

## ACEC Meeting with FHWA on Industry Issues

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This week ACEC met with key FHWA personnel for a wide-ranging discussion of industry issues, including cost recovery, FAR compliance/Audit Guide implementation and the anticipated changes to federal regulations governing consultant services. While some of the conversation centered on things ACEC knew already from previous briefings, several new pieces of information were shared with us. Below, please find a comprehensive update on these issues.

### **Cost Recovery:**

- FHWA has updated their timeline for completion of cost recovery. Currently, FHWA is predicting DCAA will finish their analysis of unallowable costs by the end of August or the end of September. At that point, FHWA will engage the State DOTs for actual recovery of costs and their timeline for completion is the end of the calendar year. FHWA did state that this timeline is a moving target based on resources.
- FHWA officials are currently working with Counsel to determine what appeal process will be used if a firm does not reach agreement with DCAA on their questioned costs. FHWA made reference to a process where a firm would appeal any concern with DCAA's findings to the State DOT. Although the contractual relationship involving questioned costs is between the firm and the State DOT, ACEC has strong concerns about the appeal process lying solely with the State DOT. ACEC will be working with the firms involved in cost recovery and with FHWA to determine and verify the appeal process.
- FHWA will be taking the next 3-4 weeks to create and verify the process for working with the State DOTs and the firms to recover costs. FHWA recognizes that cost recovery will be a complex task due to all of the variables involved, however they are trying to keep it as simple as possible.

### **FAR Compliance/Audit Guide Implementation:**

- ACEC is working with FHWA to address several FAR compliance issues identified by ACEC firms in several states including overhead caps, direct salary caps and field rates. If you are experiencing FAR or Audit Guide compliance issues in your state, please let me know and we can work together to address them.
  - Overhead Caps – States that have overhead caps are operating outside of federal law. Some states have had caps for many years and are looking to the creation of a National Compensation Matrix as a time when they will drop their cap. FHWA has stated that although the matrix has not been created (and no timeline for development has been set), status quo will not be accepted. If a state is operating outside of federal law, they will have to change their process and comply with the FAR Cost Principles.
  - Direct Salary Caps – FHWA has taken the position that direct salary caps are not allowable under the FAR. AASHTO and FHWA are currently coaching several states on what is acceptable and what is not acceptable when it comes to direct salaries. FHWA advised this issue will be addressed in updated Q&A documents they will be posting to their website next month. In the mean time, ACEC is working with FHWA and AASHTO to educate the DOTs and bring them into compliance with the law.
  - Field Rates – Field rates has been identified as an area that needs more guidance and clarification. This was discussed extensively at the AASHTO Audit

Conference in Alabama last month. ACEC is working with AASHTO on field rate related issues in at least 2 states.

- Audit Guide Training
  - Development of formal training modules is now underway. The National Highway Institute (part of FHWA) awarded the training development contract to Kimley-Horn and that effort will formally kick-off in DC next week.
  - Questions or concerns regarding the training are being collected and will be conveyed to the training development team.

#### **Rulemaking and Guidance on Consultant Services:**

- FHWA will update the Q&A document on consultant services on their website in September.
- FHWA will also issue an FHWA Order in September regarding the certification of allowability of costs used to establish indirect cost rates on federally funded, state-administered contracts. This was a recommendation of the OIG resulting from their report published last year. FHWA advised the new policy will parallel what is in place for federal contracts and can be referenced at 48 CFR 31.110. Certification will also be addressed in the rulemaking (see below).
- FHWA plans to begin a multi-phase rulemaking process by publishing “*something*” in the Federal Register by the end of October. This will be the first of what are expected to be several regulatory changes. This first phase will only include items already discussed and relatively non-controversial, including
  - eliminating the reference to “equivalent” or “alternative” state QBS procedures currently allowed in the regulations, which were prohibited by statute in 2005 (Section 174 of the 2006 Transportation Appropriations bill);
  - requiring executive certification of allowability of costs used to establish indirect cost rates on federally funded, state-administered contracts, in response to the recommendation by the OIG in its audit report;
  - clarifying cognizant audit requirements, as contained in the revised AASHTO Audit Guide; and
  - other Audit Guide references and implementation items, if possible.

- 1) This first rulemaking effort will not address more controversial issues that have been highlighted in previous FHWA briefings, such as conflict of interest rules, limits on IDIQ contracts, contract cost estimating, errors & omissions policies and procedures, and so forth. A more substantive restructuring and overhaul of 23 CFR 172 will come in later rounds; no timeline was given for those actions.
- 2) FHWA again solicited our input on these more substantive issues, in advance of any formal regulatory action. They also urged us to continue to collaborate with AASHTO on developing joint positions and statements, where possible.
- 3) FHWA is planning to submit to NCHRP for funding to update the AASHTO Guide for Consultant Contracting, which they view as slightly dated but a potential source of information for the regulatory changes they are considering. They prefer to hire a professional consultant to lead the effort, rather than utilize a volunteer process through the AASHTO Technical Committee on Preconstruction Engineering

Management. Anyone involved in the AASHTO Audit Guide updates can appreciate both the benefits and drawbacks of a volunteer-based effort!

- 4) ACEC is engaging our Consultant Services Rulemaking Taskforce to meet FHWA's call for input on the rulemaking. The Taskforce's goal is to formulate statements of policy and identify best practices for the industry and state DOTs on targeted issues. The draft white papers will be transmitted to the full ACEC Transportation Committee for review and approval, ideally for consideration at the March 2011 committee meeting. We would then make the position papers publicly available, so that FHWA can utilize them in assessing potential regulatory changes. We would also use these white papers and work through the AASHTO-ACEC Joint Committee to collaborate and develop a unified position with AASHTO, where possible.

If you have questions or concerns regarding any of the information above, please email or call me anytime. Also, if you are experiencing Audit Guide or FAR compliance issues in your state, please let me know and we can work together to address those issues. ACEC has forged a close working relationship with FHWA and AASHTO and we are working collaboratively on compliance issues to bring about adherence to federal law and the consistent of application sound practices. With your help and guidance on what's happening on a day to day basis at the state level, we can work together to reach that better state of practice.