

Meeting Summary December 8, 2021 (Meeting #28)

1. **Chair Datz called the Teams meeting to order at 1:04 p.m. A quorum was established.**
2. **Administrative**
 - a. Introductions
 - i. Committee members in attendance: Nick Datz (Owners), Scott Middleton (Specialty Contractors), Penny Koal (DES), Santosh Kuruvilla, replaced in second hour by Mike Rice (Engineers), Alexis Blue (Higher Ed), Shannon Gustine (General Contractors), Mark Nakagawara (Cities), Traci Rogstad (Schools), Sam Miller (Architects)
 - ii. Stakeholders in attendance: Tom Peterson (General Contractors)
 - b. Approval of October 27, 2021, meeting summary – M/S/P to approve meeting summary.
3. **Review DRAFT Heavy Civil Chapter**
 - a. General Contractors: We have developed an outline of the topics included in the proposed narrative. We reviewed some best practices and included two examples of how we might weight a proposal in a heavy civil option. We defined what Heavy Civil means and why it might be used. We referenced some descriptions from federal sources to give context as to what agencies might be looking for.
 - i. General Contractors: Should we just write “The heavy and civil engineering construction subsector, *as defined by the federal government*, consists of these industry groups,” rather than offering different examples of what might qualify?
 - ii. General Contractors: Yes.
 - b. General Contractors: This is all great work. That’s why we don’t have comments!
 - c. General Contractors: We wrote some bullets here on types of work suitable for heavy civil. It’s predominantly civil infrastructure with some additional items.
 - i. Architects: Is it worth explaining what “predominantly” means in the last bullet?
 - ii. General Contractors: Do we want to put in a percentage?
 - iii. Architects: Is there a legal percentage or threshold that triggers heavy civil?
 - iv. General Contractors: There’s no definition for what “predominantly” means, unlike in GCCM or other things like that.
 - v. DES: Is there a range, such as for horizontal infrastructure?
 - vi. Architects: There is no real percentage or definition. I would be hesitant to put down a definition because there isn’t one in the RCW.
 - vii. DES: Do we want to make a recommendation?
 - viii. Architects: This is a best practices document, so is there a recommendation we want to put in there for Owners?
 - ix. Chair Datz: I’m hesitant to recommend a percentage or number, because different aspects of the infrastructure are so intertwined and can be very expensive—for instance, stations and rails—depending on how they are contracted.
 - x. General Contractors: You might also have remediation that goes along with that, along lots of other factors.
 - xi. Cities: Given how complex these projects can be, adding a percentage would take away the Owners’ ability to exercise discretion—there will always be subtleties and nuances in procurement.
 - xii. Chair Datz: I like the list as-is; it helps people understand that this type of contracting mainly falls under infrastructure. I think it gives more detail than the RCW and is a good guide.

- xiii. Architects: I agree.
- d. General Contractors: We thought there should be some level of nuance when it comes to federal funding, as this is relevant for the majority of heavy civil projects. If an Owner knows there's going to be federal funding involved, this might dictate how RCW 38.10 comes into play. This helps the Owner think about what might be required for federal funding vs. funding at the state level. For instance, the Owner *may* need to retain counsel, etc. It's not a requirement, so we left it flexible.
 - i. DES: We should write that the Owner should include as much information as they have about the project's federal funding in the solicitation.
 - ii. Chair Datz: Agreed, I'll add that in. [KE1]
- e. General Contractors: When you have a lump sum bid or a self-negotiated bid, that entity—that self-performed piece—you typically have a fee on top of self-performed, as well as GCCFE on top of that, on top of the self-performed scope. This is where we introduce the first examples, such as the cash bid form example—I think we have three of them.
 - i. General Contractors: Another piece of reasoning for why the fee should be applied to everything, so people can be aware, is that sometimes the fee includes bonds or insurance. You have to apply the fee to be able to have the funds to do that. If you bid it out, you'd have to pay it anyway. Make sense?
 - ii. General Contractors: Actually, to take it back to what you just said, I think that it's going to depend on what the proposer's structure is—if it's a single entity and they have their "sister companies," that do self-performed work, they typically wouldn't bond that self-performed entity, because that's already wrapped up in the main bond. Whereas if you bid it out, then you are going to sub-bond within that. So, it gets a little tricky there on what you want included, and we go into that a little later, advising caution as to what is included in the GCCM fee, vs. what is included in the self-perform fee.
 - iii. Chair Datz: Is what I added okay? Is that what you were trying to get at?
 - iv. General Contractors: Yes, you could just say that, making it appropriate to be applied to self-performed work. I could just see somebody reading that and saying, "well this is the benefit of this; this is why I chose this. So why would I double up fees?" And it just depends on what's in the fee.
- f. General Contractors: The next bullet is weighting the various components within the RFQ/RFP. In the heavy civil option, the best practice is to request that within the proposal, the proposer self-performed fee is included along with the main fee, as part of the bid. But the weighting of the components is strictly up to the Owners—we don't define how it should be done. So that's why we put that in there. Then we provided two examples of weighting.
 - i. Chair Datz: Isn't it required?
 - ii. General Contractors: The weighting isn't required, but the fee is required.
 - iii. Chair Datz: Ok, I just want to be clear here. We say it's best practice to request the fee, but I think we want to be clear that it must be included.
 - iv. General Contractors: Yes, you're right. That should be changed. Good catch.
- g. General Contractors: Next section: Specified General Conditions (SGCs): Under SGCs, as everybody knows, under the heavy civil option, GCCM is likely to have SGCs for both the overall work and the self-performed work. Generally, as you know in the main GCCM world, what is to be included in the SGCs is usually defined. I haven't seen this done, but maybe there should be SGCs for the self-performed work. But that's usually negotiated. We figured that was best practice, because the RCM should review what SGCs are included under the self-performed work, to avoid duplicating the SGCs in the main GCCM contract with the SGCs that are negotiated

