

## SHB 1621 Committee

Meeting Notes 7/5/2023

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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             |
| X Bruce Hayashi, Architects<br>Irene Reyes, Private Industry | X Michael Transue, Mechanical Contractors (MCAWW) |

### Guests & Stakeholders:

Logan Bahr, Tacoma Public Utilities (Water & Power)  
Talia Baker, DES  
Randy Black, Lakewood Water District  
Joren Clowers, SnoKing W/S Dist/WASWD  
Patricia Collins, MFA  
Nancy Deakins, DES

Brandy DeLange, Association of Washington Cities  
Diana Pottinger, North City Water District  
Paul Richart, Alderwood Water and Wastewater District  
Abigail Vizcarra Perez, MetroParks Tacoma  
Rob Wettleson, Forma Construction  
Janice Zahn, Port of Seattle

### Meeting started at 11:33 a.m.

Co-Chair Keith Michel welcomed participants and confirmed quorum.  
The meeting was called to order at 11:33 a.m.

### Welcome and Introductions

Participants introduced themselves. Committee members and stakeholders are listed above.

### Discussion Highlights:

1. Review agenda  
Co-Chair Michel introduced the agenda, Michael Transue moved, Sharon Harvey seconded. The agenda was approved via a voice vote.
2. Approve notes from the last meeting  
The committee decided to defer approving the 6/20/23 notes to the 7/18/23 meeting to give all committee members time to review. Talia Baker noted the reference links at the end of the 6/20 notes, and Sharon informed the committee that there is an updated OMWBE Small Works Timeline she will send to Talia for distribution.
3. Stakeholder input  
Co-Chair Michel opened the meeting for discussion. He was interested in what brought people to the meeting and their initial input.

Brandy DeLange is the Government Relations Advocate for AWC. They had concerns about the potential impact to second class and code cities. AWC feels like the streamlined approach to procurement practices makes sense, but they see it as a tool to be used only when need and then used discreetly. They are interested to see what this committee recommends.

Logan Bahr said that Tacoma Public Utilities has been following the legislation. They don't have critical issues and is always interested in policy improvements.

Co-Chair Michel talked about what was accomplished at the last meeting and informed participants that the committee has a schedule that includes sharing a draft report at the September 14<sup>th</sup> CPARB meeting. This committee meets every other Tuesday through the summer and has started a matrix where members and stakeholders are encouraged to add questions, language, or opportunity to improve clarity about the bill as

currently written. The committee is in agreement that some clarity is needed, the committee would like to understand the intent of the bill and ensure there is alignment with other provisions in RCW.

4. Review Questions, Answers and Concerns

Co-Chair Michel suggested that the committee look at the matrix and discuss.

Co-Chair Michel reviewed the matrix and noted that the first two items are explanation of motivation for the bill and are not needed. Item 3 addresses the concern about when it is acceptable to have a second bidder. There is some language in the bill and may need to be comparatively reviewed to CPARB's Responsible Bidder Criteria (recognizing CPARB intends to update these as well). The last item focuses on threshold and scope and has two potential outcomes. 1) The scope of having one trade or more than one trade may determine which threshold is being used. 2) Asks if changes become part of the job, does that relate to the original threshold or not?

**Materials and Equipment Line Item**

**What is the definition of "materials" and "equipment"?**

Co-Chair Michel shared that materials and equipment should be its own line item. The threshold excludes equipment, but then equipment is later defined as materials. Michael Transue would like to have a distinction between definition of material vs. equipment. Michael Transue would like to have a distinction between definition of material vs. equipment. He wondered if something different was meant in this section. He also found [RCW 35.22.620](#) (5) which says, *"The cost of a separate public works project shall be the costs of materials, supplies, equipment, and labor on the construction of that project."* That might describe a complete project, though it doesn't say what that is. Several members and attendees wondered what the original intent was when this section was written and why the exclusions were included.

Bruce Hayashi believes that equipment is for doing the work but that there is also the equipment that is being installed. He sees the items listed as materials and finds it troublesome that the statute excludes material (pipes, wires, conductors) which are not typically defined as equipment. Characteristically items such as transformers and backhoes are equipment. This definition needs to be clarified closer to industry standards. Co-Chair Nakagawara agreed and pointed out the issue is the way the statute is written which leads to a vulnerability of people going outside of the intent.

Janice Zahn shared the Port of Seattle references Bluebook and the AGC WSDOT rental agreement. It defines equipment as what contractors use to perform the work. There are some other sources where agencies define equipment. The committee may want to compare how other agencies define equipment.

Michael Transue said that the PUD language was intended for a different purpose specific to a PUD. They may stockpile millions of dollars in wire and pipe so that they are ready if an emergency occurs. and could use current stock as they start the project.

Co-Chair Michel agreed equipment usually consists of the tools used to complete a project. Sometimes this equipment is owned by a utility district, in which case it would be okay to exclude the cost of an excavator if they are self-performing the work below a threshold. However, he agrees it is odd to categorize materials specific to the project as outside of the project costs.

