract language may allow withholding of other payments due or to become due until the overage is resolved.

When sub-consultants are involved, the port may request the prime consultant to verify that invoice amounts for sub-consultant services have been paid to the sub-consultant.

Contract Amendments

A contract amendment may change the scope of services, price, schedule, or other material elements. Amendments may also authorize changes to key personnel, the assignment of the consulting contract to a successor firm, or address new regulatory requirements. As noted, substantial changes (from the contract or formal solicitation documents) require a commission determination of whether a new contract should be awarded. "Substantial changes" is not defined in the legislation. Criteria to consider include the price of the change relative to the original contract price, the length of time extension relative to original contract time, and the addition of new service categories or tasks. The determination is on a case-by-case-basis.

Amendments to the basic contract elements or standard terms must be accomplished by a writing signed by both the port and consultant. A letter or email from one party to the other is not sufficient.

A contract amendment may authorize additional scope which the commission had authorized when approving the original contract, e.g., grant application, followed by grant management if the grant is awarded. As an alternative, for multi-phase services, e.g., selection of computer system, followed by set-up services, the entire scope may be included in the initial contract, with installation authorized only by the port's written authorization to proceed to the installation phase.

Contract compliance with the enacted legislation for contract amendments is addressed on page 20.

Contract amendments should always be documented by a justification and, when the price is increased, evidence that the price was determined to be fair and reasonable.

Contract Remedies

Insurance

Commercial liability and, where applicable, automobile insurance should be required of all consultants so that the port will be protected if the consultant causes an accident in the course of performing services for the port. The amount of coverage required is minimal for most contracts, e.g., one million dollars. Professional liability insurance should be required when it is commercially available for the type of service provided and the port has determined that it is necessary. Become familiar with the standard exclusions from coverage, such as cost estimating. Professional liability insurance may be cost-prohibitive for small firms or sole practitioners in specialized fields. When a competitive selection process is required, ensure all potential proposers are notified if insurance requirements are reduced, as it will affect their pricing. In such cases the port may arrange for coverage through its own insurance program or may waive the requirement, noting the cost/benefit reasons in the procurement file.

Warranty

Most contracts specify a warranty period during which a consultant should correct any errors or omissions in its services, regardless of whether the consultant was negligent. Consultants and their insurers are increasingly imposing notice deadlines in their proposed contracts that require ports to be diligent in their assessment of the consultant's final product, so that deficiencies are identified before the deadline. Most ports will reject proposals that impose additional notice deadlines at the RFP stage. However, check your contract documentation for any specific notice requirements.

Consultants are frequently retained to assist the port in the installation of new systems or equipment by third parties. The port may require the consultant's services when malfunctions occur, which is usually after the original consultant contract has expired. The legislature recognized this situation as a legitimate sole source selection in RCW 53.19.010(9).

Standard contract terms and conditions should include provisions allowing the port to terminate the contract based on two separate reasons:

- Termination for default (breach of contract); and
- Termination for government convenience. See Appendix A3.

Contract Breach

For errors or omissions, the port may pursue correction or a claim for damages beyond the warranty period. The port may also pursue a claim for breach of contract when, for example, the consultant simply did not perform or only partially performed. Consult with your port attorney regarding negligence or breach of contract issues before communicating with the consultant regarding a potential termination.

In the event of a contract breach, pursuit of personal service contract remedies is difficult when the contract scope is vague or the consultant's financial resources are unknown. The best practice is to write a contract that specifies the deliverables required before payment and to tie progress payments to verifiable milestones.

Contract Termination

If the port is considering contract termination, consider the following informal risk analysis:

- Is the termination the result of contractor default or for government convenience, i.e., shift in priorities, reduced funding?
- Does the agreement with the consultant address both causes for termination?
- If it is a termination for default, does the agreement require that the consultant be notified of the default and given an opportunity to cure the problem?
- Did the port's actions contribute to the consultant's default?
- Does the port need the consultant to turn over "work in progress"?
- If the services must be completed by another consultant, is it feasible to select that consultant from the finalists from the initial competitive selection? Will the port's policies require a new competitive selection process if, e.g., more than one year has elapsed or the market has changed?

Evaluation of Consultant Performance

A consultant evaluation is a performance measure designed to provide a uniform standard to determine:

- If the consultant has completed performance of its services;
- If full payment for services performed is warranted; and
- How the consultant will be evaluated for future work.

