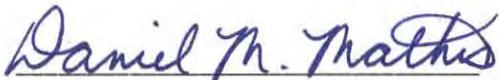


Memorandum of Understanding

Subject: Alternate Technical Concept (ATC)
Programmatic Waiver

Date: October 26, 2010

This Memorandum of Understanding (MOU) between the Federal Highway Administration (FHWA) and the Washington State Department of Transportation (WSDOT) establishes a programmatic waiver of the requirements of 23 CFR 636.209(b). This waiver is in effect in accordance with the attached Appendices and is valid until December 31, 2012.



Daniel M. Mathis
FHWA Division Administrator
Washington Division

Date: 03/22/11



Jerry Lenzi
WSDOT Chief Engineer
Engineering & Regional Operations

Date: 3/16/11



Kathleen Davis
WSDOT Highways and Local Programs

Date: 3-15-11

Appendix A: Waiver Framework

Waiver of Alternate Technical Concepts (ATC) Requirements of 23 CFR 636.209(b)

I. Background

On May 6, 2010 the Washington State Department of Transportation (WSDOT) submitted a request to the Federal Highway Administration (FHWA) for a waiver of the requirements of 23 CFR 636.209(b) under Special Experimental Project-14 (SEP-14). Specifically, WSDOT requested a waiver of the requirement that “*Alternate technical concept proposals may supplement, but not substitute for base proposals that respond to the RFP requirements*”. The FHWA found the WSDOT’s proposed method of evaluating ATC’s during the proposal process to be satisfactory and granted a programmatic waiver on June 1, 2010.

II. Scope

This document establishes the framework from which the WSDOT and FHWA shall operate under for the incorporation of ATC’s in Federal-aid Design Build contracts. The programmatic waiver is in effect for all Federal-Aid Design Build contracts administered by the WSDOT that are advertised (i.e. Request for Proposals (RFP) sent out) after June 1, 2010. The following Federal-aid Design Build contracts advertised prior to this MOU are also covered under the waiver and subject to the reporting requirements listed later in this appendix:

- 1) I-405 NE 195th to SR 527 Northbound Auxiliary Lane
- 2) I-405/NE 8th Street to SR 520 Braided Ramps – Interchange Improvements
- 3) Active Traffic Management System Design Build Project
- 4) SR 520 Pontoon Construction Design Build Project
- 5) Alaskan Way Viaduct SR 99 Bored Tunnel Alternative Design Build Project
- 6) SR 520 - Medina to SR 202: Eastside Transit and HOV Project

Federal-aid Design Build contracts administered by Local Public Agencies (LPA’s) are not covered under this waiver. Waivers may be granted to LPA administered Federal-aid Design Build projects on a project-by-project basis under the following conditions:

- 1) Either the LPA demonstrates to the satisfaction of the Division Office that ATC’s will be evaluated in accordance with WSDOT’s *Design Build Project Delivery Guidance Statement for Alternative Technical Concepts*, or
- 2) The LPA pursues, and is granted an individual SEP-14 waiver of the requirements of 23 CFR 636.209(b) using an alternate proposed method of evaluating ATC’s, and
- 3) The project is subject to the same reporting requirements listed later in this appendix. The reporting information shall be delivered to WSDOT in order to meet the annual reporting requirement

III. Reporting

The WSDOT shall annually submit to the Washington Division Office a program evaluation report that at a minimum addresses the following items:

- 1) The number of projects where the ATC process was utilized
- 2) The number of proposers on each project
- 3) The number of ATC’s generated on each project
- 4) The Best Value price as proposed and the Engineer’s Estimate for each project
- 5) A comprehensive list of any complaints about the proposed ATC process
- 6) A comprehensive list of any formal protests associated with projects utilizing the proposed ATC process
- 7) Any additional reportable factors that FHWA deems appropriate

The annual report is due to the Division Office by October 1 of each year that this MOU is in effect.

IV. Effective Dates

This MOU is in effect until December 31, 2012 and is contingent on receipt of the required annual reports. FHWA and WSDOT will revisit this MOU in October 2012 to determine if it is to be extended and if there are any changes in the scope and reporting requirements.

