AICN Newsletter

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The Quarterly Publication of the Alliance of IEEE Consultants Networks

4th QUARTER 2022

CHAIR'S COMMENTS: CHANGE IN LEADERSHIP

BY CHRISTOPHER WILSON

My time as chair of the AICNCC has come to an end. I've had the honor of leading this Committee for the past two years. In those two years, the AICNCC has had a number of notable accomplishments. The first is providing leadership and guidance to consultants through our newsletters, webinars and reports during the pandemic. Second, this committee has made tremendous inroads connecting with local consultants networks — resulting in the Fall 2022 Virtual Meeting, with all local network chairs invited. Third, the AICNCC provided IEEE-USA with guidance to address a number of consulting policy issues arising of the past few years.

Long time Chair of the Western North Carolina Consultants Network, Charles Lord, will be taking on leading the AICNCC. He has a very progressive agenda that will benefit all IEEE consultants.

Thanks for all the support the consultant community provided me these past two years.

I look forward to continuing my work with AICNN in the future. ■

2022 IEEE-USA CONSULTANTS FEE SURVEY: CONSULTANT RATES UP $30 OVER PAST TWO YEARS

BY PAUL LIEF ROSENGREN

IEEE-USA has released its *2022 Consultants Fee Survey Report*, including rich statistics from a survey of IEEE-USA members — who reported that more than half of their income came from consulting.

The report includes information and trends on how much consultants charge by region, years of experience and educational levels, as well as information on the impact of supply chain disruptions on consultants' work.

The median rate consultants charge continues to rise — now at $180 an hour, up $10 over the previous year — and $30 more than just two years ago.

The survey's findings include:

- Fee-based consultants holding a Ph.D. or an MBA had a $20 higher median hourly rate ($200 an hour) than overall respondents. Eighteen percent of respondents had Ph.D.s, while one-third hold Masters degrees.

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For questions, comments or submissions
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- Consultants specializing in Power and Communications charged the highest median rates ($200 per hour).
- Those having five or fewer years of experience charged $140 an hour on average, while those with 25 years or more charged a median of $200 per hour.
- Just more than 10 percent indicated that they have had difficulties collecting bills. This figure has remained consistent over the past two surveys.

As in the past, regional differences were apparent in rates charged. Respondents working in the Middle Atlantic, South Atlantic, and Pacific regions reported charging higher median hourly rates; while those in East North Central and West South Central reported charging below the countrywide average. Charts showing responses from each region, with decile breakdowns, are included in the report.

While supply chain disruption negatively impacted the economy, these disruptions provided opportunities for IEEE members — including requiring redoing or redesigning work to account for new supply chain constraints.

Respondents indicated supply chain disruptions caused them to:

- Create multiple designs with different components
- Widen the pool of suppliers
- Redesign and replace components with ones more readily available — on occasion necessitating the lowering of quality and safety standards
- Increase communication with clients on supply chain issues
- Stretch out timelines and project schedules
- Change design flow and accelerate design

The Report indicates that most consultants' business comes from repeat clients (an average of 62% of total dollars earned). The Report notes, however, that "having outside connections is also important, as significant earnings come from referrals from clients, friends and networking contacts." The Report also points out that social media or Google advertising do not play a major role in attracting clients for most consultants.

Further, the Report shows that consultants billing methods have remained relatively constant — with 74% of respondents reporting that they bill hourly; 22% bill a fixed price for work; and 4% percent bill on a daily rate.

The most common areas respondents offer consulting services are in:

- Systems Engineering (31%)
- Project Management (27%)
- Expert Witness (25%)
- Electrical Power Systems (25%)
- New Product Development (22%)
- Management (21%)
- Technical Writing (21%),
- Communications (21%)

According to the Report, "There has been very little movement in these most common areas of expertise since 2018. Systems Engineering has been the top category for the past five years; and Project Management has been second for four out of these five years — and among the top three for all five years."

The area with the greatest increase since last year was Failure Analysis — mentioned by 10.2% of the consultants in 2021; and 17.0% in 2022.

The Report gives a detailed breakdown of 96 areas of consulting, as well as year-to-year response rates for each, is given in the report.

This year, the IEEE-USA Alliance of IEEE Consultants' Networks Coordinating Committee (AICNCC) asked respondents to provide recommendations on actions IEEE-USA could take to assist fee-based consultants in their consulting practice. Recommendations submitted were mostly in the areas of helping make connections; increasing availability/awareness of resources; and providing advocacy at both the federal and state levels.

The complete 2022 IEEE-USA Consultant Fee Survey Report is available for purchase from the IEEE-USA Shop. The Report is $29.95 for members. Non-members pay $49.95. ■

Paul Lief Rosengren is the coauthor of In the Time of Covid: One Hospital's Struggles and Triumphs. He worked for more than three decades in corporate communications at NBC, PSE&G, BD and in state government. He has a Master's in Public Policy from The Kennedy School of Government, Harvard; and an undergraduate degree in political science from Dickinson College.

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ELECTRICAL AND ELECTRONICS ENGINEERS PROFESSIONAL LIABILITY INSURANCE INSIGHTS

Limit Your Risk through Careful Contracting

One of the most common reasons for a dispute over an alleged design error is disagreement over what is required by the contract.

Contractual issues very often result from a problem with documentation: either no contract at all, or a poorly-drafted contract. A thorough, well-drafted contract may be your best asset in the event of a design dispute.