In developing performance measures, address both services performed and expected outcomes. For example, a consultant may be prompt and responsive in delivering services, but may have failed in achieving the overall objective. Address the causes of marginal performance, especially when the causes include factors beyond the control of the consultant, such as a vague scope, poor contract administration, or technical impossibility. Address the overall performance of both the firm and the key personnel.

Identify how the port will measure the quality of performance in the written consultant evaluation – numeric scoring or descriptive terms. Either way, define the terms. With a range from 1 to 5, is 1 highest or lowest? Descriptive terms such as "met expectations" have broad implications.

Afford the consultant an opportunity to review the draft evaluation before it is finalized and to provide any comments, especially those which suggest improvements to the port's contract administration.

Chapter 9

Accounting/Financial Methods and Procedures

BARS Manual

All local governments, including ports, follow the uniform system of accounting and reporting prescribed by the State Auditor. RCW 43.09.200. Ports follow the Budgeting, Accounting, and Reporting (BARS) Manual published by the State Auditor for ports. The BARS Manual includes the prescribed uniform charts of accounts, accounting and budgeting policies, guidance for preparation of financial statements, and instructions for preparation of required supplemental schedules. The BARS Manual identifies the basic principles of accounting and describes the certification of payments and keeping vouchers and original support for all expenses, including personal services contracts.

If the port is engaging consultants in support of industrial development, trade promotion, or promotional hosting, the expenditures must be “pursuant to specific budget items as approved by the port commission at the annual public hearing on the port district budget.” RCW 53.36.120. The State Auditor must audit all port expenditures for industrial development, trade promotion, or promotional hosting. RCW 53.36.150.

If the port is entering into a cost reimbursement arrangement with a consultant, it is critical for the port to determine the adequacy of the consultant’s accounting system, especially for the allocation of indirect costs or overhead to individual jobs. (This reason alone discourages such arrangements.)

Fiscal Principles

The following suggestions are adapted from OFM, Personal Service Contracts, Section 15.40.30a: Fiscal Principles.

Fiscal principles that apply to personal service contracts include, but are not limited to:

- Port districts must pay reasonable and fair prices for services.
- Payment to the contractor must be made according to the terms of the contract. A clear statement of work should directly correlate to the method of compensation in the contract.
- Contractors must have accounting methods and systems that are describable and auditable, applicable to the circumstances. Contractors must comply with accounting measures and principles appropriate to the contractor’s type of entity and as identified in the contract.
- Payments made under personal service contracts must be applicable to the services provided and consistent with the rates and fees agreed upon.

- Payments made under personal service contracts must be adequately documented and supported by appropriate accounting records maintained by both the port district and the contractor.
- Payments should not be made for the same or similar services more than once (no duplicate payments to contractors).
- Port districts are to pay contractors for services in a timely manner (chapter 39.76 RCW). This is contingent upon the contractor completing work satisfactorily and submitting accurate and complete invoices.
- Port districts should track fund sources to ensure overpayments don't occur in any particular fund.
- Port districts should have a means to recover contract overpayments if discovered.

Excise Taxes

Personal and professional service contracts are not subject to state sales tax,¹⁶ but service providers are obligated to pay the state business and occupation (B&O) tax. Also, some cities impose their own, local B&O tax. The B&O tax can be included in the general overhead of the consultant in establishing price but should not be passed on to the port, whether the consultant invoice denotes the tax as excise tax or B&O tax reimbursement.¹⁷

Special excise tax rules apply to particular services. For example:

- Portrait and commercial photographers are required to collect sales tax on the sale of photographs. Some photographers consider their work artistic creations and prefer to grant a license to use the created photographs rather than sell the photographs outright. In these cases, sales tax does not apply.¹⁸
- Information technology services, including the creation of custom software, are not subject to retail sales tax. Purchases of standard software are retail sales even if a consultant configures the software for the particular use. Computer hardware maintenance and repair services are retail sales.¹⁹

¹⁶The retail sales tax does not apply to the amount charged or received for the rendition of personal services to others, even though some tangible personal property in the form of materials and supplies is furnished or used in connection with such services. WAC 458-20-138.

¹⁷See *Nelson v. Appleway Chevrolet, Inc.*, 129 Wn. App. 927 (2005).