Michael Transue noted that for the definition of equipment in the PUD statute, there isn't information about vehicles or tools, just items such as pipe, wire, cabling, fiber, etc.

Randy Black shared an example. To develop a relay station, the transformer cost \$250,000. He thinks the increased cost of utility equipment as part of the power industry is why this is differentiated. Co-Chair Michel wondered if it would be something manufactured by a third party, procured, and delivered to a project site, and then installed either by self-performed employees or a contractor. The power company

needs to purchase that equipment to complete that project not excluding labor and incidental material essential to perform the work.

### **\$300,000 Amount**

#### **Does the materials and equipment issue apply only to a \$300,000 body of work or all thresholds?**

Michael Transue said that the Small Works Committee discussed if \$300,000 was a right-sized number. Co-Chair Mark Nakagawara asked if the materials and equipment issue only applies to \$300,000 bodies of work. He noted that the project whole is defined in the \$75–\$150,000 threshold.

Michael Transue noted that in the original bill as introduced in Section 2, Subsection 12 in the second-class city or town statute, it says, "...not exceeding \$300,000 in value." *"This limit on the value of material being utilized in work being performed by regularly employed personnel shall not include the value of individual items of equipment. For this purpose equipment means but is not limited to conductor cabling, wire, pipe, or lines used for electrical, water, fiber optic, or telecommunications."* This appears to mean that a project can cost millions of dollars but all that value is excluded from the definition of equipment. This information is also in the first-class city statute Section 3 and then repeated in a few other sections.

### **Definition of Public Works**

#### **Does this bill's definition of Public Works override existing definitions?**

Co-Chair Nakagawara wondered if this bill overrides the existing [RCW 35.22.620](#) (3) for first-class cities where it says, *"A public works project means a complete project."* That follows the conventional thought of a complete cost. Most people would assume that "complete project costs" does not exclude materials and equipment. Now there is a new definition of project cost. Is the \$300,000 trying to be considered public works?

### **10% Capital Budget**

#### **How does the \$300,000 allowance affect the 10% cap on capital projects for first-class cities?**

Co-Chair Nakagawara questioned if the \$300,000 allowance is counted toward first-class cities' 10% cap on capital project budget for self-performed public works. This is a separate threshold first-class cities can't exceed without paying penalties.

### **Reasoning Behind Existing Language**

#### **Why did PUD statute 54.04.070 Subsection 2 use this language?**

Nancy Deakins wondered if anyone had the reasoning behind equipment being excluded. Diana Pottinger sees the complete project list as including all things. Joren Clowers said that was existing language that was pulled. He noted that the committee is highlighting a conflict that already existed in statute. Michael Transue said that this is language that exists in PUD statute [54.04.070](#)(2). That language was taken from PUD statute and then inserted into first-class cities and fire district statute. There might be somebody at PUD who might have historical knowledge of the language.

### **Language Affects Small Firms**

#### **How can the committee make sure language supports BE/BDI?**

Abigail Vizcarra Perez from MetroParks in Tacoma, noted that when talking about the difference between materials and equipment, there can be a difference between a firm being ready, willing, and able or dealing with procurement issues. When something is being installed it makes a difference if a minority company can perform. If they don't have the equipment to perform, they can't do the work. When language is borrowed from the past, we also borrow language that OMWBE and DES are trying to remove from statutes so Washington can have better inclusion. What clarity can this committee bring that will support small and minority business and allows us to pull in the bidder who might be second lowest, but they are the minority firm?

Co-Chair Michel said that he appreciates the perspective. DEI is an ongoing evolutionary process and fundamentally as this committee is evaluating the bill and crafting suggestions, need to be asking everyone to consider diversity and inclusion to make sure we don't create a new barrier. His perspective is that that what's in or out of the threshold is low priority to DEI participating. The committee is talking about self-performing or taking to procurement. Co-Chair Nakagawara agreed that the language that comes from previous bills was not focused on the goals of today, and that is the danger of borrowing language.

### **PUD Statute and Language**

#### **How have the PUDs been using the language in the statute?**

Michael Transue said that the language in the PUD statute might be there for reasons that might be different than the training issue that the water/sewer districts brought because they wanted training opportunities for in-house employees. He would like to compare PUD purpose and the training piece. Can the same statutory language provide the same policy result? Co-Chair Michel clarified that what works for PUDs may not work for others, giving the context of prudent utility management as well as equipment. These should be two distinct line items in our matrix.

Michael Transue agreed that the committee needs to figure out the issues and have performance and lookback provisions so that when the legislature adopts a policy, they are getting back what they are putting into the statute. He is interested to know how this has worked in the past, and how the PUDs are using it. From there we can have a policy perspective discussion.

Nancy pointed out that the bill has already moved PUD into the other statutes. This group might consider whether the language is okay to stay there.

Joren said that the PUD association is reaching out to membership to find examples of how it was implemented, examples of operating under prudent utility management, and differentiation between equipment and materials.

