



STATE OF WASHINGTON

OFFICE OF THE INTERAGENCY COMMITTEE

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May 30, 2007

TOPIC #4d: WAC Adoption
Waiving IAC's Prohibition on Allowing Retroactive Costs

Prepared By: Greg Lovelady,¹ Rules Coordinator

Approved by the Director: 

Presented By: Marguerite Austin, Manager

Summary:

Washington Administrative Code (WAC) 286-13-085, titled "retroactive and increased costs," prohibits the reimbursement of most approved projects' costs that are incurred before execution of the IAC project agreement. IAC has received a request from the City of Auburn to modify the WAC no later than June 8, 2007, so that it can begin construction activities immediately.

Staff Recommendation:

The Board has provided the Director with the prerogative of waiving its prohibition on reimbursing certain costs incurred before execution of an IAC project agreement. This is allowed only under limited and specific circumstances: land acquisitions and certain pre-construction costs. Staff recommends that these circumstances be broadened to include development costs for projects meeting all three of the following conditions: (1) the project is on a legislatively-approved LEAP² list from the 2007 legislative session, (2) the project is funded on June 7, and (3) the project has met all post approval requirements. Staff further recommends that the waiver period be limited to 120 days as authorized by emergency WAC.³

Background:

The present request involves the City of Auburn's Game Farm Park Soccer Renovation, the top-ranked Local Parks category project on the 2007-2009 WWRP list that was approved by the Governor and the Legislature. Specifically, the city would like to "get a jump on the construction season" by starting work before execution of the IAC project agreement. Other project sponsors within funding range (on the LEAP lists) who have also made inquiries about when they can start construction include, the City of Mount Vernon, Federal Way Parks and Recreation, the City of Burien and Jefferson County.

¹ Other IAC staff involved in preparation of this memo: Laura Johnson and Darrell Jennings.

² Legislative Evaluation and Accountability Program Capital Documents 2007-1 and 2007-3

³ An emergency WAC expires 120 days after filing. RCW 34.05.350



Normally, construction costs incurred outside of the project agreement period are not eligible for reimbursement. Under current procedures, project agreements are not made available until after the board provides final funding approval, the fiscal biennium has begun, and the sponsor provides IAC with required post approval documentation⁴ necessary to issue an agreement.

Auburn indicates that if the IAC Board grants this WAC revision, the city/contractor is prepared to begin earthwork on June 11 and install turf on July 9. The city further indicates that while it appears that only three weeks (June 11-July 1) would be gained, in reality the park users would gain about three months of soccer field use because the turf contractors are already scheduled through mid-September with other projects.

To accomplish the needed revisions to the existing WAC, the Director would need Board authorization to file documents with the State Code Reviser for adoption of an emergency rule amending WAC 286-013-085(2) with an effective date of June 8, 2007 [Attachment 2].

Analysis:

IAC approval of this proposal has several possible advantages. For example, it would:

1. Help sponsors bid projects earlier in the year, thus increasing the possibility of lower project costs.
2. Get some projects underway more quickly thus increasing the likelihood of reducing future reappropriation requests.
3. Reduce by 2-3 months the time from application submittal to actual "on the ground" development (the timeframe is now 14-15 months from receipt of the application).
4. Be administered similar to IAC's land acquisition waivers that require submittal of a request along with required post approval materials.
5. Make facilities available to the public earlier.

On the other side, however, there are several issues to consider. For example:

1. Projects will be underway with construction activities before the IAC project agreement is signed.
2. Project sponsors may not clearly understand that they are taking a financial risk since the emergency WAC could be repealed 14 days after filing⁵. The waiver would clearly need to indicate that all risk rests with the project sponsor (that is, expenses incurred outside of the agreement period would not be reimbursable if the WAC was repealed).
3. Sponsors could also find themselves in a difficult situation, if an inadvertent discovery is made while working within the waiver period (archeological find, hazardous substance issue, etc.).
4. This would probably affect only a few projects.
5. Outside of this memo, there has been no public review of this proposal.

⁴ Post-approval documentation includes: control and tenure information, progress milestones for the agreement, compliance with the cultural resources Executive Order 05-05, and certain permits when applicable.

⁵ Within seven days after the rule is adopted, any person may petition the Governor requesting an immediate repeal of the rule. The Governor would then have seven days to either deny or repeal the rule.

6. There is an undetermined workload issue to IAC grants staff.

Next Steps:

If the Board adopts Resolution 2007-09, staff will immediately file the emergency rule documents and begin granting waivers to applicants that meet the requirements specified in the emergency WAC.

On balance, staff believes this small extension of waiver authority would be beneficial to these Washington Wildlife and Recreation Program and Aquatic Lands Enhancement Account projects.

