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April 3, 2019

Walter Schacht, Chair
Capital Projects Advisory Review Board
1500 Jefferson Street SE
Olympia, WA 98501
Email: walter@saarch.com

Via Email Only

RE: Concerns with MCCM Procurement

Dear Mr. Schacht:

We write on behalf of the Mechanical Contractors Association of Western Washington (Association) to express our concerns about Mechanical Contractor/Construction Manager (MCCM) procurement under RCW 39.10.385. In some cases, the statute plainly is being violated. In others, the intent behind the statute is being frustrated with how it is being administered. Our patience is waning. We will be participating in sunset review. We will continue to support MCCM only if substantial changes are made to the statute.

By way of background, we represent approximately 100 mechanical contractors. As you know, our Association was instrumental in the passage of RCW 39.10.385. Ed Kommers, vice chair of CPARB at the time of passage of the statute, has participated in hundreds of MCCM procurements. Mr. Kommers also chaired a CPARB subcommittee that produced a series of principles for administering MCCM, which CPARB then published. We regularly appear and provide written and verbal comments at MCCM hearings.

The intent behind RCW 39.10 is to authorize alternative contracting procedures that allow for awards of public contracts based on qualifications rather than in lump sum to the lowest responsible bidder. But, this legislative authorization under RCW 39.10 is not without limits. Such awards must be based on an "open and fair process based on objective and equitable criteria." RCW 39.10.200. Of course, the use of alternative contracting procedures, including MCCM procurement, must be in the best interest of the public.

The threshold question with any decision to use MCCM is whether it is in the "best interest of the public." RCW 39.10.385 states a firm should be selected "early in the life of the public works project." We are seeing cases where an MCCM is to be selected *after* design development (DD). This timing runs afoul of the language of the statute and prevents an MCCM from having the type of preconstruction impact that was intended when the statute was enacted. In those cases, MCCM is not in the best interest of the public. Nevertheless, in nearly all cases, the MCCM process continues over our objections regarding the timing.

A critical component of RCW 39.10.385 is the public hearing process. This process is being abused. This allows interested parties to comment on evaluation criteria and weights. We are seeing two primary issues. First, we are seeing a trend of publishing hearing notices in local newspapers that neither our Association,



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nor our contractors will likely ever see. Interestingly, the notice of RFP is then published in the *Daily Journal of Commerce* where, of course, it is widely seen. We acknowledge that publishing the hearing notice in a legal newspaper in or near the project location is required by the law. However, publishing in local newspapers like the *Federal Way Mirror* or *The Daily News* (in Kelso), that are unlikely to be seen by our contractors, is an unintended consequence of RCW 39.10.385(1)(a). Second, when we do see hearing notices, we immediately request a “draft” RFP so we can review the proposed criteria and weights. In many cases, we do not obtain a draft RFP until a day or two prior to the hearing. The draft RFP is often incomplete. The draft RFP should be available at the time of publishing the hearing notice, *i.e.*, fourteen calendar days before the hearing. The lack of sufficient hearing notice and availability of a draft RFP frustrates RCW 39.10.385’s goal of a meaningful public hearing process. We will be proposing changes.

As stated above, RCW 39.10.385 was enacted to allow qualifications-based awarding of public contracts to mechanical and electrical subcontractors. This goal is being thwarted by constant efforts to seek an MCCM submitting the lowest “fee.” RCW 39.10.385 is set up to select the best “fit” for MCCM by aggregating scores from written qualifications and a final proposal. Recently, we have seen a case where the scoring criteria was materially changed *after* a written final determination was issued – in violation of RCW 39.10.385 (1)(d). This 11th hour change to the scoring criteria by the public body and/or GCCM added a “burden of fabrication.” This effort was no doubt designed to seek out the lowest fee and was prejudicial to contractors who have fabrication shops and can deliver the scope of work at a potentially lower overall cost than those who do not have such shops. This effort flies in the face of an open and fair process in selecting an MCCM.

Moreover, in regard to efforts to select the MCCM with the lowest fee, the criteria and weights for written qualifications and interviews do little, if anything, to differentiate among MCCM proposers. In many cases, the scoring of the final proposals will contain a provision that allows a public body and/or GCCM to eliminate a proposer whose final proposal deviates from the median of other finalists by more than 20%.

We are also seeing poorly-written and overbroad RFPs that provide no indication of what is actually important to the MCCM project. Examples are overbroad requests about bonding capacity, annual project volumes in dollars, safety-related criteria, and “approaches to a project.” As an Association, we provide feedback during the hearing process to narrow the scope of this criteria. But, our constructive feedback is often ignored. Public bodies and GCCMs must understand that RFPs are timely and expensive to respond to. They need to be narrowly tailored to select the best fit for the project while not overburdening proposers.

We do not agree with the use of interviews, as they appear nowhere in RCW 39.10.385. They are being employed in a manner that is anything but objective. Nevertheless, we know they are used and we have attempted to improve the interview process by working on a CPARB subcommittee to develop principles for their use. We have also provided feedback to public bodies and GCCMs at public hearings. Unfortunately, there continues to be little transparency in how interviews are evaluated. In fact, we are now seeing a trend towards a two-step process where a public body and/or GCCM identify finalists from written qualifications, conducts interviews, and then allows only *some* of the interviewed finalists to submit final proposals. This places too much emphasis on the interview, which is not even an evaluation “step” under



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RCW 39.10.385. We will be seeking changes in sunset review to either prohibit interviews altogether or ensure that they are administered in a more fair and transparent manner.

Finally, the statute allows protesting parties to receive a “scoring summary of the evaluation factors for its proposal.” RCW 39.10.385(5). While we have tried to obtain this information informally, in some cases we have had to file public records requests to receive scoring information. Also, we have had to file formal protests simply to get a public body to realize that it cannot make material changes to scoring criteria and weights after issuing a final determination to proceed with MCCM procurement, and that it must hold a public hearing *before* publishing a notice of RFP. A protest should not be necessary for these purposes.

We fully understand that CPARB is not a quasi-judicial body and we are not asking CPARB to take any specific action with regard to our above-mentioned concerns. However, we do believe it is necessary to bring these issues to the attention of CPARB, the body that oversees RCW 39.10.385. Simply put, we are no longer confident that a fair, open and objective process is being used to select MCCM firms. We will be looking for substantial changes to RCW 39.10.385, or we will consider withdrawing our support for MCCM.

Thank you for the opportunity to be heard on these issues at the May 9, 2019 CPARB meeting.

Best regards,

**Mechanical Contractors Association
of Western Washington**

A handwritten signature in blue ink, appearing to read "Ed Kommers", with a long horizontal flourish extending to the right.

Ed Kommers
Executive Director

A handwritten signature in blue ink, appearing to read "Scott Middleton", with a long horizontal flourish extending to the right.

Scott Middleton
General Counsel &
Government Affairs Director

cc: Rebecca Keith, Vice-Chair, CPARB (via email)
Nancy Deakins, P.E., Assistant Program Director, DES (via email)