### **Prudent Utility Management**

#### **Does the term "prudent utility management" apply to things like cities or fire districts?**

Michael Transue had a question about prudent utility management. During Legislative session, the people who drafted the bill took prudent utility management references to wire and cabling and put that language in other statutes. If you are a fire district or a city, do you have prudent utility management? Wouldn't it be prudent fire district management or prudent city management? Michael Transue agreed that prudent utility management is an inclusion in SHB 1621 and might need a better definition.

### **MCA Questions**

Michael Transue said that the committee may want to look at the questions the MCA created that the committee wants to add to the spreadsheet. Co-Chair Michel agreed that those should be added to the matrix.

### **Second Responsive Bidder**

#### **How can the committee clarify language about when to go to the second responsive bidder? How often is the second responsive bidder used?**

From his contractor perspective, Co-Chair Michel brought up his observation about when it's okay to go to the second responsive bidder, noting that this is a slippery slope. Michael Transue said that SB 5268 was adopted last session and it adjusted the small works roster limits and standardized them across jurisdictions. The bill set \$150K or less that could direct contract with anybody on a small works roster list and then between \$150,000-\$350,000 where the contractor would be selected from a small works list via OWMBE designation. If you were one of 4, 5, or 6 then one of those folks had to be chosen from the small works roster. He was asking if there were things in that bill that would negate what is in this bill. Sharon clarified that \$150,000 or less is where OWMBE firms come in, not the \$150,000-\$350,000 range. Co-Chair

Michel noted that related to second place, that isn't the right comparison example. SB 5268 is the small works roster procurement process. Michael Transue agreed that SB 5268 did not address that at all.

Co-Chair Michel wondered if anyone has CPARB responsibility for tracking past performance. Nancy said that CPARB developed the Responsible Bidder Statute [RCW 39.04.350](#). It requires CPARB to maintain guidelines for bidder responsibility. (Talia provided a link to the current guidelines.) Because part of the language in this bill is outside \$350,000, this committee should evaluate if only certain entities go to the second lowest bidder. Or should this apply to everyone? The intent for RCW 39.04.350 was for it to apply to everyone. Janice agreed that the Education Connection Committee should make sure that set of guidelines is included in that inventory. Co-Chair Nakagawara said that it would be hard to figure out the authority to make that determination for low bid. With 39.04 you have all the authority you need. Co-Chair Michel said that Co-Chair Nakagawara had referenced that second class cities have language about that. Co-Chair Nakagawara agreed.

Brandy said that she has reached out to second class and code cities to review anything that the committee recommends. She requests that if there are things for her to send to AWC members, she can do that and send back responses. Co-Chair Michel said that the committee may point toward CPARB's RCW 39.04.50 as a best reference point for determining a low responsive bidder.

Janice wondered how often the second bidder is selected. Does the committee need to understand the practice? RCW 39.04.350 provides the same option. Could the committee survey, poll, or get an understanding of how much this provision has already been used? Michael Transue suggested that Brandy might help the committee gain understanding. Brandy agreed she would get some feedback to share with the committee. Nancy wondered when the language was added. Three years of performance criteria are needed, and the years might not have elapsed.

#### **Review the committee's work so far.**

Diana asked for a review of work done so far and if the committee has any homework assignments. Talia reviewed the action items from the last meeting.

1. Joren reached out to PUDs and FPDs for representatives to attend the meetings.
2. Joren is requesting definitions and examples from PUDs.
3. Michael Transue emailed MCA's questions to Talia.
4. Michael Transue intends to research when \$50,000 was inserted in PUD statute and identify how much the CPI has increased since then.
5. All committee members reviewed SHB 1621, RCW 39.04.350 and the questions from Michael Transue.
6. Talia included CPARB legislation links.

#### **Additional items:**

##### **Establishing Goals**

Nancy reviewed the goals that she heard today:

- Make sure there are no conflicts or unintended consequences in the bill as written.
- Evaluate the pieces and make improvements with the goals in mind.

Diana said questions submitted prior to the end of the session wanted to look at proper performance measures and oversight needed to ensure the policy is meeting its goals. Once the committee identifies the goals then it can tackle performance measures.

##### 5. Review Timeline

Janice suggested that having the timeline on the top of the agenda would be helpful.

##### 6. Establish next meeting agenda

- Approve notes from 6/20 meeting.
- Co-Chair Michel recommended reviewing each line in the matrix.

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- All stakeholders should send Talia their email addresses so that they are included in the email distribution.

**Next Meeting:**

Tuesday, July 18<sup>th</sup> 11:30 a.m. to 1 p.m.

**Action items:**

1. Joren will bring back any examples from the PUDs about how prudent utility management language was implemented.
2. Brandy will ask her stakeholder if they have used second bidder and how frequently.
3. Nancy will review when language was added to the statute.
4. Committee members will examine the matrix and identify points of discussion with respect to their organization's opinions.

**Meeting adjourned at 12:59 p.m.**

**References/Resources:**

[RCW 35.22.620](#) – First-Class Cities / Public Works

[RCW 39.04.350](#) – Responsible Bidder

[RCW 54.04.070](#) – PUD General Provisions/Contracts for work or materials