Appendix B: WSDOT Waiver Request



**Washington State
Department of Transportation**
Paula J. Hammond, P.E.
Secretary of Transportation

Transportation Building
310 Maple Park Avenue S.E.
P.O. Box 47300
Olympia, WA 98504-7300

360-705-7000
TTY: 1-800-833-6388
www.wsdot.wa.gov

May 6, 2010

Mr. Daniel M. Mathis
Division Administrator
Federal Highway Administration
711 S. Capital Way, Suite 501
Olympia, WA 98501-1284

Dear Mr. Mathis:

In 2001, the Washington State Department of Transportation (WSDOT) was given legislative authority to develop and implement Design-Build contracting methods. This authority, provided solely for state-funded projects, allowed the WSDOT to develop and implement best management practices associated with Design-Build contracting methods. Although based upon the fundamentals of Federal Design-Build regulations, WSDOT has developed a methodology on the implementation of Alternative Technical Concepts (ATC) that we believe enhances the effectiveness of the process described in 23 CFR 636.

The WSDOT proposes to allow proposers to submit Alternative Technical Concepts (ATCs), consistent with 23 CFR 636.209, for review and approval (or disapproval) by the WSDOT during the pre-proposal period. The ATCs will only be approved if they meet certain minimum requirements and are otherwise acceptable to the WSDOT. 23 CFR 636.209 permits ATCs for Design-Build procurements, but states, "Alternative technical concept proposals may supplement, but not substitute for base proposals that respond to the Request for Proposal (RFP) requirements." We understand that the concern underlying this requirement is to ensure fair and open competition, and to make sure that all proposers are competing for the same project.

The WSDOT hereby requests that the requirement to submit separate proposals for the base and the 'alternative' technical concepts be waived, allowing each proposer the opportunity to submit ATCs for pre-approval and then to submit a proposal with or without ATCs. In allowing the practice of including pre-approved ATCs in the proposal, WSDOT has carefully crafted and implemented a procedure to avoid any unfairness on "state-only" funded projects. Pre-approval of deviations, from design requirements that otherwise would be deferred until after the contract is awarded, will be required as part of this process. The proposed ATC process gives the WSDOT the ability to factor the proposers' technical solutions into the selection process, allowing a true 'best value' selection, and gives WSDOT access to solutions from all proposers. It also gives the

successful proposer a head start on implementation of its ATCs, and avoids unnecessary costs and diversion of resources required for proposers to advance a base design that will ultimately not be used.

Compliance with the current Federal requirement for the proposers to submit separate proposals would impose an unnecessary burden on both the proposers and the WSDOT, and would likely deter proposers from submitting ATCs. The WSDOT has addressed the underlying concern regarding fairness by developing statewide policy and minimum criteria for ATCs in the RFP. Any deviations that will be allowed will not change the character of the project nor require any additional environmental approvals. The WSDOT therefore believes that a waiver of the requirement is appropriate.

The following is information supporting the waiver request:

- a. **Review process and requirements.** Enclosed is our policy on implementing ATCs on Design-Build projects.
 - The Guidance Statement sets forth the WSDOT's rationale behind the use of ATCs – further opportunity for innovation and flexibility and to allow pre-approved concepts to be part of the Best-Value decision.
 - The Guidance Statement and implementation language lays out the specific submittal and review process for ATCs, including limiting timeframes, actions by the WSDOT, the use of one-on-one meetings, and the re-submittal process.
 - Implementation Language sets forth the detailed submittal requirements/contents of the ATC.
 - The Guidance Statement and implementation language outlines the determinations that may be made by the WSDOT on submitted ATCs. It also clearly provides a notice to all proposers that approval of an ATC constitutes pre-approval of a deviation from requirements that would otherwise apply. Our Guidance Statement and implementation language supports the need for confidentiality. Confidentiality is a critical issue with proposers, who need to be reassured that their innovative thinking and concepts will not be shared with other proposers. Our ATC policy and implementation language outlines the process for one-on-one meetings and further reinforces the confidentiality of the ATC process.
 - Our implementation language authorizes proposers to incorporate pre-approved ATCs into their proposals. Any proposer that incorporates an ATC must also provide a copy of the ATC approval letters, to facilitate the WSDOT's review of the as-proposed concept for compliance with the ATC approval requirements.
- b. **How the ATC will be considered in the best-value determination.** Each proposer submits only one proposal. The RFP does not distinguish between a

proposal that does not include ATCs and proposals that include ATCs. Both types of proposals are evaluated against the same technical evaluation factors, and the best-value determination is made in the same manner. A pre-approved ATC may or may not result in a higher quality (technical rating) but will likely result in a lower price. However, it is the intent of the ATC process that both outcomes of higher quality and lower price will occur.