for the self-performed work. We tried to make that distinction clear, that those pieces within the self-performed chunk are negotiated, so you can get the appropriate amount of supervision for that work.

- i. General Contractors: I think on this one, to be consistent with what we did in the main GCCM section, we should delete the second sentence, because we actually said that perhaps SGCs were not part of the price component—that was something left up to the client. What you could say is exactly what you just said: “generally, as best practice, SGCs on self-performed work are appropriate to be negotiated, so that they can reflect the actual scope of work, staffing needed, etc.” Something like that. Rather than saying that the SGCs are part of the main award process because we took that out.
 - ii. Chair Datz: Right, so maybe rephrase to: “best practice is that SGCs on self-performed work should be negotiated.”
 - iii. General Contractors: you could say, “as a best practice, in order to best reflect actual scope of work and appropriate staffing, once the design is complete, appropriate levels can be identified.”
 - iv. Chair Datz: Great. Should we keep going?
- h. General Contractors: The last sub-bullet here is that self-performed work, may, at the Owner's option, be performed under a lump sum, as opposed to a cost-reimbursable arrangement. I think there's been some discussion that sometimes owners may just want to convert the negotiated piece into a lump sum, as opposed to cost reimbursable. It doesn't have to be, it's just an option. This is not prohibited by the RCWs.
- i. General Contractors: I think you could just strike the part, that “may have been bid.” Say, “on the main project, to make sure there is no duplication.” It doesn't matter how you get there. Get rid of that word, “bid.” Just say “SGCs on the main project.”
 - ii. Chair Datz: Got it. Ok, any other comments or questions? Alright, we're rolling.
- i. General Contractors: Alright, the last sub-bullet of category II is evaluating proposals. [Went through text, no additional comments.]
- j. General Contractors: Category III: Negotiated Self-performed Work. First sub-bullet is negotiating self-performed work. We went through the main focus points in the self-performed negotiations: (a.) productivity units—are they reasonable, (b.) are there duplications within the SGCs or in the NSS items, (c.) if escalation is identified separately, is it reasonable (that's a good one in this day and age), and (d.) are the labor rates accurate (another good one). Those were the highlights we put in—maybe there are items that some people want to add or delete? [No alternates suggested.]
- h. General Contractors: Moving on to Maximum Percentages of Negotiated Self-performed Work: we put that the expectation should be stated in the RFQ/RFP; you should target at least 30%, which is typical for public works projects. As the intent is to have the General Contractor have a stake in the work, we wrote that you should state the general criteria on how it's decided, citing examples if possible. This provides clarity to proposers as to why you chose those particular criteria, and it would also assist in the evaluation. Then we put a note of caution that the percentage stated can impact the type of firm that might fit the requirements.
- i. General Contractors: I'm kind of dwelling on that one. You never know what kind of teaming structure, what kind of win strategy that someone might have, it's hard to think of this as a stand-alone. Are we advising people to make a pre-judgement before seeing what strategy a team has?

