

SHB 1621 Review Committee

Meeting Notes 6/20/2023

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Committee Members: (7 positions, 4 = Quorum)

- | | |
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| x Keith Michel, General Contractors – Co-Chair | x Mark Nakagawara, Cities – Co-Chair |
| x Sharon Harvey, OMWBE | Mark Riker, Construction Trades Labor |
| Bruce Hayashi, Architects | x Michael Transue, Mechanical Contractors (MCAWW) |
| Irene Reyes, Private Industry | |

Guests & Stakeholders:

- | | |
|--|---------------------------------------|
| Talia Baker, DES | Randy Black, Lakewood Water District |
| Nancy Deakins, DES | Joren Clowers, SnoKing W/S Dist/WASWD |
| Diana Pottinger, North City Water District | Scott Middleton, MCAWW |
| Patricia Collins, MFA | Maggie Yuse, Seattle Public Utilities |
| Rob Wettleson, Forma Construction | |

Meeting started at 11:34 am

Co-Chair Keith Michel welcomed participants and confirmed quorum. The meeting was called to order at 11:34.

Co-Chair Michel asked members to approve or make edits to the minutes from June 6, 2023. There were no proposed edits to the minutes. Michael Transue motioned to approve the minutes that were submitted by Talia Baker. Co-Chair Mark Nakagawara seconded the motion, and a voice vote approved it unanimously.

Co-Chair Michel asked if there were any comments or suggestions on the agenda. Michael Transue moved to approve. Sharon Harvey seconded the motion, and a voice vote approved it unanimously.

Discussion Highlights:

1. Background

Joren Clowers and Randy Black introduced background about SHB 1621.

Randy Black provides some history on SHB 1621. This bill was originally sponsored through Senator Pam Roach in 2017, who looked at the Water Districts' request to extend limits. The limit at the time was \$25,000 by special purpose districts to perform work on behalf of the Owner. At the time, this limit was insufficient for the cost of materials and the hourly rate that employees were paid to perform that work. The bill proposed matching what cities could do at capacity, which is \$75,000 for work done in-house by any of the proposed groups with the same capacity. The bill was eventually amended to only include \$50,000, which was double to capacity, but still inefficient.

Washington Association of Sewer and Water Districts found that due to inflationary costs, the biggest issue was training staff. As the aging workforce retires there are very few qualified people to hire. People working in the utility field rarely switch jobs, and very few new people have the needed experience.

In the last three years, many district employees have been working with contractors, but the contractors have very limited experience. When it comes time to operating the complex technical systems like pressure-reducing or sustaining stations, it takes expertise to learn and practice how they work together. Utility Districts are having to bring in green employees with limited or no experience. Training must occur from the ground up on the equipment, safety systems, and all the other essential aspects of the job, and this takes time.

When it comes time to answer emergencies the work needs to be performed by staff, so getting them trained on equipment and safety is essential. Getting time on equipment is key because there are many issues that do not come up often. They can't replicate that experience unless they are doing the work themselves.

This is where the Water Districts want to be able to perform some of the complex activities and projects that cities and utilities take on. Longer sustaining projects currently use contract work or put the work out for public bid. This increase in availability gives them flexibility to work with their own staff and get them trained and experienced.

Randy gave an example of a 12-inch water main that needed upgrading. This gave a chance for staff to perform the work, but because they could only do \$50,000 of work including materials, they were limited to only doing a segment at a time. Scheduling and doing the work became a secondary factor.

Joren shared the document HB 1621 Background/Overview.

Conversations about raising the bid limit again came from COVID-caused work shortages and the difficulties some districts had in getting contractors to perform important projects. Legislators had some concerns because special purpose districts, cities, public utility districts (PUDs), fire purpose districts, etc. have varying rules for in-house public works. It got confusing to track who was under which rules and limits.

Washington Association of Sewer and Water Districts looked at existing Revised Code of Washington (RCWs) for cities, PUDs, first-class cities, second-class cities, special purpose districts, fire protection districts and proposed to standardize them across the board for consistency.

The three main concepts in this bill are bid limit thresholds, prudent utility management, and lowest responsible bidder.