¹⁸Sales by photographers of the right to publish photographs are primarily licenses to use and not sales of tangible personal property. Such sales are not subject to the retail sales tax. WAC 458-20-140.

¹⁹See WAC 458-20-156.

Chapter 10

Monitoring and Financial Reporting

Funds Tracking

The contract should tie progress payments to milestones and deliverables. Progress payments based solely on hours worked precludes the port from monitoring performance.

Occasionally, a consultant may request that the port make an advance payment, typically when a major investment in materials or software is required to perform the services. Advance payments, while they may be currently authorized by statute, are not a good idea. RCW 42.24.080 was amended in 2008 to allow advance payments, although the intent of the legislation was to allow advance payment only in a limited situation involving public utility districts. Legislation will likely be introduced in 2009 to correct this erroneous authorization.

Audits

Risk-based audits review the management, fiscal controls, and contracting practices of the port relating to personal service contracts.

Auditors review for contract compliance. Port personnel need to ensure that all requirements in the contract are met, or an internal control weakness will be noted that can result in a finding. It is important to tie all contract fees and expenses to invoices and document your auditing efforts to prove to auditors that you are actively administering the contract. The database required of larger ports in RCW 53.08.440 should be its key audit control of contracting practices.

The financial records of any nonprofit corporation receiving port funds are also subject to audit by the State Auditor's Office. RCW 53.06.060.

Contract Database

By January 1, 2010, all ports with more the ten million dollars in gross revenue must maintain a database on a public web site of all contracts. RCW 53.08.440. Required data includes:

- Contactor/consultant name;
- Contract purpose;
- Effective dates and periods of performance;
- Contract cost and funding source;
- Contract modifications;
- Competitive solicitation process or exemption.

Keeping the database current should be a top priority because of its value as a contract administration and internal audit tool. Port procedures should require staff to use the database to ensure compliance with statutory requirements, such as:

- ensuring that contract amendments exceeding 50 percent of the original contract are filed with the commission and publically available; and
- ensuring that contracts are not structured to evade competitive solicitation requirements.

During external audits, ports should be able to produce current contract status reports promptly and without having to make wholesale updates to the data.

Chapter 11

Performance Measures

Benchmarking

Benchmarking is the process of comparing performance with other entities with the objective of improving performance. Different benchmarking analyses include:

- Financial – performing a financial analysis to compare cost and competitiveness;
- Performance – comparing service delivery with competitors; and
- Process – comparing business processes with best practices to identify efficiencies.

The process of benchmarking includes the following steps:

- Identify or reconfirm the port's core businesses;
- Identify problems affecting core businesses;
- Identify other entities that either;
 - Share the same problems, or
 - Are leaders within the core businesses;
- Survey those entities for measurements and alternative performance methods; and
- Identify and implement business process improvements.

With the enactment of the new personal service contract legislation, benchmarking offers a significant opportunity for ports. Every port will now need to evaluate and revise its existing policies and procedures regarding personal service contracts.

A baseline “before and after” measurement can be established addressing the time required to solicit and execute contracts, the quality of the performance received, and the costs – both of the service and the port's administration.

Ports can then compare performance with other ports, and with state agencies that have operated under similar legislation for 20 years. The benchmarking process should offer ports the tools to expedite the selection process, improve its overall quality, and realize cost savings through competition.

A sample task matrix for personal and professional services contracts prepared by the Port of Everett is in online Appendix D8. It provides a baseline for benchmarking the required steps and identifying “before and after” practices.

Internal and External Performance Audits

Financial and performance audits of ports are performed by the Washington State Auditor. In addition to the legal and contractual compliance of traditional audits, performance audits offer an objective and systematic assessment of the performance and management of an entity, program, activity, or function in order to:

- Provide information to improve performance and operations;
- Facilitate decision-making by parties with responsibility to oversee or initiate corrective action; and
- Improve accountability to the public.

Ports can develop a basic internal audit system to track their progress in implementing the new contracting requirements using the materials appended to the online version of this Manual. Port staff can utilize the checklists and other material provided to assess their understanding of the contracting requirements and to provide feedback where the Manual should be clarified.

With respect to consulting services, the goals of an internal audit system are to demonstrate a transparent competitive process resulting in the selection of the best value contracts in compliance with port personal service contracting law.

