



AMERICAN COUNCIL OF ENGINEERING COMPANIES

Notes from Meeting of USACE and ACEC Representatives Washington, DC (January 12, 2011)

Attendees:

USACE

James Dalton, Engineering and Construction Community of Practice Chief
Steve DeLoach, Engineering and Construction Deputy Chief
Paul Parsonneault, (Telephone)

ACEC

James Blake, JMT
Mickey Jones, Mason and Hanger
Mark Steiner, ACEC

The meeting started with a brief review of the USACE/ACEC Partnering Agreement (resigned this year) to help set the overall tone for the meeting. Proceeded to address the following priority items:

1. Contracting out policy - with the program getting smaller and the Corps hiring thousands of more employees, what is the current policy on contracting out to private sector? How has the Obama Administration's "in sourcing" policy affected USACE? What is the USACE current policy on doing work in house? The prior internal targets for doing 70% of Civil Works and 20% of MILCON with in-house staff are no longer in effect. They never reached the 70% goal due to Congressional add-ons. The focus is now on increasing technical competence, retaining personnel, and improving the ability to design. At present all percentage goals are out (formulated about 3 months ago) and districts are choosing projects from lists based on what they need to be doing and can perform (held to), without increasing staff. USACE HQ has just received information from the Divisions regarding which projects the districts are proposing to do in-house. The use of standardized designs will reduce MILCON work along with reduced budgets. Otherwise, no real change seen. USACE is not a program management organization, but a design organization. The Advance Acquisition Strategy Board filters out work that requires unique talents or does not contribute to broadly needed capabilities, as well satisfying client needs, controlling costs, and providing innovation. James is interested in our identification of specific problems as they arise and alternative ways for USACE to remain effective. All districts or regions do not have to be full service. USACE is looking at having some skill sets centralized and available elsewhere when needed.

2. Designer of record issues, especially on adapt-build. How will USACE mitigate the liability risks of A-E's consulting on adapt-build contracts?

The designs are government owned and furnished. USACE will clarify in writing, so that both initial designers and adapting designers know exactly what their responsibility and liabilities are when they pursue work.

3. Competing task orders between firms on A-E multiple award contracts with price as a factor goes against the Brooks Act. The practice of competing T.O.s is also very expensive and time consuming. Does USACE plan to scale this practice back? How should competition enter into the contracting method and task order selections; need simplified and consistent Brooks Act compliant task order competition procedures and forms (not SF 330 again)?

USACE fully agrees with the ACEC position that T.O.s should not be competed on price. ECBs have been issued to that effect and they will send out another notice (or ECB) to stress compliance. ACEC should identify violations as soon as they arise and member firms can use the USACE feedback site on a non-attribution basis.

4. Thomas Amendment - Corps performance of services available from the private sector (e.g. levee work) for others. Headquarters USACE needs to remain vigilant on Thomas Amendment issues at District level. How can USACE and ACEC jointly work together to resolve the problem? USACE supports the use of the private sector and does not want to compete in providing services to state and local governments and the private sector clients. They have had no discussions with Congress on the repeal of the Thomas Amendment and do not believe it is necessary. Levee compliance determinations are insurance issues and not public safety issues and therefore not what USACE should be using their limited resources for. ACEC should provide examples of problems directly for prompt attention. This includes news articles that include cost comparisons between private sector and USACE performance of work. Such information should not be provided to local governments and is probably not consistent or real.

5. What changes can the A-E industry expect regarding the implementation of varying Federal Sustainability policies? Energy and water use, security and resilience, environmental impact reduction (or reversal) and climate change adaptation, performance and life-cycle cost reduction, and other sustainability issues can conflict with each other. There is a Tri-Service effort to establish uniform policy. This includes a standard method for analyzing life-cycle costs. USACE is willing to meet with ACEC on the policy prior to finalization. The Tri-Service working group has discussed seeking the involvement of ACEC, AGC, DBIA, and others. In any case, implementation must be by registered professionals and not practitioners or systems providers. Climate change impacts need to be addressed and criteria established.