From the existing language for cities, bid limit thresholds were \$150,000 when two or more trades were involved and \$75,500 with one trade. The existing language for PUDs allows employees to perform work under \$300,000 without a contract if doing so is accepted industry practice. *'Prudent Utility Management means performing work with regularly employed personnel utilizing materials of a worth not exceeding \$300K in value without a contract. This limit on value of materials being utilized in work being performed by regularly employed personnel shall not include the value of individual items of equipment.'* This language was taken and applied across the board in the new bill. The existing language for the second-class cities for the lowest responsible bidder allows those cities to accept a second-lowest bidder if the lowest bidder had in the last three years delivered projects late, over budget, or that did not meet specifications. Only second-class cities were able to utilize this standard.

Impacts on the bid limit thresholds, the existing language for cities was applied uniformly. The prudent utility management took the language from existing PUDs and applied it uniformly to all the districts, and the lowest responsible bidder language took existing language from second-class cities and applied it uniformly as well. This took all the things that were different for each of these providers, gave everyone the same thresholds and abilities across the board, and attempted to standardize them for the benefit of the legislatures and all stakeholders involved.

Only during the last couple days of session was the amendment added to include CPARB review.

2. Questions about SHB 1621

Co-Chair Nakagawara asked if the \$300,000 threshold was intended to be for public works and characterized that way, or was it going to be separate characterization outside of the public works realm? All first-class cities are subject to 10% of the capital budget. He shared his confusion and asked if the thresholds are mutually exclusive? What was the intent? It has impacts to the overall allowance of what First-class city crews can do within the capital budget limit or they are subject to a loss of gas tax revenue.

Diane Pottinger and Joren confirmed the intent was that all of these were exclusive by project.

Co-Chair Nakagawara asked for clarification on how to characterize that work outside of gross public works.

Joren shared that there wasn't a representative from PUDs able to be at this meeting. He will try to confirm a representative to attend a future meeting to address this concern and give some examples on how they utilize prudent utility management. Co-Chair Nakagawara shared that neither he nor the city attorney can understand what prudent utility management is because they haven't used it before. Joren confirmed that it is only used in emergency situations, and he will work to get someone to share examples with the committee.

Michael Transue shared a question the Mechanical Contractors Association (MCA) had during the legislative session about prudent utility management. What does that mean in the utility industry, and how does it translate to other jurisdictions? If it means doing more work in-house and that's prudent, the contracting community enjoys a good balance in statutes between in-house and outside work.

Michel Transue further shared the MCA had similar questions on how and when prudent utility management is used. He would like to email the questions and comments MCA had during the session to Talia so she can get them out to everyone. He is hoping to discuss those questions deeper with the committee. Randy would appreciate getting Michael Transue's list of questions so they can provide some specific clarifying examples.

Michael Transue also indicated that he would like to have a good discussion about the second-class city lowest response responsible bidder provision. He would like to hear from the cities' perspective about how often they use accepting the second-lowest bidder provision and has it been successful.

Diane gave the example of a contractor that was the lowest responsible bid for a watermain project. He met the criteria in the bid package but the crews he had were extremely inexperienced. The water district had to have a full-time inspector running the job because the crews did not know how to do it. The district would not want to work with this contractor again until his crews had more experience. In this case, the second-lowest bidder would have been preferred.

Co-Chair Michel wondered if someone had a performance database with this type of information in it that someone could refer to when throwing out a lowest responsible bid. He would want black and white data metrics that could assist when reviewing a lowest responsible bid.

Diane looks the jobs from the perspective of the inspector time used. In her example the inspector was on-site 8–10 hours every day after the first week rather than 1–2 hours per day. The Contractor clearly sent out very inexperienced crews.

Co-Chair Michel asked if there were other obvious questions related to bill as issued.

Michael Transue brought up there was a Capital Projects Advisory Review Board (CPARB) sponsored bill that passed during this last session (*see Resources below for 2SSB 5268*). It standardized \$150,000 or less on a small works roster for direct contracting. It streamlines the small works roster process below \$150,000. Below \$350,000 there were provisions for disadvantaged, minority, women, veteran-owned businesses having a first look at those types of projects. One of the questions in the document he is going to share with committee members relates to the small works roster, and he hopes to keep that information as part of this committee's awareness as well.

Nancy Deakins addressed the responsible bidder criteria. She was surprised that second-class cities added language outside the responsible bidder statute [RCW 39.04.350](#) created by CPARB. CPARB is also responsible for maintaining those guidelines when statute changes. She hopes owners review and understand the principals behind RCW 39.04.350 and how it is being used. These new guidelines need to align with the published [CPARB Bidder Responsibility Guidelines](#). She saw the added language as going rogue, because the statute for mandatory responsible bidder criteria vs. supplementary responsible bidder criteria was created through a CPARB committee of stakeholders and has been working successfully for a number of entities. It sounds like local contractors may not be clear about the current statute and the requirements. Guidelines on the CPARB website include examples of language that can be used for this committee's work. The Department of Enterprise Services (DES) has been using responsible bidder language before it was included in the statute. She shared the link to the guidelines in the chat and believes MRSC has provided trainings about that statute as well.