In addition, ports should implement an internal control system which:

- facilitates timely discovery of improper conduct and prompt implementation of corrective measures;
- conducts periodic reviews of policies/procedures;
- provides an internal reporting mechanism; and
- provides for disciplinary action (from Federal Acquisition Regulations (FAR) 52.203-13c).

To best integrate compliance into the port culture, the port's performance evaluation system should be reviewed to determine if it adequately addresses the employees' efforts to manage consultant contracting in accordance with the new requirements.

Chapter 12

Federal Funding Requirements

Recipients of federal funds must comply with applicable federal consultant contract requirements in addition to Washington port personal services contracting laws. To the extent that Washington ports receive federal funds, it is typically in the form of grants issued by the Federal Aviation Administration (FAA), Department of Homeland Security (DHS), or Federal Highway Administration (FHWA), typically through WSDOT. Some Environmental Protection Agency (EPA) grant funds are awarded through the Department of Ecology, but these awards typically do not include additional consultant contracting requirements.

Federal grant funds usually do not require full compliance by recipients with the Federal Acquisition Regulations (FAR's), and most Washington ports do not have the staff needed for the intensive contract administration required. Instead, federal grants usually require compliance with grant terms and OMB uniform administrative requirements and cost principles. See OMB Circular A-87, now codified in title 2 of the Code of Federal Regulations at <http://www.ecfr.gov/cgi-bin/text-idx?SID=7943b17022abfda8d0767f40c2f9bfe5&mc=true&node=pt2.1.200&rgn=div5>.

While ports are cautioned to review the specific requirements of their grants, including reference documents, the following additional requirements apply to many federal grants:

- RFPs must specify weighted criteria including price (except A/E services);
- ports must adopt protest procedures for procurements;
- stricter compliance with time deadlines for submission of proposals (see FAR 52.214-7 re late proposals);
- the FAR's and the accompanying Architectural/Engineering Services Form 330 reflect a broad definition of A/E services; and
- competitive solicitation proposals are not available under the Freedom of Information Act unless incorporated into a contract. 5 USC 552; FAC 24.202.

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Appendix A

Appendix A1: Chapter 53.19 RCW

Chapter 53.19 RCW Personal service contracts

Sections

53.19.005 Intent.

53.19.010 Definitions.

53.19.020 Exceptions.

53.19.030 Emergency contracts.

53.19.040 Sole source contracts.

53.19.050 Compliance with chapter – Civil penalties – Auditing – Prosecution.

53.19.060 Changes in scope of work – Amendments to contracts.

53.19.070 Application of chapter restricted.

53.19.080 Management of contracts – Guidelines.

53.19.090 Commission policies – Ports to follow.

53.19.100 Training course.

53.19.005 Intent.

The legislature hereby establishes a policy of open competition for all personal service contracts entered into by port districts unless specifically exempted under this chapter. It is further the intent to provide differentiation between the competitive procurement procedures for personal and professional services contracts.

[2008 c 130 § 5.]

53.19.010 Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Commission" means the elected oversight body of an individual port.

(2) "Competitive solicitation" means a documented formal process providing an equal and open opportunity to qualified parties and culminating in a selection based on criteria, in which criteria other than price may be the primary basis for consideration. The criteria may include such factors as the consultant's fees or costs, ability, capacity, experience, reputation, responsiveness to time limitations, responsiveness to solicitation requirements, quality of previous performance, and compliance with statutes and rules relating to contracts or services.

(3) "Consultant" means an independent individual or firm contracting with a port to perform a service or render an opinion or recommendation according to the consultant's methods and without being subject to the control of the port except as to the result of the work. The port monitors progress under the contract and authorizes payment.

(4) "Emergency" means a set of unforeseen circumstances beyond the control of the port that either:

(a) Present a real, immediate threat to the proper performance of essential functions; or

(b) May result in material loss or damage to property, bodily injury, or loss of life if immediate action is not taken.

(5) "Evidence of competition" means documentation demonstrating that the port has solicited responses from multiple firms in selecting a consultant.

(6) "Personal service" means professional or technical expertise provided by a consultant to accomplish a specific study, project, task, or other work statement which may not reasonably be required in connection with a public works project meeting the definition in RCW 39.04.010(4). "Personal service" does not include purchased services as defined under subsection (8) of this section or professional services procured using the competitive selection requirements in chapter 39.80 RCW.

(7) "Personal service contract" means an agreement, or any amendment thereto, with a consultant for the rendering of personal services to the port.

