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Office of the Governor Division of Administration Facility Planning and Control

Public Hearing—Substantive Changes to Proposed
Rule; Designer Contracts
(LAC 34:III.1.A.)

In accordance with the provisions of the Administrative Procedure Act (R.S. 49:950, et seq.) and the provisions of R.S. 39:121, the Division of Administration, Facility Planning and Control published a Notice of Intent to promulgate a rule change to Title 34, GOVERNMENT CONTRACTS, PROCUREMENT AND PROPERTY CONTROL, Part III. Facility Planning and Control, Chapter 1. Capital Improvement Projects, Subchapter A. Designer Contracts in the December 20, 2019 edition of the *Louisiana Register* (LR 45:1858-1863). The notice solicited comments and testimony. Comments were received and a Public Hearing was held on January 29, 2020, where additional comments were submitted. The Division of Administration, Facility Planning and Control, proposes to amend the language of the proposed Rule.

No fiscal or economic impact will result from the amendments proposed in this notice.

Title 34

GOVERNMENT CONTRACTS, PROCUREMENT AND PROPERTY CONTROL

Part III. Facility Planning and Control

Chapter 1. Capital Improvement Projects

Subchapter A. Designer Contracts

§103. Definitions

Available Funds for Construction (AFC)—the budgeted amount of funds, established by the owner prior to bidding, available for awarding the construction contract(s).

Consultants—individuals or organizations engaged by the owner or the designer to provide professional consultant services complementing or supplementing the designer's services. As applicable, consultants shall be licensed to practice in accordance with laws of the state of Louisiana. The owner shall engage or have the designer furnish as part of the designer's services the services of consultants, which are deemed necessary for the project. Typical consultants are architects, landscape architects, civil, structural, mechanical, and electrical engineers, and others required to provide the services required or implied by the scope of the project, compensation for which is included in designer's-fee for basic services. Special consultants are those, other than the above, which the owner may approve to perform special services and for which compensation will be in accordance with §109.C.

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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.

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AUTHORITY NOTE: Promulgated in accordance with R.S. 39:1410.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Division of Administration, Facility Planning and Control, LR 8:473 (September 1982), amended LR 11:849 (September 1985), LR 31:1076 (May 2005), LR 46.

§107. Available Funds for Construction (AFC)

- A. AFC, as defined by §103, 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.
- C.1. At the completion of the program completion phase the designer shall make recommendations regarding whether the AFC is realistic for the project when compared with the completed program. At this point, or at any other submissions of the project's statement of probable cost (construction cost estimate) by the designer, if such statement of probable cost is in excess of the AFC, the owner shall have the option to:

a. instruct the user agency to collaborate with the designer to revise the program so that the anticipated base bid will be within the AFC; such program revisions shall be done without additional compensation to the designer, except for extensive program revisions authorized in writing by the owner;

b. – c. ...

2. Any adjustment in the AFC, approved in writing by the owner during design shall include an appropriate adjustment in the fee. The fee shall not be modified at any time after advertising for bids, except as allowed per §109.A.1.d and §109.A.3.

D.1. - 2. ...

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-to restore elements of the program that were eliminated to reduce cost.

AUTHORITY NOTE: Promulgated in accordance with R.S. 39:1410.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Division of Administration, Facility Planning and Control, LR 8:474 (September 1982), amended LR 11:850 (September 1985), LR 31:1076 (May 2005), LR 32:2047 (November 2006), LR 46.

§109. Compensation

A. The fee for basic services to be paid to the designer shall be as follows.

1. - 1.c. ...

d. 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.

iii. If the lowest bona fide base bid, is less than 90 percent of the AFC, refer to §107.E. regarding any additional compensation for alternates and change orders.

2. – 2.d. ...

3. Change orders. Preparation of documents required for change orders for any cause shall not be started without owner's written approval. Fee adjustments for change orders shall be as follows.

a. Routine change orders, which involve a small amount of effort, will not involve extra compensation. The designer shall notify and obtain the owner's prior written approval before preparing a change order for which he/she feels is due extra compensation for the extra effort involved. At the construction close-out phase, all such change orders will be reviewed by the owner and the designer's contract will be amended to reflect extra compensation for the change orders which the owner has determined merit additional fee. The fee will be computed by increasing the AFC (for designer fee purposes) by the amount of change orders that qualify for additional fee as described above and recalculating the fee.

b. Designer shall prepare change orders caused by errors or omissions of the designer without additional compensation. The designer shall be financially responsible for costs that result from errors. The owner shall participate in the cost of omissions to the extent of the value received by the owner. The designer will be notified of any claims of error or omission designations made to a change order prior to execution by the owner.