- ii. Tom: Could be, absolutely. You could say, “we want you to self-perform all the guideway work,” and you have stations and garages included in that proposal solicitation. You could be limiting yourself as to what types of firms might fit that model, whether it applies to a joint venture or a single entity.
- iii. Shannon: What is the benefit of having this statement? I don’t think we can identify the potential for detriment if we don’t include it. Is there a value for including this that outweighs any potential box we’re putting someone in?
- iv. General Contractors: You’re talking about stating the percentage of self-performed work?
- v. General Contractors: I’m referencing “impact on the percent stated on the type of firm selected.” Everything else is fine, it’s just that last sub-bullet I’m stuck on.
- vi. General Contractors: Yes, maybe we should delete that part.
- vii. Chair Datz: Agreed, when you’re putting it up for RFQ, you really have no idea who the firms are or what the makeup is going to be, so how can you even make that assumption. I think by statute all you have to do is put the minimum. Should we get rid of the “maximum” in this sub-bullet header? We don’t really talk about maximum.
- viii. Shannon: Yes, good point. I mean, we know the maximum, right?
- ix. Chair Datz: By statute, it’s 50%. And if you have a minimum, you can go up to that 50%, depending on the makeup of the firm, and what they typically self-perform.
- x. General Contractors: Well, keep in mind that’s just a negotiating percentage. You still can bid on 20% of it, up to 70%. That’s why we wrote it the way we did.
- xi. Chair Datz: Any comments? Everybody good with those changes?
- xii. General Contractors: Now for the next sub-bullet, I thought I heard someone say you must give your self-perform fee.
- xiii. Chair Datz: You do, yes.
- xiv. General Contractors: So why would we have pros or cons?
- xv. Chair Datz: Good point. We’ll take that part out.
- xvi. General Contractors: To that point, I think that part might have been written before it was stated that a self-perform fee was a requirement.
- i. General Contractors: Alright, the next section was Cost Reimbursable Fee vs. Lump Sum. This was just to offer a bit more clarity on whether it’s allowable to either have negotiated self-perform scope as cost reimbursable fee, as bid or if you want to convert it to lump sum once the scope and price have been negotiated.
 - i. General Contractors: Would you say that as best practice, you want to write “once the scope is negotiated,” which, never mind, it’s in there already. I wanted to reiterate that you don’t want to put it in your RFP. I think it’s good.
- j. General Contractors: Section IV: Construction Management and Contracting Plan (CMCP): [Went through the bullets.]
 - i. Chair Datz: In that third sub-bullet [coordinated with inclusion efforts] we should write “should” not “can.” I think we need to be stronger on the inclusion language here. I think in general, we might want to double back on this to ensure we’ve addressed inclusion sufficiently, or touch base with that other committee. That was a big push at the end of the session last year.
 - ii. General Contractors: I agree with what you said, and we don’t know what that other subcommittee is doing, so I agree we should check in. [Continued through the outline.]
 - iii. Chair Datz: You’ve done a great job! Minor comments.

- k. General Contractors: Section V: Auditing heavy civil: We brought some context on why there is an audit requirement here and not in the main GCCM. Is it still in the MC/CE piece?
- i. Chair Datz: It is. And I think that's what this comment is trying to get at; is that right?
 - ii. Specialty Contractors: Yes, my comment was more to stick a pin in this issue—there's an opportunity here because regarding audits, the statute for this and alternative subcontracting is essentially the same. And it's defined pretty vaguely how the audit can be done in the best manner to protect the Owner and the public dollar, and also not to be overly burdensome, in terms of contractors doing the work. Particularly if the parties have agreed to convert elements of a contract to a lump sum. I'm flagging this because I think there are some good points here to be cognizant of. Maybe there are some best practices we should also include in the section on alternative subcontracting.
 - iii. Chair Datz: That's a good point. We do want to make sure those two audit sections are pretty similar, right? Both sets of statutes are vague, like you said, and we're trying to establish best practices.
 - iv. Specialty Contractors: My wheelhouse isn't in heavy civil, so there may be nuances here and reasons to be different than with alternative subcontracting.
 - v. General Contractors: I think what we're really trying to do is give a "why," and to say that lump sum contracts really aren't appropriate to be audited. I would delete that first multi-square bullet under the second circle, because what we're trying to tell people is that it's not appropriate to audit a lump sum negotiation. The entire point is to not do the audit.
 - vi. Specialty Contractors: I agree with you. Isn't that something we debated previously, without reaching consensus on removing audits from all lump-sum appropriations?
 - vii. General Contractors: I don't remember that—we talked a lot about audits, i.e., what can be cumbersome about them. If we talked specifically about removing audits from lump sum and couldn't agree, I guess I don't remember that. I would argue every day of the week, that if you're forcing someone to take all the risk by going lump sum, then potentially taking money back from them by doing an audit, that's fundamentally not fair.
 - viii. Specialty Contractors: I agree with you there.
 - ix. Chair Datz: Looking back at that section, we were pretty vague, just looking at proper accrual of costs.
 - x. Specialty Contractors: For legislative purposes, maybe we didn't want to put anything firm.
 - xi. General Contractors: Yes, that's correct. But I don't think we couldn't agree on whether you should, or you shouldn't audit a lump sum. I think we were worried that people wouldn't understand and that it would get struck, so we decided to punt it to best practices.
 - xii. Specialty Contractors: Yes, that's fair.
 - xiii. Chair Datz: The whole purpose of the conversations that we've had is that the intent of the audit isn't to take back money. Especially if it's lump sum, both parties have agreed to the risk. If it's over or under, that's just how it is.
 - xiv. General Contractors: From the Owner's perspective, what liability do you take on if you're going to audit, and you say, "I'm going to take this money back;" did you just turn it into cost plus?
 - xv. Chair Datz: Right, it's not reasonable for either party.