What's important when entering into a design contract, including a contract where design obligations are imposed on a construction contractor/subcontractor?

- ***Always*** have a written contract, making certain it addresses the various issues that may come up. A simple purchase order is insufficient, as it does not address the many contingencies that may arise.
- Communicate with your customer to define your duties and meet their expectations, as possible.
- When you can, provide your own contract form, understanding what local and state laws require, along with local custom and practice.
- Take the time to read and understand the contract.
- Make certain the contract is executed by both (or all) parties, and keep a copy of it.
- Keep copies of any communications that may impact the contract, including (but not limited to) correspondence regarding your scope of work, change orders, etc.

What are some of the most important contractual provisions to consider?

- **Scope of Work:** Thoroughly setting out your scope of work (both what you are doing, and what you are **not** doing) is critical. Fully discuss and make certain both parties are aware of the contractual scope of work — before you enter into the contract. Where possible, include the scope of work as an exhibit to the contract so that the scope can be described fully and thoroughly.
- Do not rely on contractual provisions that, in turn, require your compliance with another contract (for example: As a subcontractor, do not consent to a scope-of-work clause that requires you to comply with the terms of the primary contractor's agreement with the owner).
- **Indemnity Clauses:** Indemnity obligations seek to shift risk. The design professional may indemnify its client for claims that arise out of, or pertain to, the design professional's own negligence. Always tie any indemnity obligation to your (design professional's) independent negligent acts, errors, or omissions. Do not consent to indemnify the other party for their own negligence. Doing so presents potentially uncontrollable risks, and many states prohibit such indemnification.
- Where possible, do not agree to undertake the indemnitee's defense, but only agree to indemnify (for both defense costs and damages) — where the design professional's negligence has been established, and/or proven. Some states require one to specifically carve out the duty to defend. For example, one might state that the "[design professional] shall indemnify (but shall have no immediate duty to defend…").
- **Insurance Requirements:** Make certain that you are aware of, and can satisfy, the contract's requirements concerning ***Additional Insured*** status, types of coverage, minimum limits, etc. It's usually a good idea to speak with your agent concerning the contract's insuring requirements, and whether your insurance program satisfies them.

IEEE consulting members, and those considering the opportunity to become self-employed (or even to undertake a single consulting project) can learn more about their exposure to risk and ways to mitigate exposures with contracts and insurance, in addition to prudent business practices. These resources can be found at https://www.ieeeinsurance.com/ieee-plrm.html. Information about the professional liability insurance and related policies, as well as the online application for coverage are at https://www.ieeeinsurance.com/ieee-us-refresh/professional-coverage/professional-liability-insurance.html. ■

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U.S. DEPARTMENT OF LABOR ANNOUNCES PROPOSED RULE ON CLASSIFICATION OF EMPLOYEES AND INDEPENDENT CONTRACTORS

The U.S. Department of Labor (DOL) recently published a Notice of Proposed Rulemaking to help employers and workers determine whether a worker is an employee or an independent contractor under the ***Fair Labor Standards Act***. The proposed rule is likely to affect many U.S IEEE members, who engage in consulting work as independent contractors.

Remember California AB5?

Regular readers of this newsletter may feel a sense of déjà vu, as this issue first raised its head in California three years ago with the passage of Assembly Bill 5. To better understand the proposed federal rules, it may be helpful to review the impact that AB5 had on consultants, and compare that to the DOL proposal. AB5 attempted to update employment law in California to cover the increasing number of gig workers in the economy by redefining who is (and isn't) an employee. AB5 established the so-called "ABC" test, a set of three criteria to determine who is a legitimate independent contractor. The test criteria are:

1. The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
2. The person performs work that is outside the usual course of the hiring entity's business.
3. The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

All three of these criteria must be satisfied for the person to be classified as an independent contractor. One can imagine how criterion (b), in particular, could quickly turn an engineering consultant into a de facto employee (a software engineer contracting with a software company and an electrical engineer contracting with another engineering firm are obvious examples). Fortunately, the state labor code was amended after the passage of AB5 to provide certain exemptions to the ABC test, in particular for licensed engineers and certain bona fide business-to-business contracting relationships. Under those exemptions, the multifactor Borello test applies, instead.

What's Different in the Proposed Federal Rules?

The DOL proposal specifically does *not* employ the California ABC test. Instead, it requires a test against six enumerated "economic reality" factors that include such criteria as:

- The opportunity for the person to incur profits (or losses) through managerial skill (or lack thereof)
- Whether the person makes investments of a capital or entrepreneurial nature
- The degree of permanence of the relationship between the person and the contactor
- The degree of control the person has over the performance of the contracted work
- Whether or not the person's work is an integral part of the contractor's business
- The degree to which specialized skills and independent judgment are used to perform the work

Unlike the California rule, there is no requirement that all six factors are satisfied. Instead, classification requires a "totality-of-the-circumstances" analysis that considers all factors that may be relevant and does not assign a predetermined weight to any of the factors.

For further details on the proposal, as well as IEEE-USA's position on the new rule, refer to the archived IEEE-USA livestream webinar on the topic, presented by IEEE-USA's Director of Government Relations Russell Harrison.

Michael Behnke, P.E., is a Senior Member of IEEE. He is a corresponding member of IEEE-USA's Licensure and Registration Committee and IEEE-USA's Alliance of Independent Consultant Networks Coordinating Committee.

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