

Office of Facility Planning and Control

Public Hearing, Title 34, Part III, Chapter 1, Subchapter A. Designer Contracts

Comments received at Public Hearing on August 26, 2020 in reference to Notice of Intent, Louisiana Register of December 20, 2019 pp 1858-1863, and subsequent Public Hearing Notice, Louisiana Register of January 20, 2020, pp 155-156, and substantive revisions and Public Hearing Notice, Louisiana Register of July 20, 2020, pp 1041-1043.

Doreen Brasseaux, ACECL president and CEO; August 26, 2020 submitted comments; **FP&C responses are in italics:**

§103. Definitions

Standard of Care-The designer and their professional consultants shall perform their services consistent with the skill and care ordinarily provided by similar professionals practicing in the same or similar locality under the same or similar circumstances.

- **ACECL Comment:**

ACECL appreciates the inclusion of the Standard of Care definition, however, the term is not referenced otherwise in the proposed rule. Will FP&C consider adding the Standard of Care reference to Sub Section 129 Other Conditions Paragraph E?

FP&C response: The appropriate location for the designer's Standard of Care is Article 7.1 of the proposed 2020 Procedure Manual in the same location it has existed since the 2004 Procedure Manual. It will utilize basically the same language, and be a part of the designer's contract.

§107. Available Funds for Construction (AFC)

A. ~~The available funds for construction (AFC)~~ AFC, as defined by §103, of the project as fixed by the owner shall be stated in the contract between owner and designer.

B. The designer shall be responsible for designing the project so that the base bid does not exceed the AFC. The use of any alternate bids must be pre-approved by the owner. The owner will take into consideration abnormal escalation in construction costs that can be substantiated prior to bid.

- **ACECL Comment:**

ACECL remains concerned about the expectation that design consultants can estimate to within 10% of the bids. FP&C has stated that it is only expecting an 'estimate,' yet the designer may be unfairly penalized for an estimate variance relative to Bids received, which is beyond their control. We feel 10% is too tight a range for estimates but understand FP&C desire. We suggest allowing designer estimates to include bid alternates not exceeding 10% of AFC where appropriate.

(Please see item E - below)

E. When the lowest bona fide base bid is less than 90 percent of the AFC and the designer has reduced the original program scope to reduce costs, the owner shall have the option to have the designer, without additional compensation, modify the construction documents ~~as required~~ to restore elements of the program that were eliminated to reduce cost.

FP&C response: The key for the §107.E requirement is to replace the scope elements unnecessarily removed by the designer due to their own estimate prior to the bid. Because the designer's fee is based on the AFC, the designer has already been compensated on those elements that were

unnecessarily removed from the project scope to reduce costs, based on the designer's estimate and at the designer's recommendation. The owner, and thus the state taxpayer, should not have to pay twice for the same work. If the designer did not remove scope, then this requirement is not applicable. Alternates can be used to assist, but if the alternates are estimated above the AFC, FPC written permission is required, since the designer would be compensated for the value above the AFC. Again, the statement of probable cost (construction cost estimate) to ensure the design is within the proposed AFC/budget is extremely important at each phase of the design, and an essential part of the designer's professional responsibilities of scope, budget, and schedule.

- **ACECL Comment:**

ACECL remains concerned about the expectation that design consultants can estimate to within 10% of the actual bids. FP&C has stated that it is only expecting an 'estimate,' yet the designer is penalized for an inaccurate estimate/bid variance.

To clarify, our understanding is that FP&C will not require designer redesign in the event a project bids less than 90% of AFC, provided the original project program has not been reduced by the designer. FP&C will allow designer to incorporate Bid Alternates in excess of the AFC (per designers estimate), to maximum of 10% of AFC if prior approved by FP&C in advance of project bidding. Assuming this is a correct understanding, ACECL requests FP&C add language that allows designer to design Base Bid to AFC (by their estimate) while allowing Bid Options (pre-approved by FP&C) to no more than 10% of AFC, per designer discretion.

***FP&C response:** Public bid statutes permit alternates, however they must be approved in advance by FP&C since the designer would be compensated for the value above the AFC. To automatically allow alternates above the AFC would be to automatically grant a designer fee increase. Instead, the designer should endeavor to estimate the project as accurately as possible, without added contingencies. FP&C will consider recommendations for alternates as the project warrants.*

§109. Compensation

d. e. Fee adjustments for alternates are as follows.

i. If an alternate, pre-approved by the owner, has a cost estimate within the AFC, the designer's compensation for said alternate is already included within the designer's base fee.

ii. If an alternate, pre-approved by the owner, has a cost estimate in excess of the AFC, the designer shall receive compensation for the value above the AFC for that portion of the phase completed as described in §111.A.1.a. (by increasing the AFC for designer fee purposes). If an alternate is based on a substitute system requiring additional design effort, then the total estimated cost shall be used in determining the AFC for design fee purposes for phases completed. If the scope contained in that alternate is not awarded at bid, but later included as a change order and the designer compensated per §111.A.1.a, the compensation shall be adjusted such that the designer shall not be compensated twice for the same work.

- **ACECL Comment:**

ACECL requests FP&C clarify that designers will be allowed to design alternates in excess of AFC (no more than 10% of AFC in the event bids are 80% below AFC to 0% above AFC) in order to meet the desired goal of being within 90% of AFC.

FP&C response: As stated in previous response, alternates are permitted by public bid statutes, however they must be approved in advance by FP&C since the designer would be compensated for the value above the AFC. To automatically allow alternates above the AFC would be to automatically grant a designer fee increase. Instead, the designer should endeavor to estimate the project as accurately as possible, without added contingencies and thereby not inflating the cost estimate. FP&C will consider recommendations for alternates as the project warrants.

§129. Other Conditions

A. [Actually E.] Fault. Time delays, cost overruns, design inadequacies or other problems with performance of the designer may result in the designer being held "at fault". The owner shall determine if the designer is to be held at fault as provided in R.S. 38:2313.B.(5).

- **ACECL Comment:**

Add 'in accordance with applicable standard of care.'

FP&C response: The appropriate location for the reference to designer's Standard of Care is Article 7.1 of the proposed 2020 Procedure Manual under Designer's Services where it has existed since the 2004 Procedure Manual. It will utilize basically the same language as was used previously. It will utilize basically the same language, and be a part of the Designer's contract.

- **ACECL Comment:**

On behalf of the American Council of Engineering Companies of Louisiana we appreciate the opportunity to comment on the FP&C Notice of Substantive Changes to the Proposed Rule: Designer Contracts and ask for your favorable consideration of our comments.

FP&C response: All comments were carefully considered, and FP&C hopes that the ACECL will find our responses and clarifications acceptable.