- xvi. General Contractors: One of the benefits of converting to lump sum is to get rid of the cost of the audit. We're spending millions of dollars on audits, and it doesn't add value to a project, if you have a fair and reasonable price. I think part of our original debate was the question of whether, as a taxpayer, you should be able to negotiate this amount of work without some level of checks and balances. The guidance can we provide is that before converting to lump sum, the Owner should feel comfortable and confident that they have the right price. That can mean employing third-party cost-estimating firms, subject-matter experts, or whatever it is. I think that's the advice we should be providing—not telling them how to audit, but instead giving them tools to make sure due diligence is done prior to converting.
- xvii. Chair Datz: Exactly, we're essentially front-loading the audit. We want to make sure due diligence is done prior to converting to lump sum.
- xviii. General Contractors: "If in-house capabilities are not available to review pricing, an owner can employ the expertise of a third-party firm to ensure a fair value for the work has been negotiated." Since we are talking about best practices, we can say "an advantage to converting to lump sum is to reduce the public burden of an audit." The public burden refers to the cost and the administrative burden because audits require staff.
- xix. Specialty Contractors: I think there are some Owners out there who regardless of this language may still want to audit—although I agree it's not practical.
- xx. General Contractors: It's completely inappropriate and I think we should write that. We could even add language about the benefits of converting to lump sum. It's about motivating the right people to do the needed work. It is not to get savings on the work.
- xxi. Chair Datz: Hopefully most Owners would understand that lump sum as a concept is more favorable to them, right? It's better because you're very clear on what you're going to get.
- xxii. General Contractors: I think that's why you need the off ramp, because if you don't feel that you're getting a fair price, you shouldn't convert to lump sum. You should go cost reimbursable and then audit.
- xxiii. Specialty Contractors: It might be helpful to note that we're not talking about a state audit; both Owners and Contractors need awareness that there could be certain triggers. Sometimes there is confusion about this, and that this is different from a formal state audit, which could happen at any time.
- xxiv. General Contractors: Every time we say "audit" we can just say "independent audit."
- xxv. Chair Datz: Ok, we'll do that. Is everyone ok with that? [No dissent.]
- xxvi. Nick: I do want to delete the section on "what could or could not be audited" because that could be interpreted to mean that we're talking about competitive vs. noncompetitive bids, rather than cost reimbursable vs. lump sum.
- xxvii. General Contractors: Agreed.
- xxviii. General Contractors: On the matter of to what would limit the scope of an audit, I want to note that audits have been causing a lot of grief, and that's why we have this language.
- xxix. General Contractors: I think those bullets are good; we just need to decide on the third one.
- xxx. Chair Datz: OK, I stand corrected.
- xxxi. General Contractors: Really, it's just saying what could limit the scope of the audit. You could just say "lump sum change orders should not be

audited,” because the intent is that those have been carefully vetted. That way we’re articulating three things that should not be audited, instead of just saying “lump sum.”

xxxii. Higher Ed: Should we put “shall” instead of “should?” Or is that more ambiguous?

xxxiii. General Contractors + Chair Datz: I think we’ve historically avoided “shall” as it sounds too much like a statute. We’re working on best practices, so we’re not trying to be litigious. [All agree to leave as is.]