- c. **How clauses assigning responsibility if ATC is not feasible.** The current Guidance Statement and implementation language includes provisions making it clear that the Design-Builder is responsible for designing the project in conformance with all contract requirements (including ATC included in its proposal) and is also responsible for obtaining all third-party approvals required for the ATCs. Provisions also clarify that the Design-Builder must conform to the original RFP requirements if it is unable to obtain approvals or the concept otherwise proves to be infeasible.
- d. **Timeline for ATC approvals.** The WSDOT ATC Guidance Statement and implementation language provide for timelines to approve, reject, or return for modification responses on ATC submittals.
- e. **Betterments.** As noted above, the WSDOT wishes to encourage ATCs that will improve project quality as well as ATCs that reduce project costs without reducing project quality. The evaluation process described above allows more flexibility for the evaluators to consider quality enhancements.

If you should have any questions or comments, please contact Fred Tharp, Design-Build Development Engineer, at 360-705-7816 or via email at tharpf@wsdot.wa.gov, or me at 705-7821.

Sincerely,



Jeff Carpenter, P.E.
State Construction Engineer

JC:cd
Enclosure

**Appendix C: WSDOT Design-Build Project Delivery Guidance Statement –
Alternate Technical Concepts**

WSDOT Design-Build Project Delivery Guidance Statement

Alternative Technical Concepts

**Date – April 10, 2010
Format – Final**

Contents

1.	Introduction	2
2.	What are Alternative Technical Concepts?	2
3.	One-On-One Meetings for ATC's	2
4.	Submittal.....	2
5.	Review.....	3
6.	WSDOT Response	3
7.	Incorporating ATC's into the Proposal.....	4
8.	Evaluating ATC's in the Proposal	4
9.	WSDOT Use of Concepts Contained in an ATC	4
10.	Implementing Language: ITP	4
11.	Implementing Language: General Provisions	7
12.	Implementing Language: Stipend Agreement	10

Introduction

This guidance statement establishes WSDOT policy regarding the use of Alternative Technical Concepts (ATC) on design-build contracts.

What are Alternative Technical Concepts?

An ATC is a confidential request by a Proposer to modify a contract requirement, specifically for that Proposer, prior to the Proposal due date. ATC's are evaluated for approval or denial by WSDOT within the deadline set forth in the Instructions to Proposers (ITP), which is usually set to occur several weeks before the Proposal due date. The Proposer may only incorporate unconditionally approved ATC's into a Proposal. Except as noted herein, any contract requirement can generally be subject to consideration for an ATC. In order to be approved, an ATC must be deemed, in WSDOT's sole discretion, to provide a project that is "equal or better" on an overall basis than the project would be without the proposed ATC. Concepts that simply delete scope, lower performance requirements, lower standards, or reduce contract requirements are not acceptable as ATC's. In addition, WSDOT generally allows the ATC process for all design-build contracts in order to promote innovation, find the best solutions, and to maintain flexibility in the procurement process.

One-On-One Meetings

One-on-one meetings between WSDOT and each Proposer may be held to discuss the feasibility of ATC's. To the extent provided by law, all discussions at these meetings shall be strictly confidential, and all WSDOT employees or consultants shall sign a confidentiality agreement prior to participating. A representative from HQ Construction shall be invited to all one-on-one meetings with a Proposer.

At the one-on-one meetings, it is appropriate for WSDOT to give the Proposer an indication of whether or not the ATC is likely to be approved, with the understanding that the official WSDOT determination cannot be made until the ATC is formally submitted. However, it is not appropriate for WSDOT to indicate in any manner to a Proposer that a particular ATC would favorably or unfavorably affect the technical score.

Submittal

In order to allow sufficient time for review, all proposed ATC's must be submitted to WSDOT no later than the time specified in the ITP. This deadline applies to both initial submissions and revised submissions in response to WSDOT's comments.

Each ATC submittal package shall address the elements required by the ITP. Each of the elements are intended to facilitate one of the following purposes: (1) help WSDOT understand what is being proposed; (2) help WSDOT understand specifically what changes to the RFP are being requested; (3) establish an understanding from the design builder on the change in risk exposure associated with the requested changes; and (4) help WSDOT determine whether or not the ATC will provide a project that is "equal or better" on an overall basis to what the project would be without the proposed ATC.

