

Small Works Committee

Meeting Notes 8/12/2022

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Members: (14 members, 3 alternates 8 = quorum)

X	Dawn Egbert, Ports
	Bobby Forch Jr., Diverse Business
X	Bill Frare, DES – Owner State
X	Josh Klika, MRSC
	Erik Martin, Counties
X	Karen Mooseker, School Districts
X	Rachel Murata, OMWBE

	Brenda Nnambi, Transit
X	Irene Reyes, Private Industry\DBEs
X	Mark Riker, Trades/Labor
X	Cathy Robinson, Cities
X	Jolene Skinner, Labor & Industries
X	Kara Skinner, Insurance/Surety
X	Olivia Yang, Higher Education

Alternates:

	Mark Nakagawara, Cities (alternate)
X	Angela Peterson, Ports (alternate)
	Julie Underwood, Cities (alternate)

	Erin Frasier, Trades/Labor
X	Michael Transue (alt for Scott Middleton)

Guests:

X	Talia Baker, DES
X	Maja Huff, WSU
X	Melissa Van Gorkom
	Scott Middleton
	William Ward

X	Cindy Magruder, UW
	Beck Eatch, WSU
X	Janice Zahn, CPARB Chair
X	Leeann Snyder
X	Corey Fedie, Hospital Districts

Meeting started at 1:32 pm

Chair Bill took roll to establish a quorum. 11 members present.

Workgroup Reports

1. *Retainage and Bonding*: Jolene Skinner from LNI shared a [presentation](#) with her report.

- This workgroup’s Objective is to Identify ways to reduce barrier of retainage and bonding on small and limited public works.
- Streamline requirements for all public owners

The workgroup reviewed the list of barriers from last meeting.

- Long waiting times for retainage release.
- Cost for surety is higher for new/small contractors until the business is established.
- Paperwork is lengthy.
- Capacity to bond additional projects is limited

They started with asking, “Why are they necessary?”

To provide protections to workers, owners, taxes and contractors. It will be more difficult and expensive to recover unpaid wages, and taxes when they are not present.

The risks associated with waiving retainage and/or bonds include unpaid workers, taxpayers paying twice if the state pursues the owner, and increases in workers compensation premiums for all contractors.

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Researched other states to see what they may be doing. They have not identified any other states that waive retainage and/or bonds. Jolene shared a link to state summaries

<https://www.keglerbrown.com/biddingandcontracts/50-state-summaries/>

In the [New York City the MWBE compliance report from 2021](#). She shared that they are focusing on Capacity building (page 6) with a Bond Readiness Program, Mentor program, Strategic Steps For Growth Program, Contract Financing Loan Fund, and Agency Compliance training. The report highlighted that during this program they experienced 21% of utilization of prime construction contracting dollars were awarded to MWBE firms during the 1st two quarters of FY21.

Los Angeles, CA has a [Contractor Development and Bonding Program](#)

Oregon [Public Works Bond Program](#) has a \$30K bond for prevailing wages.

Louisiana [Bonding Assistance Program](#) where the state guarantees 25% of the contract price or \$100K, whichever is greater.

More ideas discussed so far that need more exploration and discussion include:

- OMWBE co-sign the waiver,
- Only allow waiver of retainage for both rosters and not the bond,
- Remove retainage and bond requirements for Contracts <\$5K (was in MRSC recommendations in 2021),
- Allow waiver for retainage & bond for SWR & LPW contracts \$5-35K,
- Agency/State assisted Bonding

Mark Riker asked about the source of NYC information and how they are managed? Also regarding OMWBE co-signing of the waiver and the removal of the requirements, how do workers get paid if there is a failure to pay? The thought is if the project is less than \$5K, the Contractor's Bond through their license would be able to cover unpaid wages or taxes. For the NYC report, there would need more research to identify the details.

Olivia shared that she did talk to Rachel about the OMWBE co-sign possibility. They would not be able to jump onboard right now. Possibly the Public Agency could find a co-signer in lieu of retainage.

Rachel noted that OMWBE is not opposed to the concept, but there are a lot of questions about the feasibility of it and how that would be implemented. There will be more discussion.

OMWBE might not be the right agency for the co-signing role or bonding guarantee program, but that idea has a lot of merit.