Joren added to chat: *(8) For the purposes of this section, "lowest responsible bidder" means a bid that meets the criteria under RCW 39.04.350 and has the lowest bid; provided, that if the district commission issues a written finding that the lowest bidder has delivered a project to the district within the last three years which was late, over budget, or did not meet specifications, and the commission does not find in writing that such bidder has shown how they would improve performance to be likely to meet project specifications then the commission may choose the second lowest bidder whose bid is within five percent of the lowest bid and meets the same criteria as the lowest bidder.*

Co-Chair Nakagawara said that there would need to be a long history of an evaluation process. Action taken could be construed as arbitrary and vulnerable. There are a lot of public bodies who don't do contractor performance evaluations because tying evaluations to a determination of a non-responsible contractor is very difficult.

Nancy shared DES has contractors list references and have questions the public owners score on similar scope, size, and complexity. She wondered if Diane's District found any contract language to correct those issues. Diane responded they couldn't find any contract language that allowed them recourse, but hearing there are steps to go through would be helpful in the future.

Co-Chair Michel would like to know about the definition for equipment cost as the language used seems broad in terms of what is considered equipment. The threshold excludes most of the equipment costs, but his definition of equipment refers to the means and methods whereas this category seems to include all the materials (pipe, wire, etc.) What kind of material costs are included if all that equipment is allowed to be outside the threshold?

Co-Chair Michel also has a question about single trade at \$75,000 vs multiple trades or more at \$300,000. This bill also appears unclear how to define how many trades are involved in an individual project. How is it different from utility management vs. a public

contract? There seems to be room for interpretation for projects in excess of \$300,000 that still qualify for self-performed work. Was that intentional? What's the actual intent? When the intent isn't clear, parties think they can stay in line with the RCW even though they are not.

Michael Transue remembered discussions when the GC/CM contracting processes started, and self-performance was a significant issue. He observed that Co-Chair Michel expressed the same issue in a different way.

Diane would like clarification regarding whether asphalt or paving are to be included. She gave an example of a watermain project where her district thought they only had to replace the trench with a two-foot-wide patch. They found out in a preconstruction meeting that they were expected to do a full-width half-of-the-street replacement. The contractor did not bid on a full half street replacement, and it wasn't included on the Right-of-Way permit. This added \$40,000 to the project because asphalt is costly. Finding out if materials are included in project costs is of great interest because then Asphalt would be considered a second trade.

Co-Chair Michel said that Diane's recent example was a good example of navigating jurisdictional permit requirements when there is a change to the original project which adds another trade which then changes the threshold. His understanding of intent is there should be a project, budget, and scope that is compared to this threshold. There isn't a requirement that covers anticipation of changes through the project execution that may challenge or change the threshold.

Michael Transue agreed that it sounded like a change order question and a needed discussion between the owner and the contractor. There needs to be deeper discussion on the specifics between the definition of Materials vs. the definition of Equipment and what should be included in the overall project costs.

Co-Chair Nakagawara agreed that without knowing the intent and clarification on what the term 'materials' is referring to the owner could end up with \$300,000 worth of labor and \$10 million dollars of materials and equipment.

Diane believes that for water districts, with this legislation it was never their intent to hire crews that would specifically do projects under \$300,000. That might have been the intentions of others, but not what she thought people would do with this bill.

Randy agreed the bill was strictly intended to encompass and to understand that costs, materials, and other performances have increased at a greater pace than what the current law proscribed before this bill was adopted. The concern was being able to perform the activities while keeping staff trained, and to meet the needs of the less experienced workforce.

Diane wondered if, in this committee's report to the legislature, the committee should spell out the intent of the legislation or what the intent is NOT to do. She could see that some might see this as a huge loophole.

Michael Transue advised that it's always good to provide a balance of what is intended with what is not intended, just to cover all the bases and provide clarity.