At no time during the ATC submittal and review process shall the Proposer disclose any pricing information related to the ATC, including but not limited to, estimated increases or decreases to the Proposer's Price Proposal, if any.

The Proposer shall not share or disclose any portion of an ATC to third parties (such as other governmental agencies that may have an interest in the ATC) without first gaining WSDOT's permission. This will allow WSDOT an

opportunity to terminate potentially controversial ATC's.

Review

Incomplete ATC submittal packages may be returned to the Proposer without review or comment. WSDOT may, in its sole discretion, request additional information regarding a proposed ATC. WSDOT may, in its sole discretion, deny any ATC. ATC's that do not meet the "equal or better" standard shall be rejected. ATC's that would require excessive time or cost for WSDOT to review, evaluate, or investigate will not be considered. WSDOT will not consider contract cost savings in the "equal or better" determination.

To the extent permitted by law, all discussions with Proposers regarding ATC's and information contained in an ATC submittal will remain confidential. Due to the confidential nature of ATC's and the need to respond in a timely manner, the WSDOT Project Manager shall minimize the number of staff involved in the ATC review process. When technical issues and questions arise that are outside the project team's expertise, HQ Construction should be consulted. All staff that are to be involved in the review shall sign a confidentiality agreement before beginning the review.

WSDOT shall refrain at all times during the ATC submittal review process, including one-on-one meetings, from indicating in any manner to a Proposer that a particular ATC would favorably or unfavorably affect the Proposers technical score. To do so can not only short circuit the Proposal evaluation process, but it can also interject the owner's bias into the Proposal process. When measured in terms of the competitive process, this could provide advantages to a single Proposer to the detriment of the remaining Proposers. The Proposer should be advised that if approved, the ATC will be evaluated in accordance with the ITP.

Design deviations, as defined in the WSDOT Design Manual Section 330.03, are not categorically prohibited from consideration in an ATC. Any ATC must be, in total, "equal to or better" than what was originally required. In addition, design deviations that are approved for inclusion into an ATC, to the extent provided by law, shall not be disclosed to other Proposers until such time as the contract is executed and WSDOT takes full ownership and control of the unsuccessful Proposal which includes the design deviation. Any question that may arise regarding conducting an "apples to apples" comparison of Proposals is resolved by requiring the ATC to meet the "equal or better" standard.

Matters that are specifically not eligible for approval as an ATC include the following:

1. Concepts that are not deemed, in WSDOT's sole discretion, to meet the "equal or better" criteria. When making this determination, consider the project as a whole. Ask the following question: "Is the project with this ATC 'equal or better' than the project without the ATC?"
2. Any change that would require excessive time or cost for WSDOT review, evaluation, or investigation.

WSDOT reserves the right in its sole discretion to reject any ATC.

WSDOT Response

WSDOT will respond to each Proposer within the timeframe stipulated in the ITP. The WSDOT Project Manager shall obtain approval from the State Construction Engineer or his delegee, and FHWA concurrence as appropriate on federal oversight contracts, prior to providing a final response to an ATC. The format for the response should include the ATC number, brief description, and shall be limited to one of the designated responses provided in the ITP.

Incorporating ATC's into the Proposal

A Proposer has the option to include any or all approved ATC's in its Proposal and the Proposal Price should reflect such incorporated ATC's. If WSDOT returned an ATC stating that certain conditions must be met prior to granting approval, the Proposer must satisfy the stated conditions and obtain WSDOT's approval of the ATC prior to incorporating the ATC in the Proposal. Except for approved ATC's, the Proposal shall not otherwise contain exceptions to or variations from the requirements of the RFP.

WSDOT will not advise Proposers on whether or not to include ATCs in their Proposals.

Evaluating ATC's in the Proposal

In order to avoid potential conflicts and ensure the objectivity of the evaluation process, WSDOT employees or consultants that participate in pre-Proposal one-on-one meetings with Proposers shall not evaluate Proposals.

Once an approved ATC is included in a Proposal, it is the responsibility of the Proposal evaluation team to determine how the ATC fits within the evaluation criteria. Technical scoring shall be the sole province of the Proposal evaluation team, and shall be based solely on the scoring criteria in the ITP.

WSDOT Use of Concepts Contained in an ATC

By submitting a Proposal in compliance with the ITP, all unsuccessful Proposers acknowledge that upon payment of the designated Stipend, all ATC's incorporated into a Proposal, as well as any ATC's that were approved by WSDOT but not included in the Proposal, shall become the property of WSDOT without restriction on use.