Dawn mentioned that her port has the option waive bonding up to a certain amount as a public entity, but does not choose to so because of the potential liability and impacts on their budget. She also agrees that the workers need to be protected.

Co-Chair Reyes inquired about the possibility of proposing a blend of recommendations based on project dollar value. Maybe the Dept. of Commerce could be considered the appropriate grantee entity.

Kara shared that she does a lot of education through PTAC and WSDOT to help and certify small and emerging contractors and was wondering if that had come into consideration. Jolene reached

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out and asked Michael from WSDOT to join a future workgroup meeting and discuss more formal ways to share the opportunities.

Mr. Riker asked for clarity on the double payment issue on behalf of the state. Jolene explained that if the contractor has not paid their taxes, then L&I goes after the awarding agency for those taxes. When appropriated funds for the contract are spent out, the public owner will have to spend more funds to cover those taxes for that project work. The owner ends up paying double for the project. Has a separate fund been discussed in lieu of retainage or bonding to protect the workers' wages? That has not been discussed yet.

Kara pointed out that in a duplicate payment situation, it's not just taxes that have to be paid. If the current contractor has been paid any part of the contract amount and they haven't completed the job, then the owner will have to pay a new contractor's wages etc. to finish the job.

The next workgroup meeting will have Rachel from OMWBE discuss barriers and what assistance they can provide, Michael from WSDOT will discuss opportunities and results from their prompt payment event, and the whole group will be looking at how a tier system would work for larger public owners.

When talking with UW and other larger entities, Jolene heard that many do not have small projects under \$35K because they have in-house staff to take care of them, whereas smaller entities don't necessarily have those resources need to contract out for them. The majority of PW project dollars are spent on projects that are less than \$35K. There can be a big impact on the small contractors if we can identify ways to make a difference on projects under the \$35K threshold. The large public owners also want to make a difference and would like to consider what a tiered system might look like to still allow some opportunities, waivers, or other options etc. for slightly larger contracts.

Cathy Robinson wanted to know how a larger entity would be defined. Out of all the PW projects listed under \$35K, how many are larger entities vs how many are med-small entities? Jolene would need to do some comparisons to answer those questions and will need to identify what defines a Large Public Owner.

Co-Chair Frare inquired via a visual poll of those present as to how many folks are in strong support of pursuing a Tier System and would like to know how important working on this is? Is there anyone in strong support of this system?

Mr. Transue pointed out that that decision would depend on the details.

Olivia shared that Higher Ed is typically opposed to a Tier approach because it is not dependent upon how big the agency is, it's how educated and trained the staff are.

Co-Chair Reyes pointed out that the Tier system is helpful to spread the wealth across the community by granting more discretion to the more seasoned agencies on the amount of risk they are willing to take on.

2. *Equitable Distribution*: Rachel Murata is the lead and reported the workgroup had a good discussion at the last meeting. They reached an agreement on a couple of topics. One of the questions posed to them at the last meeting was what is considered the short list vs sending out bid requests to the whole SWR. The consensus was that removing the short list ability and just sending the bid request to all firms that meet the requirements may be the best option towards transparency and accountability.

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There is the possibility of removing the short list ability could remove the need for a tier system until the project reaches towards \$350K.

Another issue that was discussed by the workgroup is whether or not there should be a requirement that bid awards be posted publicly on a regular basis to promote transparency and trust. The workgroup has not come to a consensus on that issue, so discussion will continue.

Dawn shared that the Ports are already required to publish their list of their awards off of their own SWR. It doesn't really impact equitable distribution nor if it went out to everyone who it should have gone out to. She's wondering why would we require another task if it doesn't really impact the equitable distribution?

Olivia pointed out that it's not so much the details of who the bid request went to, but who responded to the request. How many bidders responded to the request?

That documentation gets embedded in the SWR system, and it's just a matter of who gets assigned the task of generating that documentation.

Co-Chair Reyes stated that the publishing of the awards provides transparency and promotes trust. She also inquired if there is a threshold of the published awards?

Rachel shared that one other issue that was brought up during workgroup discussions and intersects with the work of other workgroups is the idea of a higher direct-buy threshold when contracting with small business.