- I. General Contractors: Final sub-bullet: When should audits occur? As we’ve been discussing, the RCW language is fairly broad. We know that different Owners view this differently, so we tried to include some items that might be considered if an Owner is going to do a more extensive audit. One was for Contractors to be made aware of intended audits prior to beginning the project, so they can set up with that in mind. Is it appropriate to include anything here? Again, generally, audits have been causing a lot of grief for the various Contractors on our subcommittee.
 - i. General Contractors: Should we lead with this as an introduction? Add something like, “audits have a purpose, here they are,” before going into the sub-bullets?
 - ii. Chair Datz: Yes, let’s do that.
 - iii. General Contractors: Should we also add the best practice that when audits occur, they should be done throughout the project timeline, so that Contractors don’t have to wait around afterwards and the burden at final closeout can be alleviated. We could put this in as a best practice bullet. This should be best practice because then you’re never giving people money, then taking it away. You could say, “a continuous or periodic, phased audit, as opposed to an all-encompassing audit at the completion of the job.” You’re still auditing the same things, you’re just getting some of it done ahead of time.
 - iv. Chair Datz: It’s also more transparent, in that you’re both working together and catching any issues together, in real time, when they can potentially be fixed. It lets you avoid the contentious process afterwards. It’s in the contract and the RFQ/RFP, that this is something you’re going to do regularly.
 - v. General Contractors: To that point, spelling it out in the RFP/RFQ or sample contract that’s provided would be helpful, because it’s not just going to affect how you set up, it affects your staff levels. You need to make sure you have the right staff in place at the right times to support the audit. That could be the why for including this suggestion. Let’s write, “Including timing and process, this will allow the GCCM to appropriately staff the project to support the audit.”
- m. Chair Datz: I think we hit on everything here, do we want to jump over the examples?
 - i. General Contractors: Weighting of bid proposal example 1: These are some examples from the projects—we redacted these to keep them as anonymous as possible.
 - ii. Chair Datz: Here’s another one.
 - iii. General Contractors: Why we didn’t do this for any of the add-on sections, for GCCM, for alternative subcontracting.
 - iv. Chair Datz: No, we didn’t, and I guess that’s a question for the committee—do we think we should give people examples? Did we come to a consensus?
 - v. Specialty Contractors: I thought we had talked about putting examples in the appendix. Whether we include them here or in the appendix, I think it’s good to include some examples of what we think is an ideal way to do it. We’re

trying to educate various stakeholders on the process. I've got some good examples I can make anonymous and share.

- vi. Chair Datz: I agree, I always like examples. We just want to add the caveat that they are just examples and not the only way to do it. What we'll probably end up doing is just take the scoring table to preserve anonymity. Let me pull up some bid examples. [Shared some example bid forms for heavy civil onscreen.]
- vii. General Contractors: Do all of these examples have the SGCs as a lump sum amount?
- viii. Chair Datz: They would have, because these are from before the legislative changes. That's a good point, that we don't want to reinforce that trend if we use these. Maybe if we get any more heavy civil contracts starting now, we can include them. Mark, do you have any coming up in the next year or so?
- ix. General Contractors: I don't think it has to be a real bid. Someone probably has this template in Word that we can change. We don't have to use a redacted example.
- x. Chair Datz: We can just change the language here to whatever we want. We can figure that out later.
- xi. General Contractors: We can just take it out. We don't want to inadvertently reinforce habits we're trying to break.
- xii. Chair Datz: Yes, that's a good point. I don't think it's anything we need to decide on now. Once we get through the narrative, we're going to have more visuals we want to develop. Then we can dive into these little details a little more. Please send more examples if you'd like to (Scott, Mark, everyone) [AI].

4. Action Items and Next Steps:

- a. Chair Datz will reach out to Sam and Keith to see if either is ready for a January meeting and will let the group know. [AI]
 - i. We've got four more sections, so I encourage everyone who's on those sections to get started and not wait till a month before they're due. We want to get them out to the committee, hopefully a few weeks before that monthly meeting. That means we'd want something from the Construction Services Closeout by the end of January; GCCM Procurement by the end of February; and Total Contract Cost by the end of March. That will give us a pretty good draft to clean up. We're over halfway through the document now, so nice work everyone.
- b. Remaining action items are found in context of the meeting notes above by searching [AI].

5. Meeting adjourned at 2:45pm.