Implementing Language: ITP

In order to implement this Guidance Statement, the Instructions to Proposers shall include the following Language, unless approved otherwise by HQ Construction:

ALTERNATIVE TECHNICAL CONCEPTS (ATC's)

To promote innovation by Proposers and to maintain flexibility in the procurement process, WSDOT will allow Proposers to submit to WSDOT for consideration ATCs that modify the Basic Configuration or other Contract requirements. In order to be approved, an ATC must be deemed, in WSDOT's sole discretion, to provide a project that is "equal or better" on an overall basis than the project would be without the proposed ATC. Concepts that simply delete scope, lower performance requirements, lower standards, or reduce contract requirements are not acceptable as ATC's.

Proposers are reminded that the Contract contains restrictions on the Design-Builder's ability to obtain an adjustment in the Contract Price or Contract Time relating to differing site conditions and/or unknown Utilities in relation to ATC's.

PRE-PROPOSAL SUBMITTAL OF ATCS

To be considered, a proposed ATC must be submitted to WSDOT no later than XXX am/pm Pacific Time on the date set forth in Section XXX of this ITP. This deadline also applies to revised submissions in response to WSDOT's comments. Each ATC submittal package shall consist of an original and two copies, and shall address all of the following elements:

- *Brief Description: A few words identifying the ATC, for future reference;;*
- *Detailed description: A detailed description and schematic drawings of the configuration of the ATC or other appropriate descriptive information including, if appropriate, product details, and specifications;*
- *Usage: A description of where and how the ATC would be used on the Project;*
- *Subsurface Investigation: Describe Proposer's plan for conducting and completing a pre-Proposal geotechnical investigation;*
- *Proposed RFP modifications: References to all requirements of the RFP that are modified by the proposed ATC with an explanation of the nature of the modification from said requirements and a request for approval of such modifications;*
- *Design Deviations: If the ATC requires "design deviation(s)" as defined in Section 330.03 of the WSDOT Design Manual, the submittal package shall include documentation for the design deviation(s) which conforms to the WSDOT Design Manual and is in the same format as the Pre-approved Design Deviations included in the RFP. No design deviation shall be incorporated into an ATC without receiving WSDOT approval, and FHWA approval as applicable.*
- *Analysis: An analysis justifying use of the ATC and demonstrating how the project with the ATC is "equal or better" than the project without the ATC. The "equal or better" analysis shall address the following:*
 - (1) Functionality, which when appropriate shall require a traffic operational analysis;*
 - (2) Structural adequacy;*
 - (3) Safety;*
 - (4) Comparison of life cycle costs including repair and maintenance;*
 - (5) Aesthetics;*
 - (6) Impacts on construction traffic;*
 - (7) Effect on or changes to environmental commitments identified in the RFP;*
 - (8) Impacts to surrounding and adjacent communities;*
 - (9) Changes needed in the location, length, height, or number of noise walls;*
 - (10) Impact on utilities and rail;*
 - (11) Discussion of additional right of way or easements required;*

Do not require any data indicating the effect that approval of the ATC will have on the Proposal Price.

If a Proposer wishes to make any announcement or disclosure to third parties (such as other governmental agencies that may have an interest in the ATC) concerning any ATC, it must first notify WSDOT of its intent to take such action, including details as to date and participants, and obtain WSDOT's prior approval to do so.

PRE-PROPOSAL REVIEW OF ATCS

Incomplete ATC submittal packages may be returned by WSDOT without review or comment. WSDOT may, at its discretion, request additional information regarding a proposed ATC, conduct one-on-one meetings with Proposers to discuss ATCs, and/or establish such protocols or procedures as it deems appropriate for conducting one-on-one meetings. Subject to the Washington Public Records Act, and to WSDOT's right to use proposed concepts following award of the Contract based on payment of the Stipend, all discussions with Proposers regarding ATCs will remain confidential.

Although WSDOT reserves the right in its sole discretion to reject any ATC, ATC's specifically not eligible for approval include the following:

1. *ATCs that are, in WSDOT's sole discretion, deemed not to provide a project that is "equal or better" on an overall basis than the project would be without the ATC.*
2. *Any ATC that would require excessive time or cost for WSDOT review, evaluation, or investigation.*

In order to be approved, an ATC must be deemed, in WSDOT's sole discretion, to provide a project that is "equal or better" on an overall basis than the project would be without the proposed ATC. Potential changes to the Proposal Price will not be considered by WSDOT in the "equal or better" determination.