(8) "Purchased services" means services provided by a vendor to accomplish routine, continuing, and necessary functions. "Purchased services" includes, but is not limited to, services for equipment maintenance and repair; operation of a physical plant; security; computer hardware and software maintenance; data entry; key punch services; and computer time-sharing, contract programming, and analysis.

(9) "Sole source" means a consultant providing professional or technical expertise of such a unique nature that the consultant is clearly and justifiably the only practicable source to provide the service. The justification shall be based on the uniqueness of the service, sole availability at the location required, or warranty or defect correction service obligations of the consultant.

[2008 c 130 § 6.]

53.19.020 Exceptions.

All personal service contracts shall be entered into pursuant to competitive solicitation, except for:

- (1) Emergency contracts;
- (2) Sole source contracts;
- (3) Contract amendments;

(4) Contracts between a consultant and a port of less than fifty thousand dollars. However, contracts of fifty thousand dollars or greater but less than two hundred thousand dollars shall have documented evidence of competition. Ports shall not structure contracts to evade these requirements; and

(5) Other specific contracts or classes or groups of contracts exempted from the competitive solicitation process by the commission when it has been determined that a competitive solicitation process is not appropriate or cost-effective.

[2008 c 130 § 7.]

53.19.030 Emergency contracts.

Emergency contracts shall be filed with the commission and made available for public inspection within seven working days following the commencement of work or execution of the contract, whichever occurs first. Documented justification for emergency contracts shall be provided to the commission when the contract is filed.

[2008 c 130 § 8.]

53.19.040 Sole source contracts.

(1) Sole source contracts shall be filed with the commission and made available for public inspection prior to the proposed starting date of the contract. Documented justification for sole source contracts shall be provided to the commission when the contract is filed. For sole source contracts of fifty thousand dollars or more, documented justification shall include evidence that the port attempted to identify potential consultants.

(2) The commission shall ensure that the costs, fees, or rates negotiated in filed sole source contracts of fifty thousand dollars or more are reasonable.

[2008 c 130 § 9.]

53.19.050 Compliance with chapter — Civil penalties — Auditing — Prosecution.

A port commissioner or employee shall not expend any funds for personal service contracts subject to this chapter unless the port has complied with the competitive procurement and other requirements

of this chapter. The port commissioner or employee executing the personal service contracts is responsible for compliance with the requirements of this chapter. Willful and intentional failure to comply with the requirements of this chapter subjects the port commissioner or employee to a civil penalty in the amount of three hundred dollars. A consultant who knowingly violates this chapter in seeking or performing work under a personal services contract is subject to a civil penalty of three hundred dollars or twenty-five percent of the amount of the contract, whichever is greater. The state auditor is responsible for auditing violations of this chapter through its regular financial and accountability audits. The attorney general is responsible for prosecuting violations of this chapter. [2008 c 130 § 10.]

53.19.060 Changes in scope of work — Amendments to contracts.

(1) Substantial changes in the scope of work specified in the contract or which are substantial additions to the scope of work specified in the formal solicitation document shall be submitted to the commission for a determination as to whether the change warrants the work to be awarded as a new contract.

(2) An amendment or amendments to personal service contracts, if the value of the amendment or amendments, whether singly or cumulatively, exceeds fifty percent of the value of the original contract must be filed with the commission and made available for public inspection prior to the proposed starting date of services under the amendments.

[2008 c 130 § 11.]

53.19.070 Application of chapter restricted.

This chapter does not apply to:

- (1) Contracts specifying a fee of less than fifty thousand dollars;
- (2) Contracts awarded to companies that furnish a service where the tariff is established by the utilities and transportation commission or other public entity;
- (3) Intergovernmental agreements awarded to any governmental entity, whether federal, state, or local and any department, division, or subdivision thereof;
- (4) Contracts awarded for services to be performed for a standard fee, when the standard fee is established by the contracting agency or any other governmental entity and a like contract is available to all qualified applicants;
- (5) Contracts for services that are necessary to the conduct of collaborative research if prior approval is granted by the funding source;
- (6) Contracts for professional services which are entered into under chapter 39.80 RCW; and
- (7) Contracts for the employment of expert witnesses for the purposes of litigation or legal services to supplement the expertise of port staff.

[2008 c 130 § 12.]