3. *Thresholds\Cost Escalator\Two-Tier System* – Dawn Egbert reported regarding to direct-purchase per RCW 39.26 that there wasn't enough information at this point where to go with that until some of the other workgroups have had an opportunity to conclude some of their work. So that discussion has been tabled for now.

The workgroup is still sitting with the same thresholds discussed at the last Small Works Committee meeting with the single change to remove the "allow a short list" option that had been listed under the \$50K-S150K.

- Keep Limited PW <\$50K – Allow public owners to select without competition or request quotes at their discretion. (*add owner's written policy*)
- Small Works \$50K-150K – Keep current process to request quotes from all.
- Small Works \$150K-350K – Invite quotes from all contractors from the roster pertaining to the category of work solicited for.

Angela Peterson asked if the removal of state sales tax has been discussed, since all Major projects do not include tax in the total value. This has not been discussed in the workgroup.

Cathy Robinson supports the idea of removing sales tax from the base bid since each area of the state has different tax rates.

Co-Chair Frare shared that the statute is silent regarding tax inclusion and there isn't any prescriptive language.

Dawn shared that her Port awards contracts with sales tax included. [RCW 39.04.155](#)

Olivia shared that Higher Ed does not factor sales tax into the base bid. School Districts does not either.

It would be simpler for contractors if the exclusion of sales tax in a base bid was identified in the statute. That would also help contractors that work in multiple counties.

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Co-Chair Frare it would be a best practice to know your delivery method prior to solicitation. Need to have some trust.

Mr. Riker would be interested to know what the variance data looks like. 5% would be easy to support where 15% would not.

Co-Chair Frare pointed out that it depends on the year. 10-years ago most bids were 35% or lower than the Engineer's estimate. In today's bid environment there is a wide variance from low, to double the engineer's estimate.

Even though we are in an inflationary period it's a challenge to ensure the Engineer is cognizant of the current bid environment.

It's an on-going struggle. There have seen more No-Bid situations in the last 6-months than ever before and this is happening across the board for larger agencies.

When DES gets a funding authorization, but the bid exceeds that amount, then they go back to the Owner to rescope or ask what they wish to do. They always get a funding authorization that includes sales tax before signing the contract.

Cathy Robinson pointed out that there are two different thoughts regarding sales tax; if soliciting for bids it's for work. State law requires payment of sales tax regardless. It would currently be up to internal policy on what total is taken to the Board\Commission\Council that is granting approval of the award. It has nothing to do with how the bids were solicited.

4. *Developing and Maintaining Rosters* – Josh Klicka shared his [presentation](#).

Tasks for the group were identifying the qualifications to get on and stay on the rosters, and the definition of *Small Business*.

The workgroup identified 2 different focuses for this group.

- 1a Research recommendations to change roster statutes to allow small business as defined in RCW
- 1b Research recommendations to change rosters to allow access to small business as certified

Could look at small business approach around direct contract value limits, however that is defined. Also could connect it with Equitable Distribution. The next meeting topics will depend on feedback from today's meeting.

Dawn shared there were discussions around possibly making a recommendation that at a certain threshold level there could be incentives for contracting with small businesses. However, that still doesn't address Equitable Distribution.

Mr. Riker inquired if there has been any discussion on what would get someone removed from the roster? Some factors could be violation of wage issues, noncompliance, not paying workers, etc. That discussion has not come up yet, but it will be added to the discussion list.

Dawn added that any contractual issues of non-performance should be factored in. There needs to be agency protections to keep these types of contractors from reapplying and getting onto our rosters.

Debarment is one method and the contractor has to be in good faith with L&I.

There is Responsible Bidder Criteria, if they don't meet that criteria then they shouldn't be on the roster. While the criteria doesn't include contractual, but it does allow the awarding agency to

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decide on additional criteria. If they are debarred they Have to have an active license, workers comp insurance, required training, etc. (7 items) ([RCW 39.04.350](#)).

Cathy noted that it's good to remember that a contractor can have all the boxes checked to join the roster but a lot can happen in 12 months. We have to ask how often the list is checked for issues and debarments.

Dawn agrees that including some criteria would be helpful.

Co-Chair Reyes is in favor of Responsible Small Works Roster Criteria, and mandatory responsible contractor criteria. She would also like to see post contract performance criteria to help identify the bad actors.