WSDOT Response

WSDOT will respond to all ATCs within 14 calendar days of ATC receipt, provided that WSDOT has received all requested information regarding the ATC. The format for response should include the ATC number, brief description, and shall be limited to one of the following:

1. *The ATC is approved;*
2. *The ATC is not approved;*
3. *The ATC is not approved in its present form, but may be reconsidered for approval upon satisfaction, in WSDOT's sole discretion, of certain identified conditions that must be met or certain clarifications or modifications that must be made as described hereunder. The proposer shall not have the right to incorporate this ATC into the Proposal unless and until the ATC has been resubmitted within the time limits in the ITP, with the conditions stated below satisfied, and WSDOT has unconditionally approved the revised ATC; or*
4. *The submittal does not qualify as an ATC but appears eligible to be included in the Proposal without an ATC (i.e., the concept appears to conform to the Basic Configuration and to be consistent with other contract requirements).*

WSDOT approval of an ATC extends solely to the information contained in the ATC submittal.

INCORPORATION INTO PROPOSAL

The Proposer may include any or all approved ATC's in its Proposal. The Proposal Price shall reflect any incorporated ATC's. Except for incorporating approved ATC's, the Proposal shall not otherwise contain exceptions to or variations from the requirements of the RFP. If WSDOT responded to an ATC by stating that certain conditions must be met prior to granting approval, the Proposer shall not have the right to incorporate the ATC into the Proposal unless and until the ATC has been timely resubmitted with the conditions satisfied and WSDOT has approved the ATC in writing. Once an ATC has been approved, only the entire ATC is eligible for inclusion into the Proposal. The inclusion of partial ATCs into a Proposal is not allowed.

WSDOT's geotechnical investigation and subsurface utilities investigation conducted for this Project and included in the RFP was based on the WSDOT Conceptual Design and Basic Configuration. Therefore, the geotechnical information and subsurface utilities information provided in the RFP does not purport to represent site conditions for an ATC.

Consequently, with respect to geotechnical investigations, the Proposer is responsible for conducting its own geotechnical investigation prior to the Proposal due date, for changes to the Conceptual Design or Basic Configuration, if any, that are approved as part of an ATC. Proposer's geotechnical investigation shall comply with the requirements of the WSDOT Geotechnical Design Manual. When conducting the geotechnical investigation, Design-Builder may take into consideration the geotechnical information provided in the RFP to supplement its analysis to the extent that said information meets the investigation

requirements of the Geotechnical Design Manual as applied to the Design-Builder's design addressed in the approved ATC. The Proposer's pre-proposal geotechnical investigation will form the basis upon which differing site conditions will be addressed under the Contract for Work implemented as part of an ATC. Failure of the Proposer's investigation to meet the Geotechnical Design Manual standard will result in the Proposer assuming all geotechnical risks in terms of both cost and time associated with the Work addressed in the ATC.

With respect subsurface utilities, WSDOT has performed preliminary investigations of existing Utilities located within the Project's Right-of-Way as designated in the RFP absent modification by an ATC. The Proposer will be responsible for conducting its own investigation relating to all utilities located outside of said Right-of-Way.

Implementing Language: General Provisions

In order to implement this Guidance Statement, the General Provisions shall include the following Language, or other as approved by HQ Construction:

1-01.3(1) DEFINED TERMS

Alternative Technical Concept (ATC) - Concepts proposed by a Proposer and approved by WSDOT which modify the Basic Configuration or other Contract requirement.

1-02.4(2) SUBSURFACE INFORMATION

WSDOT has made subsurface investigation of the site of the proposed Work. The boring log data and soil sample test data accumulated by WSDOT are available for inspection by the Design-Builder. The boring logs shall be considered as part of the Contract. However, WSDOT makes no representation or warranty expressed or implied that:

- 1. The Design-Builders' interpretations from the boring logs are correct;*
- 2. Moisture conditions and indicated water tables will not vary from those found at the time the borings were made; and*
- 3. The ground at the location of the borings has not been physically disturbed or altered after the boring was made.*

WSDOT makes no representations, guarantees, or warranties as to the condition, materials, or proportions of the materials between the specific borings regardless of any subsurface information WSDOT included in the RFP or otherwise made available to Proposers.

The availability of subsurface information from WSDOT shall not relieve the Design-Builder from any risks or of any duty to make examinations and investigations as required by Section 1-02.4(1) or any other responsibility under the Contract or as may be required by law.