53.19.080 Management of contracts — Guidelines.

(1) The municipal research services center, in cooperation with the Washington public ports association, shall develop guidelines for the effective and efficient management of personal service contracts by all ports. The guidelines must, at a minimum, include:

- (a) Accounting methods, systems, measures, and principles to be used by ports and consultants;
- (b) Precontract procedures for selecting potential consultants based on their qualifications and ability to perform;
- (c) Incorporation of performance measures and measurable benchmarks in contracts, and the use of performance audits;
- (d) Uniform contract terms to ensure contract performance and compliance with port, state, and federal standards;
- (e) Proper payment and reimbursement methods to ensure that the port receives full value for taxpayer moneys, including cost settlements and cost allowance;

(f) Postcontract procedures, including methods for recovering improperly spent or overspent moneys for disallowance and adjustment;

(g) Adequate contract remedies and sanctions to ensure compliance;

(h) Monitoring, fund tracking, risk assessment, and auditing procedures and requirements;

(i) Financial reporting, record retention, and record access procedures and requirements;

(j) Procedures and criteria for terminating contracts for cause or otherwise; and

(k) Any other subject related to effective and efficient contract management.

(2) The municipal research services center shall submit a status report on the guidelines required by subsection (1) of this section to the governor and the appropriate standing committees of the legislature no later than December 1, 2008.

(3) The Washington public ports association shall publish a guidebook for use by ports containing the guidelines developed under subsection (1) of this section.

4) The municipal research services center and the Washington public ports association shall each make the guidelines available on their web sites.

[2008 c 130 § 13.]

53.19.090 Commission policies — Ports to follow.

(1) A port entering into or amending personal service contracts shall follow the policies adopted by the commission, which shall be based on guidelines developed pursuant to RCW 53.19.080.

(2) This section applies to ports entering into or renewing contracts after January 1, 2010.

[2008 c 130 § 14.]

53.19.100 Training course.

The Washington public ports association shall provide a training course for port personnel responsible for executing and managing personal service contracts. The course must contain training on effective and efficient contract management under the guidelines established under RCW 53.19.080. Port districts shall require port employees responsible for executing or managing personal service contracts to complete the training course to the satisfaction of the commission.

[2008 c 130 § 15.]

Appendix A2: Review Teams

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Appendix A3: Sample Terms and Conditions for Personal Service Contracts

Disclaimer

These sample terms and conditions for personal services contracts are included in this document solely as examples of what other ports have used. No representation is made that these are specifically applicable to another port's unique contracts. Be sure to review this document with your port's legal counsel before use.

Note – Any changes for a specific Agreement should be highlighted so that Port staff signing and administering the Agreement are apprised of the changes. Handwritten changes must be initialed by both parties.

In consideration of the mutual covenants, obligations, and compensation to be paid by the Port to Consultant, it is agreed that:

1. **Representatives** – The Port's Project Manager and Consultant's Representative for this Agreement are as specified. Guidance or direction shall be valid only when communicated through these representatives. Alternate representatives may be appointed by either party with written notice to the other party. *Note: Ensures consistent lines of communication; avoids unauthorized changes.*
2. **Key Personnel** – The Consultant and/or its subconsultants' key personnel, as described in its Consultant selection submittals, shall remain assigned for the duration of the Project unless otherwise agreed to by the Port.
3. **Relationship of the Parties** – Consultant, its subconsultants and employees, is an independent Contractor. Nothing contained herein shall be deemed to create a relationship of employer and employee or of principal and agent. *See Guidance Chapter 4.4 for discussion. Port cannot just rely on this paragraph but must ensure the consultant is not treated as an employee in practice.*
4. **Conflicts of Interest** – Consultant warrants that it has no direct or indirect economic interest which conflicts in any manner with its performance of the services required under this Agreement. Consultant warrants that it has not retained any person to solicit this Agreement and has not agreed to pay such person any compensation or other consideration contingent upon the execution of this Agreement.
5. **Compliance with Laws** –
 - a. Consultant agrees to comply with all local, state, tribal and federal laws and regulations applicable to the services, including nondiscrimination and equal opportunity, registration and taxes, permitting regulations and those regarding employee safety, the work place environment, and employment eligibility. Consultant shall obtain all licenses and permits required to complete the scope of work.
 - b. The Port shall furnish Consultant with the information required by the Hazard Communication standard for materials preexisting on the project site. Consultant will ensure that this information is made available to the Consultant's personnel and subconsultants, and incorporated into the contract documents as appropriate. *Note: Some consultants will request that these clauses be deleted or revised if inapplicable to the scope of work; better to retain them in case the scope is expanded by future amendment.*