Co-Chair Michel has seen owners struggle to keep their organization working efficiently while trying to compliment that with outside resources that are fundamentally public bid opportunities. The balance of providing bid opportunities is important. What organizations are allowed to do will vary based on their diversity of size, resources, and what funding is in place. A bill like this appears to open the door to a significantly higher amount of self-performed work leaving the impression that it will reduce public bid opportunities which would otherwise be available. The balance needs to be fair. He acknowledged Randy's point about significant increases in costs and inflation. The opposition with the thresholds is that there needs to be improvement in the language to better define what items are inside and outside of the thresholds to reduce ambiguity. This committee can help identify improvement to the language and provide some clarity that can help maintain the balance.

Co-Chair Michel thanked Joren and Randy for sharing the background and providing some on this bill.

3. Outline of Goals for the Summer

Co-Chair Michel feels this committee can use the summer to craft and refine the bill language and asked what goals the committee wants to identify for these meetings. He restated the current action item: define questions and get them organized and requested Talia to add them to the minutes. He asked for further goals from the committee.

Diane suggested tracking examples as they are shared and the issues that come up with each so the committee can identify intent, what needs clarification, and possible solutions as part of the information gathering for the final report. Having a list might bring up other questions that may not have been discussed or help to identify related issues.

Co-Chair Michel suggested starting with follow-up to the questions that Michael Transue created. Everyone can review and then the committee can discuss.

Randy agreed and suggested the committee develop a working document that allows the committee to clarify the intent, the language, and to track when people agree.

Co-Chair Michel suggested using the final version of the bill and mark it up to create questions or changes. This could be a component of the report the committee will create for CPARB.

Diane said that Randy's example of a once-in-a-lifetime pressure-sustaining station would be a great example to include. There might be documentation of how it would not be a regular project and could be an example of exception to threshold limit.

Michael Transue observed that reviewing the bill section by section would be helpful and there can be a summary under each section of what that section proposed to do. He also noted there may be some repetition in Sections 2 through 5. He will also research when the \$50,000 was inserted into the PUD statute and identify how much the Consumer Price Index has increased since then. For the next meeting he suggested the whole committee review RCW 39.04.350 and then as a group walking through the questions he will send out.

Diane asked if the committee would consider looking at different templates.

Talia suggested using both the bill with highlighting to identify concerns and an Excel spreadsheet that can track the issues, discussion points, resources, or possible solutions as they come up. She asked that all questions be sent to her, and she will add them to the minutes.

Diane requested a copy of the document that Jordon Clowers presented, and Talia committed to adding it to this meeting's event page.

Diane asked who will reach out to PUDs and Fire Districts. Joren Clowes said that Judi Gladstone (Executive Director of WASWD) is talking to George Cahn (sp?). Jordan Clowes said he will try to get the definition or examples from PUDs, and he should have them for the next meeting. He hasn't heard back from fire protection districts and will reach out and see if they can join the next meeting. He believes that addressing Michael's questions covers the concerns of fire protection districts.

Diane brought up the requirements for disadvantaged businesses. With them, there was a difference between \$150,000 and \$350,000. Where are those requirements? Michael Transue requested the committee receive a copy of the final bill report on 5268 and the final bill language that was adopted by the legislature.

Nancy shared there is a CPARB Small Works Committee working on implementing the small works bill (2SSB 5268) that requires OMWBE to develop a program to certify small businesses and MRSC to develop a statewide small works roster by July 1, 2024, and there might be rules around direct contracting within those limits. There have been many presentations already about the bill and its implementation. We might want a link to the presentation. It would be a helpful overview for this committee, especially if they didn't want to read the 62-page bill. (*see Resources below*)

Sharon volunteered that she is on that Small Works Committee. She distributed links to the bill, amendment, and report in the chat. Those resources can also be found in the resource section of these minutes.

Diane had one question about the impact to sales tax. Special purpose districts do not have taxing authority. She would like to know more about what Co-Chair Nakagawara was discussing in his earlier example.

Co-Chair Nakagawara explained that the limitation for first-class cities is that they are subject to 10% of their capital project budget. When they have self-performed crews exceed that 10%, first-class cities are docked the gas tax revenue they receive from the state. The concern is around the \$300,000 threshold. Will it be characterized as public works? Was it contemplated to be characterized as public works? It's not clear why there would be differentiation between a \$150,000 limit for an instance of self-performed public works, and now a \$300,000 limit of ...what? Does it count the same as public works? If it does, it's confusing as a statute that there would be a \$150,000 threshold clearly for self-performed public works along with \$300,000 for prudent utility management, which technically is public works according to RCW 39.04. It's an improvement under the gross definition as defined under RCW 39.04. Most instances of this would be considered public works, because they wouldn't be routine maintenance. The

fact that there are two thresholds creates this confusion—that's where he would like clarification on intent. What kind of materials would account for that? Most of what he thinks of as materials are listed as equipment. If it was intended to be the same, then that threshold of \$150,000 would just go straight to \$300,000. First-class cities across the state are going to be subject to losing their gas tax revenue because of this confusion. We don't want to set a jurisdiction down a path where they will be in a position to impact their bottom line because the confusion caused them to overperform.