The geotechnical information in the RFP does not represent site conditions for an ATC. The Design-Builder is responsible for conducting its own geotechnical investigation, prior to the Proposal due date, for changes to the Conceptual Design or Basic Configuration, if any, that are approved as part of any ATC included in the Proposal. Proposer's geotechnical investigation shall comply with the requirements of the WSDOT Geotechnical Design Manual. When conducting the geotechnical investigation, Design-Builder may take into consideration the geotechnical information provided in the RFP to supplement its analysis to the extent that said information meets the investigation requirements of the Geotechnical

Design Manual as applied to the Design-Builder's design addressed in the ATC.

1-04.1(2) GENERAL OBLIGATIONS OF THE DESIGN-BUILDER

The Design-Builder, in addition to performing all other requirements of the Contract Documents, shall:

- (c) Obtain and pay the cost of obtaining all Governmental Approvals including Governmental Approvals required to implement any approved ATC(s) incorporated into the Contract Documents;*
- (n) Obtain and pay the cost of obtaining any third party approvals required to implement any approved ATC(s) incorporated into the Contract Documents; and*
- (o) Unless otherwise noted in the Contract, be responsible for all costs and/or delays of any nature associated with the implementation of any approved ATC incorporated into the Contract Documents.*

1-04.4(2) MATTERS NOT ELIGIBLE FOR CHANGE ORDERS

The Design-Builder acknowledges and agrees that no increase in the Contract Price is available except in circumstances expressly provided for in the Contract, that such price increases shall be available only as provided in Section 1-04.4, and that the Design-Builder shall bear full responsibility for the costs of all other changes. Matters which are the Design-Builder's exclusive responsibility include the following:

- (m) Delays in obtaining or failure to obtain any third party approvals required to implement any approved ATCs incorporated into the Contract Documents;*
- (n) Unless noted otherwise in the Contract, any increases in costs or time incurred implementing an ATC.*

1-04.4(8) BASIC CONFIGURATION CHANGES

Upon the Design-Builder's fulfillment of all applicable requirements and limitations relating to Change Orders specified herein, if a Necessary Basic Configuration Change increases the cost and/or time to perform the Work, the Design-Builder shall be entitled to an increase in the Contract Price and/or an extension of the Contract Time, excluding any costs and/or time that could have been avoided by the Design-Builder; provided, however, the Design-Builder shall not be entitled to an increase in the Contract Price or an extension of the Contract Time in connection with any error, omission, inconsistency or other defect in the Conceptual Plans.

1-04.7 DIFFERING SITE CONDITIONS (CHANGED CONDITIONS)

For Work unrelated to an ATC, Differing Site Conditions shall mean (a) subsurface or latent physical conditions encountered at the Site differing materially from those indicated in the Geotechnical Baseline Report (RFP Appendices G1 and G4) and/or the Supplemental Boring Project (RFP Appendix G5) and which are not discoverable from a reasonable investigation and analysis of the site including subsurface conditions, or (b) physical conditions of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in the type of Work provided for in the Contract and the Work site characteristics, provided in all cases that the Design-Builder had no actual or constructive knowledge of such conditions as of the Proposal Date.

For Work related to an ATC, Differing Site Conditions shall mean (a) subsurface conditions encountered

at the Site differing materially from those indicated in the Design-Builder's geotechnical investigation conducted for purposes of the ATC prior to the Proposal due date (to the extent said investigation complies with the WSDOT Geotechnical Design Manual), and which are not discoverable from a reasonable investigation and analysis of the site, or (b) physical conditions of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in the type of Work provided for in the Contract and the Work site characteristics, provided in all cases that the Design-Builder had no actual or constructive knowledge of such conditions as of the Proposal Date.

1-07.17(5) RELIANCE ON UTILITY INFORMATION

WSDOT has performed preliminary investigations of existing Utilities located within the Project's Right-of-Way. RFP Appendix U4 provides the results of a Subsurface Utility Engineering (SUE) investigation of certain types of Utilities existing within the Project's Right-of-Way, which investigation was performed based on the parameters indicated in the SUE report. Additional information with respect to Utilities existing within the Project's Right-of-Way is primarily provided in RFP Appendix U1-U9, although information relevant to Utilities can also be found throughout the RFP documents. The Design-Builder acknowledges that (a) the Utility Information does not identify Service Lines impacted by the Project, and (b) information contained in the Utility Information, including the descriptions of the affected Utilities and their locations, is preliminary and may not be accurate. The Design-Builder shall verify all Utility Information included in the RFP, and shall perform its own investigations in accordance with the Contract Documents. The Design-Builder shall not proceed with any construction Work at any location until such investigations have been completed for that location.