6. **Records and other Tangibles** – Until the expiration of six years after the term of this Agreement, the Port or its representatives has the right to audit this Agreement and Consultant shall maintain accurate records related to providing services under this Agreement. Consultant shall deliver such records to the Port upon termination of the Agreement or otherwise as requested by the Port. This paragraph shall survive the termination of this Agreement. *Note: six years is the statute of limitations applicable to written contracts.*
7. **Ownership of Work** – The services to be performed by Consultant shall be deemed instruments of service for purposes of the copyright laws of the United States. The Port has ownership rights to the work products prepared by the Consultant in performing these services. Consultant shall not be responsible for changes made in the work products by anyone other than the Consultant. Consultant shall have free right to retain, copy and use any tangible materials or information produced but only for its own internal purposes. Use of documents or other materials prepared under this Agreement for promotional purposes shall require the Port's prior consent. *Note: Transferring ownership presents issues for artists and for computer system design incorporating commercially available software. In such cases, replace the first two sentences with: Consultant assigns to the Port an irrevocable license to use and reuse for any lawful purpose the work products created by the Consultant in the course of performing these services.*
8. **Disclosure** – All information developed by the Consultant and all information made available to the Consultant by the Port, and all analyses or opinions reached by the Consultant shall be confidential and shall not be disclosed by the Consultant without the written consent of the Port or court order. *Note: for environmental remediation projects edit this paragraph to acknowledge that consultants may be under an independent obligation to report discovered contamination to regulatory agencies.*
9. **Deliverables** – All tangible materials produced as a result of this Agreement shall be prepared as specified by the Port's Project Manager. Delivery of materials produced shall consist both of the tangible materials and one electronic copy of any computer file used in the creation of the tangible product in a PDF format or other format specified by the Port. The Port may offset from the Consultant's fee expenses incurred by the Port in correcting deliverables not prepared in accordance with this paragraph.
10. **Compensation** – As full compensation for the performance of its obligations of this Agreement and the services to be provided, the Port shall pay Consultant as specified in the Agreement and the Port's Guidelines for Consultant Fees and Reimbursable Expenses. Consultant's expenses will be reimbursed at cost, with the exception of all third party costs which will be reimbursed at cost plus the negotiated percentage markup.
11. **Payment Schedule** – Consultant shall submit detailed numbered invoices showing description of work items being invoiced, work order number, title of project, total authorized, total current invoice, balance of authorization, individual's names and titles, hours, hourly rate and all authorized expenses itemized, with backup, in accordance with the Port's Guidelines for Consultant Fees and Reimbursable Items, by the 10th of the month to be paid by the end of the current month, unless other terms are agreed to by the parties.
12. **Costs and Disbursements** – Consultant shall pay all costs and disbursements required for the performance of its services under this Agreement.
13. **Indemnification** – To the maximum extent permitted by law, the Consultant shall defend, indemnify and save harmless the Port, its officers, agents and employees from any and all suits,

claims, penalties or damages arising out of the Consultant's obligations under this Agreement or Consultant's negligent act or omission or willful misconduct, except to the extent caused by the negligent act or omission or willful misconduct of the Port. The provisions of this paragraph shall survive the expiration or termination of this Agreement.

14. Insurance –

- a. Prior to the commencement of services Consultant shall submit to the Port certificates of insurance evidencing:
 - i) Commercial General Liability coverage on occurrence form CG0001 or equivalent with limits of \$1,000,000 per occurrence and \$2,000,000 aggregate;
 - ii) Automobile Liability covering owned, non-owned and hired vehicles of \$1,000,000 combined single limit per accident; and
 - iii) Professional Liability not less than \$1,000,000 per claim and in the aggregate. Insurance shall have a retroactive date before the date of notice to proceed and coverage shall remain in effect for the term of this Agreement plus three years. *Note: Delete when professional liability insurance is not commercially available for the specific services e.g. art or training.*
- b. All policies shall be issued by a company having an A. M. Best rating of A:VII or better. Each insurance policy shall be endorsed to state that coverage shall not be suspended, voided, canceled or reduced in coverage or limits except after 45 days prior written notice has been given to the Port. Except for professional liability, the Port shall be named as an additional insured on all policies on ISO Form CG 20 10 Form B. The certificates of insurance shall specify the project name, project number, and contract number. *Note: insurance requirements may be reduced or eliminated when the scope of services warrants and the cost savings are realized by the Port, such as when a Consultant is developing artistic materials from a remote location. Obtain Port approvals if required and document the risk assessment for the file. Note: review the insurance requirements annually for changes in the market.*