Being on a Small Works Roster is a privilege. There should be a discussion for enhanced criteria to stay on the roster. Some compliance criteria and training for new contractors would give them an opportunity to correct poor or negligent behavior before being removed or debarred.

CPARB Chair Zahn expressed concern that there aren't any small business contractors on this Committee and hopes to make sure their voices are heard. She would like to see more representation especially when talking about consequences.

Co-Chair Frare agreed and shared that it has been a struggle to recruit some representation, but Irene is working on outreach. There has been some reluctance to join publicly, and most are just too busy and burnt out on surveys.

Mr. Transue will reach out to the AGC and see if they can help out.

Feedback from the Diverse Community

Co-Chair Reyes is still working out how to get comments from small businesses. She would like to have 3 specific questions to give them per topic. The questions need to be simple and quick. She will continue to reach out and try to gather as much information as possible.

Payments & Definitions

Olivia shared that the Legislative Writing\Drafting (LWD) Committee has been working on the definition of small business. They still do not have a consensus. There has been no opposition to the notion that there is small, smaller, and smallest small businesses. They hope to avoid redesigning the wheel and adopt existing rules, categories, thresholds around federal or state certified businesses.

Regarding prompt pay, some permissive legislation identifying what a public owner or general contractor is allowed to do toward facilitating getting contractors paid on undisputed and completed work.

Co-Chair Frare appreciates all of the work everyone is doing. He would like to pull some recommendations together for CPARB in September so this Committee can start working with the towards getting some draft legislation pulled together. We need to think about what this committee wants to prioritize if the goal is to get a bill into the system by January 2023.

Co-Chair Frare has made arrangements with the AG's office to review and draft some legislation based on outlines and draft recommendations that this committee has come up with so far. So they are on stand-by for content.

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CPARB Chair Zahn outlined the timing of next 3 scheduled CPARB meetings. She recommends language be developed by October so CPARB can approve the proposed legislation by December. Ideally there should be enough content for CPARB to discuss and vote on the actual recommendations moving into legislation.

Co-Chair Frare noted that CPARB is a Legislative Advisory Board, so they do not have to go through the Governor's office for proposed legislation.

Having a deadline for each step will be helpful to make sure we keep moving forward.

Co-Chair Reyes suggested we can choose 2 or 3 most important items so we can still get some legislation moving forward.

Co-Chair Frare agreed and referenced the MRSC's Local Government report to CPARB. This committee could give a report to CPARB in September on what we are in agreement on, vs. what is still in discussion as a status report. By the October meeting we can come with more definition on what we intend to accomplish with the legislation and we could then get approval in December.

CPARB Chair Zahn feels that sounds reasonable. Representative Pollet expects to see recommended legislation on this during the next legislative session. It would not surprise her to get requests in November for Committee Days to give updates on what CPARB has been working on and intends to submit this session. She recommends the committee complete as much proposed bill language as possible. CPARB can call a single topic special meeting in November if need be.

Mr. Transue recommends having a Special Meeting in November and call it "2023 Legislative Priorities" to get as much legislation fleshed out as possible prior to December.

Co-Chair Frare reminded everyone that we do not want to be making changes after December.

CPARB Chair Zahn reminded this committee that the BE/DBI report language will also be included in the Legislative Priorities.

Dawn asked what the Co-Chairs want for the September meeting?

Mr. Transue recommended that each team lead put together their concepts discussed as a starting point.

Co-Chair Frare feels we need to present more than concepts. We should identify Principals and areas of agreement vs what is still being discussed or researched. ...(outlined topics)...Workgroups for principals, areas of agreement per whole committee, areas still being discussed seeking consensus,

The next meeting agenda will consist of pulling together the content and identifying what we are in agreement with vs. what is still in discussion.

Talia will do a doodle poll for a meeting for the week of August 29th.

The Committee will request an additional 20 minutes on the CPARB agenda.

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Meeting adjourned at 3:22 pm

Action items:

1. Each workgroup lead will identify the topic issues they have discussed and the status of each whether there is consensus or continuing discussion.
2. Talia will send out a Doodle Poll for the Week of August 29th for an additional Committee meeting to prepare for the CPARB report out.
3. An additional 20 minutes will be added to the CPARB Agenda for the SW Committee.