If the Design-Builder's investigations identify Utilities (excluding Service Lines) not described in the Utility Information, or if the Design-Builder determines that any Major Underground Utility was not described in the Utility Information with Reasonable Accuracy (as defined in Section 1-07.17(9)), the Design-Builder shall notify WSDOT immediately upon such discovery. If any such unidentified Utility is installed within the Project's Right-of-Way pursuant to a franchise or permit, WSDOT shall execute an assignment of rights and delegation of obligations there under in the same form as RFP Appendix U1, in favor of the Design-Builder. The Design-Builder shall be responsible for confirming the exact location (horizontal and vertical) of each Utility (including Prior Relocations) potentially affected by the Project, regardless of whether information with respect to such Utility has been provided by WSDOT or by the Utility Owner.

The Design-Builder shall comply with RCW 19.122 et seq. regarding underground Utilities. The Design-Builder shall refresh and maintain the location ground markings in all areas on a daily basis where excavation is in progress.

The Utility Information in the RFP does not purport to identify utilities outside of the Project's Right-of-Way. Consequently, the Design-Builder is responsible for conducting its own subsurface utilities investigation for changes to the Conceptual Design or Basic Configuration, if any, that are approved as part of an ATC, for any Work area located outside the Project's Right-of-Way as designated in the RFP absent modification by an ATC.

1-07.17(9).4 LIMITATIONS AND EXCLUSIONS

4. Increased costs or time attributable to inaccuracies or omissions in the Utility Information, where the impacted Work (a) is part of an approved ATC incorporated into the Contract Documents, and (b) the Work area designated in the ATC is outside the Project's Right-of-Way as designated in the RFP absent modification by an ATC.

Implementing Language: Stipend Agreement

In order to implement this Guidance Statement, the Stipend Agreement shall include the following Language, or other as approved by HQ Construction:

***Services and Performance.** Department hereby retains Proposer to prepare a responsive Proposal in response to the RFP. A "responsive" Proposal means a Proposal submitted by a qualified Proposer, which conforms in all material respects to the requirements of the RFP, as determined by Department, and is timely received by Department.*

Subject to the provisions of the RFP documents regarding ownership of EPDs, all work performed by Proposer and its team members pursuant to this Agreement shall be considered work for hire, and the products of such work shall become the property of Department without restriction or limitation on their use. Such work shall include, but is not limited to all ATC's approved by WSDOT whether or not included in a Proposal. Neither Proposer nor any of its team members shall copyright any of the material developed under this Agreement.

Capitalized terms used but not otherwise defined herein shall have the meanings set forth in the RFP.

Appendix D: FHWA Programmatic Waiver Approval



U.S. Department
of Transportation

**Federal Highway
Administration**

Memorandum

Subject: **ACTION:** Alternate Technical Concept (ATC)
Programmatic Waiver

Date: June 1, 2010

Dwight L. Horne

From: Dwight Horne
Director, Office of Program Administration

Reply to
Attn. of: HIPA-30

To: Daniel M. Mathis
Division Administrator
Olympia, WA

This is in reference to Mr. Anthony Sarhan's May 24, 2010 email that transmitted Washington State DOT's (WSDOT) May 6, 2010 letter that requests a waiver from the requirements of 23 CFR 636.209 concerning ATCs. Specifically, WSDOT is requesting a waiver from the requirement in Section 636.209(b) that states "Alternate technical concept proposals may supplement, but not substitute for base proposals that respond to the RFP requirements."

The Washington State DOT's proposed method of evaluating ATCs during the proposal review process is satisfactory. WSDOT will pre-approve ATCs and ensure that any deviations from design criteria are adequately reviewed and the appropriate steps are taken to avoid any unfairness in the proposal process. This process should address the intent of the existing policy of ensuring fairness during the consideration of proposals.

This waiver is approved under our SEP-14 innovative contracting experimental program. The proposed annual reporting criteria suggested by WSDOT are satisfactory.

Thank you for the opportunity to review and comment on this SEP-14 request. Should you have any questions, please contact Gerald Yakowenko at (202) 366-1562.