Co-Chair Michel asked Co-Chair Nakagawara if he could follow up and include a gas tax reference RCW as a reference. The committee doesn't need to have an answer, but it does need to point out the relationship to the exiting provision that impacts first-class cities. Co-Chair Nakagawara followed up that the code was [RCW 35.22.620\(2\)](#) and is referred to as motor vehicle fuel tax distributions. He recognized that there are more code cities than first-class cities. Co-Chair Michel observed that it's important to have people on the committee represent everyone in those categories.

4. Roll Call of Members and Stakeholders

Co-Chair Michel saw new names and did a roll call. Patricia Collins will be helping with meeting minutes. Rob Wettleson was recognized from Forma Construction and is Co-Chair Michel's back-up. Maggie Yuse from Seattle Public Utilities introduced herself and added that they would like a clearly defined term regarding water. Seattle Public Utilities provides sewer and stormwater so some clarification would be very helpful

5. Last call for goals for the timeline

Co-Chair Michel called for any last goals. He encouraged people to send questions to the CPARB inbox at CPARB@des.wa.gov .

Nancy reminded the committee that all committee meetings are open public meetings, and it is best to avoid replying to all and have Talia be the main distribution of correspondence for the whole committee. Due to the Open Public Meetings Act [RCW 42.30.030](#) it is best to avoid accidentally creating a non-public meeting.

Nancy suggested reviewing the committee timeline. She has done bill implementation plans for this bill, and she is proposing a little different timeline than one included in the agenda, items 4a–4e. She suggests providing a draft report to CPARB by the September 14th CPARB meeting. The hope is that the committee could present the draft report to CPARB so they could share the proposal with their stakeholders. This would give CPARB members time to come back with comments by October 12th before they approve the final report on December 14th. If there are recommendations on legislation, the earlier those recommendations are approved by CPARB the better.

Co-Chair Michel agreed the earlier goal is beneficial. The committee will target draft recommendations for CPARB by the September 14th meeting as a deliverable to work on this summer. This committee will likely need meetings between the September and December CPARB meetings. Anytime a product is created there will be a wider range of feedback. He identified next steps as reviewing the documentation, reviewing the submitted questions and consider any others that may be impacted, share recommendations, and as a committee try to identify and find common ground.

Next Meeting is July 5, 2023:

- Review questions and documentation
- Look for obvious answers that will help craft the intent
- Outline possible changes
- Consider how to interpret this bill language and its impacts
- Allow time for new stakeholders to share
- Stakeholder recruiting is allowed and encouraged

Action items:

1. Joren Clowers will reach out to PUDs & FPSa for a representative to attend the next meeting.
2. Joren Clowers will get the definition or examples from PUDs.
3. Michael Transue will email MCA's questions regarding SHB 1621 to Talia for distribution to the whole committee.
4. Michael Transue will research when the \$50,000 was inserted into the PUD statute and identify how much the Consumer Price Index has increased since then.
5. All Committee members review the SHB 1621. RCW 39.04.350 and the questions from Michael Transue.
6. Talia will include links to the CPARB Legislation from 2023 and all supporting documentation in the minutes.

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Meeting adjourned at 12:53 pm

References\Resources:

[SHB 1621 as passed the 2023 Legislature](#)

- [Amendment 1621-S AMS LGLT S2730.1](#)
- [Final Bill Report](#)

[RCW 39.04.350](#)

[RCW 35.22.260](#)

[Local Government Public Works Study](#)

[CPARB Bidder Responsibility Guidelines](#)

[2SSB 5268 as passed the 2023 Legislature](#)

- [Floor Amendment](#)
- [Final Bill Report](#)
- [CPARB FAQ on 2SSB 5268](#)
- [CPARB One-Pager on 2SSB 5268](#)
- [DES Small Works Roster Overview Presentation](#) *(From Small Works Committee 5/12/2023)*
- [OMWBE Small Works Timeline](#) *(From Small Works Committee 5/12/2023)*