6. What design-policy changes are being considered by USACE and when might we expect to see them? Can ACEC help by acting as the industry "sounding board" in the process of formulating alternatives? The varied experience base and business perspectives of our member firms may provide valuable insights that facilitate effective and efficient implementation of changes. In the case of "low impact" designs and

implementation of energy and water saving requirements industry should be involved. ASHRAE 189.1 will be used for future design efforts, but 90.1 is not being eliminated. Internal methods of delivery are being assessed by USACE. Not all districts have the same level of expertise and competence. USACE intends to assess areas needed and where continuous work and experience can be maintained at a high level. This will result in a major change with districts providing expert services to other districts, so that efficiency and performance are increased. USACE welcomes industry input on how to do this well (e.g. dam safety work).

7. Small Business Utilization

USACE wishes ACEC well on our initiatives on the Effective use of Small Businesses. They cannot be involved. The principal initiatives are to collect the data and give agencies the credit for all prime and subcontract work going to small businesses, by type of work and category of small business, and establishing subcontracting goals based on a percent of prime contract value versus a percent of subcontracted work.

8. General "Beyond Negligence" Liability Issues

Recent legal cases show how tort lawyers are targeting the design and construction industries for suits. These suits go beyond negligence to "strict liability" applications for the consequences of events far exceeding criteria during design. ACEC is seeking legislative liability mitigation (e.g. merit considerations, venue restrictions, damage limitations, insurance, and time limitations) for high consequence events. In one case, the contractor was held liable (loosing government contractor immunities) for acting on his own initiative (without specific direction or approval of the government) when later unforeseen conditions arose. Performance based contracts require just such initiative. USACE cannot address.

9. Procurement, QBS/Brooks Act Selections, and Delivery Methods

- Ongoing QBS use decisions require scrutiny (District violations)

Problems arise from two causes. One is due to error, with the other due to misunderstanding of requirements when the work is on the "edge" of A/E services (e.g. environmental, construction, operations and maintenance, and R&D activities). In all cases early identification of the problem allows for proper resolution. USACE will review instructions and training programs to reinforce understanding of QBS benefits and compliance with FAR. At ACEC's suggestion, USACE will look into developing a checklist to be completed for all buildings and infrastructure related services contracts to identify when FAR Part 36 should apply. ACEC will contribute to development of the checklist, as appropriate. ACEC to keep USACE informed of violations as identified.

- Design-Build applications - designer of record and owner advocate issues (strengthening link between client and designer)

The need for a link between owner and designer is clear. A good design-build (d-b) contractor facilitates that relationship. Unfortunately, that is not always the case and privity of contract considerations hamper fixes. USACE and ACEC need to jointly address

the problem, including exploring the use of "fencing" design costs, direct technical reporting, and similar initiatives.

- ACAS Rating of Designers

A related problem exists for A/E firms working on d-b contracts. They do not get rated for ACAS, CCAS, Peepers, or other developing performance recording systems. USACE suggested the creation of a separate system for design services on d-b contracts. Are willing to pursue further.

- Early Contractor Involvement - D-B alternative

Pilots have been tried and there are advantages, but USACE is still "experimenting". USACE will keep ACEC informed.

10. BIM issues. The Bentley requirement is only for Center of Standardization use in establishing standard designs. No other platform specific requirement exists. Otherwise USACE is vendor neutral and will not require a specific BIM platform on adapt-build projects. No requirement exists for design-build contracts.

11. Commissioning services - should be QBS

USACE believes such services should be performed by professional firms under the supervision of PEs and selected through QBS procedures. Some USACE contracts still have construction contractors hiring commissioning agents with only certification requirements and limited guidelines. A policy and guide spec change is needed. Paul Parsonneault will address and look for ACEC support in making changes.

12. Construction Phase Support - should be QBS; what is the reliance on the contractor, what is concentration of USACE to Contractor employees

USACE uses QBS procedures for construction phase support, including quality assurance, project engineering, etc. They view these personnel as staff augmentation and are establishing professional construction services as a separate job series for USACE personnel.

Follow on planning:

Plan regular USACE/ACEC meetings for open discussion of items influencing the ACEC community. James wants quarterly small group (consistent) meetings and would like them established in advance for the full year. Steve is our POC for setting up for the rest of the year. They would also like to establish ACEC representation on a technical advisory group (NIBS led) on energy savings and energy conservation, so that the USACE program will balance costs against performance. Hey want to keep abreast of advances in technology and the value of offsets.