15. Standard of Care –

- a. Consultant shall perform its work to conform to generally accepted professional standards. Consultant shall be responsible for the professional quality, technical adequacy and accuracy, timely completion and coordination of all plans, designs, drawings and specifications prepared under this Agreement. Consultant shall, without additional compensation, correct or revise any errors or omissions in such work.
- b. The Port's approval of plans, drawings and specifications shall not relieve Consultant of responsibility for the adequacy or accuracy thereof. The Consultant shall remain liable for damages and costs incurred by the Port arising from the Consultant's errors, omissions or negligent performance of services furnished under this Agreement. *Note: May delete when inapplicable, particularly for artist services.*

16. Competitive Specification – If the scope of work includes development of specifications:

- a. Consultant shall provide for the maximum use of materials, equipment, construction methods and products that are readily available through competitive procurement, or through standard or proven production techniques.
- b. Consultant shall not produce a design or specification which would be restrictive or written in a manner as to contain proprietary requirements other than those based on performance, unless such requirements are necessary to demonstrate a specific outcome or to provide for necessary interchangeability of parts and equipment. Consultant shall justify in writing the use of any sole source. Where brand names are identified, they shall be followed by the salient product performance characteristics and the words "or approved equal" so that comparable quality or utility may be determined.

17. **Time** – Time is of the essence in the performance by the Consultant of the services required by this Agreement. The Consultant shall complete its services within the milestones set forth in the project schedule. At the end of each month the Consultant shall submit a copy of the current schedule and a written narrative description of the work accomplished, identifying scheduled milestones and the status thereof. The Consultant shall also address issues which may result in completion beyond the established schedule or budget.
18. **Assignability** – Consultant shall not assign any interest in this Agreement and shall not transfer any interest in the Agreement to any party without prior written consent of the Port. If subconsultants are authorized the Consultant shall ensure that these Terms and Conditions are incorporated into its agreements with subconsultants. *Note: without this paragraph Consultant is free to delegate performance or even “offshore” the work.*
19. **Termination of Agreement** –
 - a. The Port may terminate this Agreement if the Consultant substantially fails to fulfill its obligations under this Agreement through no fault of the Port. Any payment due for services satisfactorily performed prior to termination may be offset by the Port’s anticipated additional costs incurred because of the Consultant’s default. No payment shall be made for anticipated profit on unperformed work.
 - b. The Port may terminate this Agreement at any time for government convenience in which case it shall provide notice to the Consultant and reimburse the Consultant for its costs and fees incurred prior to the notice of termination.
 - c. Upon receipt of a termination notice the Consultant shall promptly deliver to the Port all data and deliverables developed while performing this Agreement, whether completed or in progress. *Note that the Port’s payment obligation varies depending on whether the termination is for default or for government convenience.*
20. **Disputes** – If a dispute arises relating to this Agreement and cannot be settled through direct discussions, the parties agree to endeavor to settle the dispute through a mediator acceptable to both parties, the cost of which shall be divided equally. The Port reserves the right to join any dispute under this Agreement with any other claim in litigation or other dispute resolution forum, and the Consultant agrees to such joinder, so that all disputes related to the project may be consolidated and resolved in one forum. Venue for any litigation shall be the Pierce County Superior Court of the state of Washington and the prevailing party shall be entitled to recover its costs and reasonable attorneys fees. *Note: arbitration, as opposed to mediation, is not recommended because it is less transparent and can be more costly than litigation.*
21. **Extent of Agreement** – This Agreement represents the entire and integrated understanding between the Port and Consultant and may be amended only by written instrument signed by both the Port and Consultant. *Note: this is known as an “integration” clause; it helps to ensure that changes are only authorized through established Port procedures and reflected in a written amendment signed by both the Port and Consultant. Note that the Consultant’s proposal or marketing materials must be incorporated into the Agreement if the Port is relying on representations made in such documents.*