Attachments:

- Attachment 1: Resolution 2007-09, *WAC Adoption: Waiver of Retroactivity*
- Attachment 2: Proposed WAC revision

Attachment 1

**Resolution #2007-09
WAC Adoption: Waiver of Retroactivity
Chapter 286-13-085 WAC**

WHEREAS, in regard to projects included in LEAP¹ Capital Documents No. 2007-1 and 2007-3, the Interagency Committee for Outdoor Recreation (IAC) hereby finds:

1. Certain project sponsors are hindered from starting work as soon as might be possible due to IAC's policy prohibiting reimbursing development costs incurred before execution of the project agreement.
2. Some of these sponsors would like IAC to waive this policy because conditionally allowing the reimbursement of such costs for projects on the 2007-1 and 2007-3 LEAP lists would provide several advantages, including; reducing the project implementation period, reducing the likelihood of future reappropriation requests, and making facilities available to the public in a timelier manner.
3. These project applicants are willing to assume any risks to state funds associated with allowing the work to begin before execution of an IAC project agreement.

NOW, THEREFORE BE IT RESOLVED, that IAC finds it is appropriate to offer administrative relief to those sponsors with qualified projects on LEAP Capital Documents 2007-1 and 2007-3, and that the delay associated with adoption of permanent rule would be contrary to the public interest; and

BE IT FURTHER RESOLVED, that Washington Administrative Code (WAC) 286-13-085(2) should be amended to enable reimbursement of such costs for projects, cited in LEAP Capital Documents 2007-1 and 2007-3, that are funded on June 7, 2007, and that have met all IAC post approval requirements; and

BE IT FURTHER RESOLVED, that any such expenditures shall be at the option and risk of the requesting jurisdiction; and

BE IT FURTHER RESOLVED, that the Director shall be authorized to file with the state Code Reviser such documents as may be necessary for adoption of an emergency rule amending WAC 286-13-085(2) as shown in Attachment 2 hereto, with an effective date of June 8, 2007.

Resolution moved by: _____

Resolution seconded by: _____

Adopted — Defeated — Deferred (circle)

June 7, 2007

¹ Legislative Evaluation and Accountability Program

WAC 286-13-085

Retroactive and increased costs ~ Proposed Amendments

Under most conditions, eligible expenses may only be reimbursed for activities that occur within the period cited in the project agreement. This is known as the committee's prohibition on retroactivity. To avoid this prohibition, a waiver may be issued.

(1) ...

(2) Retroactive development costs. The only retroactive development costs eligible for reimbursement consideration are preliminary expenses (e.g., engineering costs).

However, solely in respect to ~~WWRP~~ projects on LEAP Capital Documents 2007-1 and 2007-3-5, that were approved for funding by the IAC on June 7, 2007 the director is authorized to grant a waiver of retroactivity, which establishes eligibility for future reimbursement of all ~~appropriate-eligible~~ development costs. Such applicants' retroactivity requests must be in writing, and ~~provide sufficient justification~~ include all post-approval materials required by IAC policy (for example, control and tenure information, compliance with applicable Executive Orders, etc.). Reimbursement of expenditures is subject to the provisions of WAC 286-13-070. This authority shall be effective until the execution of a project agreement or ~~June 30, 1997~~, September 30, 2007, whichever occurs first.

Johnson, Laura

From: Daryl Faber [dfaber@auburnwa.gov]
Sent: Tuesday, May 15, 2007 1:00 PM
To: laura.johnson@iac.wa.gov
Subject: Request for W.A.C. Waiver

Thank you for taking the time to discuss the City of Auburns desire to begin construction on Game Farm Park Soccer Renovation (construction of 2 synthetic surface soccer fields) prior to the July 1 date. As you are aware this project scored #1 in the state under the "local parks category" and the City of Auburn is ready to move forward in an effort to "beat the construction season" and therefore save the taxpayers money and to provide additional months of play at the site.

Thanks in part to the IAC's \$300,000 grant, the \$1,400,000 Game Farm Park Soccer Field project is fully funded. The bid opening has occurred and the selected contractors are within budget. City Council will authorize staff to provide the contractor(s) "one for earthwork, one for synthetic surface" the "notice to proceed" on May 21. Should the IAC Board recommend waiving the requirements of W.A.C. 286 13 085 sub paragraph 2, the city/contractor would be prepared to begin earthwork June 11 and turf installation could begin on July 9. While it appears that we are only gaining 3 weeks (June 11-July 1) in actuality the park users would be gaining approximately 3 months of soccer field usage due to the fact that the turf contractors are already scheduled through mid September with School District projects.

Please let me know what additional information may be needed prior to your June 7 & June 8 meeting. If a personal visit is required I would be willing to free up time on my calendar. Thanks again for the continued efforts of the IAC.

Daryl Faber
City of Auburn

5/15/2007