* * *

B. Payment to the designer for additional services—shall be made on the basis of a detailed scope of work, a proposal from the designer, and negotiations between the owner and designer. All additional services must be pre-approved in writing by the owner prior to start.

* * *

C. – E. ...

AUTHORITY NOTE: Promulgated in accordance with R.S. 39:1410.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Division of Administration, Facility Planning and Control, LR 8:474 (September 1982), amended LR 11:850 (September 1985), LR 31:1077 (May 2005), LR 32:2047 (November 2006), LR 46.

§111. Payments to the Designer

A. – A.1.c.i. ...

2. A partial payment for the construction documents phase shall be made when the designer has completed 100 percent of the construction documents and has submitted these to the owner, the user agency, and the other required statutory agencies and the owner determines by inventory check and conformity that all required documents have been submitted, and are sufficiently complete, coordinated and ready to bid, then the designer shall be entitled to a payment of 80 percent of the fee for the construction documents phase. Should the owner's approval of the construction documents not be issued within 45 days of submittal due to no fault of the designer, then the designer shall be paid an additional payment of 10 percent of the fee for the construction documents phase. The balance of the fee for this phase will be due upon the completion of review by owner and user, when corrections have been made, and a complete set of bid documents are submitted to the owner. For projects with an AFC over \$10 million, interim payments up to 50 percent of the fee for the construction document phase may be made by agreement between the owner and the designer.

3. ...

4. The designer shall promptly pay consultants. By signing the professional design services invoice, the designer agrees that all consultants will be promptly paid those amounts due them out of the amount paid to the designer within 45 days. Upon receipt of reasonable evidence of the designer's failure to pay consultants' amounts due them, the owner may withhold all or part of the designer's payment until the owner is satisfied that any amounts owed have been paid or otherwise settled.

B. – C. ...

AUTHORITY NOTE: Promulgated in accordance with R.S. 39:1410.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Division of Administration, Facility Planning and Control, LR 8:474 (September 1982), amended LR 11:851 (September 1985), LR 13:656 (November 1987), LR 31:1078 (May 2005), LR 46.

§115. Designer's Accounting Records

A. Records of direct reimbursable expenses and expenses pertaining to additional services on the project, and for services performed on the basis of multiplier times direct personnel expense, shall be kept on the basis of generally accepted accounting principles and shall be furnished and/or made available to the owner or the owner's authorized representative on request.

AUTHORITY NOTE: Promulgated in accordance with R.S. 39:1410.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Division of Administration, Facility Planning and Control, LR 8:477 (September 1982), amended LR 11:854 (September 1985), LR 46.

§119. Abandonment or Suspension

A. If any work designed or specified by the designer is abandoned or suspended in whole or part by the owner, the designer is to be paid for the services rendered up to receipt of written notice from the owner, as follows.

1. If the abandonment or suspension occurs at the completion of a phase, the designer shall submit to the owner all required deliverables and shall be paid the full amount due on completion of such phase as described in §111.A.1.

2. If the abandonment or suspension occurs during a phase, the designer shall submit to the owner all documents prepared by him/her up to receipt of written notice from the owner, and the owner shall compensate the designer up to the percentage completion of that phase.

B. Should the project be reactivated, the new fee will be computed on the basis of the revised AFC and §109.A.1.b if inactive for more than 24 months. The designer's fee for the phases of work required to complete the project shall be the percentages for such phases stated in §111.A.1 applied to the new fee. Any required code update or scope change may merit additional services per §109.B, as the anticipated project design effort warrants.

AUTHORITY NOTE: Promulgated in accordance with R.S. 39:1410.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Division of Administration, Facility Planning and Control, LR 8:478 (September 1982), amended LR 11:854 (September 1985), LR 46.

Public Hearing

In accordance with the provisions of the Administrative Procedure Act, specifically at R.S. 49:968(H)(2), the Division of Administration, Facility Planning and Control gives notice of a public hearing to receive additional comments and testimony on these substantive amendments to the proposed Rule. The hearing will be held at 10 a.m. on August 26, 2020 at the Claiborne Conference Center, Iowa Room, 1-153, which is located at 1201 North Third St. in Baton Rouge, LA. At that time, all interested persons will be afforded an opportunity to submit data, views, or arguments, either orally or in writing. In accordance with Covid-19 Guidelines, all attendees must wear masks and have their temperatures taken upon entry to the Claiborne Conference Center. Seating will be provided to comply with recommended social distancing and masks must continue to be worn during the public hearing.

Mark A. Moses
Director