Washington State Department of Transportation

Memorandum

October 18, 2023

TO: WSDOT Project Development Engineers

FROM: Mark Gaines, Development Division Director, State Design Engineer

SUBJECT: Project Delivery Memo #23-03 – Indirect Costs Within Reimbursable Agreements

Purpose

The purpose of this Project Delivery Memo is to provide policy and instruction for WSDOT staff who develop cost estimates, agreements, permits or invoices to other entities.

Per RCW 47.28.140, 39.34.130 and 43.09.210, WSDOT is required to recover costs based on ***"an actual cost basis"***, ***"the full costs of a state agency incurred"*** or ***"paid for at its true and full value"***. The full cost of services and materials includes indirect costs. The requirement to recover these costs applies to all reimbursable agreements. This memo will also establish the process for a waiver of indirect costs.

RCW 47.28.260 was enacted in 2013 and allows for exemption under specific circumstances. It states, **"the department may waive application of its indirect costs by entering into a reciprocal agreement with the public agency, instrumentality, municipal corporation, or political subdivision in which each party agrees to waive indirect costs".** Note, that a separate agreement is required where the reciprocity in waiver of indirect costs is documented.

Background

WSDOT enters into a reimbursable agreement when performing work for others and that party reimburses WSDOT for the costs incurred. The indirect rate is then applied (at the current rate) to all costs incurred during a billing period.

- Direct cost – an easily identifiable cost which is specific to the project work, such as labor or materials.
- Indirect cost – sometimes called overhead costs, are business or operational costs incurred for a common purpose and not directly connected with a specific project. Indirect costs may include the party's general administrative and support activities, such as accounting, personnel administration, computing, contracting and procurement. If federal funding is used on a project, the guidelines set forth in 2 CFR Part 200 identify direct or indirect costs. For additional information on indirect costs, contact the Accounting & Financial Services Office.

The Office of the Attorney General provided WSDOT clear direction, citing case law, that WSDOT has very limited legal authority to subsidize a local jurisdiction by waiving any direct or indirect costs. However, if WSDOT does not perform any type of work and simply passes funds or contractor costs to another agency, indirect costs are not applicable, and no waiver is required.

Direction

Department Agreement Writers shall ensure that all reimbursable agreements (standard and non-standard) include language and a budgetary component for the billing of the current indirect cost rate. The recommended language is as follows:

> *(Party) in consideration of the faithful performance of the Work to be performed by WSDOT, agrees to reimburse WSDOT for the direct and related indirect costs of the Work.*

Agreement Writers may only waive indirect costs by entering into a waiver agreement under RCW 47.28.260.

When entering into a waiver agreement for indirect costs under RCW 47.28.260, staff shall:

- Include documentation of the reciprocity between the two parties. This means that each party will benefit as closely as possible in an equal manner from the waiving of indirect costs. This can only occur if each party will be completing work for one another over a period of time.
- Exchange their organization's indirect rate plan or study with one another.
- Develop a system to accurately monitor the reciprocity over the course of the waiver agreement. The Department has an obligation to ensure that one party is not benefitting substantially more than the other. The recommended language is as follows:
    - *The Parties agree to review the reciprocity of this agreement on the first week of May, each year.*
- Specify the project or work to be performed by each party, for no longer than a maximum term of ten years, unless amended by the parties.
- Send HQ Utilities, Railroad, & Agreements Office (URA) all Waiver Agreements for review and assistance in obtaining *Approval as to Form* by the Office of the Attorney General.

When amending an existing agreement that has waived indirect costs Agreement Writers shall:

- Review with HQ URA, in consultation with the Office of the Attorney General, the original justification for waiver and the terms of the agreement.

When acting as a pass-through agency of any funds or contractor costs staff shall:

- Ensure that WSDOT is NOT performing any type of work for the other party related to the funds or costs that WSDOT is passing onto that party.
- Not include indirect costs in the agreement. A waiver is not needed since indirect costs are excluded in these circumstances.
- Specify which portions of payment and billing will not include indirect costs if WSDOT is combining pass-through funds or costs into a reimbursable or payable agreement. If considering this, confirm with Accounting & Financial Services and Program Management representatives.

Department Agreement Writers shall ensure agreements avoid using "Lump Sum" costs, as there is difficulty in documenting the full costs, including indirect costs.

The Development Division will revise the Agreements Manual M 22-99 to reflect this change.

This memo supersedes Project Delivery Memo #12-02 State's Indirect Cost Rate.

MG: gg

cc: Regional Administrators
Project Development Engineers