

## Transcript for June 6, 2023 Lunch 'n Learn meeting

**[This transcript was edited for accuracy and clarity.]**

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Zavatsky, Drew (DES)

Well, good afternoon, everybody. This is Drew Zavatsky, with the Department of Enterprise Services.

Welcome to the first of our lunch and learn sessions.

Today we'll be talking about supplier diversity, the Supplier Diversity Policy, and the sheltered markets portion of the policy, section C4.

We have two presenters with you or with us today.

Ernesto Perez and Brandon Cipolla are both with DES.

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Perez, Ernesto (DES)

Hi there. My name's Ernesto. I also go by Ernie too, so if you want to call me Ernie, that's fine.

I'm with DES within the PIE program, so I am the Supplier Diversity Policy program manager. I'm here to help you as we all work towards implementing the policy.

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Cipolla, Brandon (DES)

Hi everyone. I'm Brandon Cipolla, contracts liaison with DES, so I'm available for your contracts questions in and out of this meeting. I'll be monitoring the chat and hopefully helping answer some of the questions that you may have.

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Zavatsky, Drew (DES)

Most of this meeting is going to be devoted to answering your questions, so we're going to whip through these slides and then get to any questions you have, there's over 180 people registered and I'm still not sure how many people are going to join us today, but we'll try to get to everything we can.

Those questions that are not answered by the end of the session, we will respond to in writing. Once we assemble answers for all of those questions, the Q&A will be available online.

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Perez, Ernesto (DES)

**[Slide 3]** Quick overview of the slides. DES, we are the state's lead procurement agency. We also manage the statewide contracts, of which we have about 200 with over 1500 vendors.

We also make enterprise procurement policies and procedures, including the supplier diversity policy.

**[Slide 4]** So bit more about our statutory directive.

Why are we making these policies?

Why are we putting them into place?

The legislature has required us to develop these policies and procedures to encourage statewide equity in goods and services by contracting and doing more business with small and veteran-owned businesses.

The statutory directive, RCW 39.26.090(6), mentions a focus on contracting with small businesses, microbusinesses, minority- and women-owned businesses. To implement this, our Procurement, Inclusion, and Equity (PIE) Program strives to achieve that goal of increased contracting with these businesses.

What steps are we doing to make that happen?

**[Slide 6]** Supplier Diversity Policy just went into effect on April 1st, so I'm sure we're all still working on trying to get this implemented, trying to figure out what implementation looks like, and how it works best for each individual agency.

The best resource we've created for you is the virtual Handbook, so I'm sure you've all checked it out, but when in doubt, any questions you need answered, I would say check there first.

There are also great frequently asked questions at the bottom of each Handbook section, so it is a very, very handy tool.

**[Slide 7]** This slide shows the eight tools in the policy. We are focusing today on #4: the contracts under \$150,000.

**[Slide 9 – column 1, Planning]** Step one is planning.

For contracts under \$150,000, the first step is to figure out whether a contract will be valued at \$150,000 or less. And then if yes, assess market opportunity, that's another big point that we really want to emphasize. So, for doing any procurement really try to get a feel for the market, do some window shopping, maybe get some quotes, so you can have an idea for a reasonable price range. These questions are helpful when assessing market opportunity:

- What's a good low price point for this product/service?
- What does this price point look like on the higher end?

If the price range you find after market research is \$150,000 or less, then it may make sense to post the contract solicitation with the intent to award it to a responsive and responsible small and/or veteran-owned business and to see if you can find potential bidders for the solicitation.

So, for this part of planning outreach is probably your best friend, make sure you look in the WEBS database to see if there are small and/or veteran owned businesses capable of bidding on this solicitation.

Then you would ideally be reaching out to them, getting quotes and ideas to put the contract on their radar to bid on. It lets the businesses know "Hey, we're going to be posting this contract soon", so that way the businesses are aware and likely to bid. This helps avoid a worst-case scenario where you do put out this sheltered market solicitation and then there are no sheltered bidders who bid on it.

So, outreach planning, very important.

**[Slide 9 – column 2, Solicitation]** And then for solicitation, explaining the sheltered market details in the solicitation is the biggest thing to take away from this part of the slide. Sample language is provided in the Handbook. But be certain to explain that the solicitation is going to be for sheltered markets with the intent to award the contract to a responsive and responsible sheltered bidder, meaning a small or veteran-owned business. The solicitation should also include, in the evaluation section, what you're going to be looking for in the evaluation process, how you will be evaluating the bids, and also what bidder qualities are necessary to be considered a sheltered bidder.

**[Slide 9 – column 2-3, Contract]** Once you're preparing to sign the contract, it's necessary to get that warranty and certification from the contractor that they are in fact a Washington small business and/or a certified veteran-owned business.

**[Slide 10 Sheltered Market Procurement Options]** So next we'll go over two main options (shown in the PowerPoint) that we're thinking might be at least a good basis for approaching the sheltered market procurement strategy. The first option would be making the solicitation open to all bidders and award it to the best sheltered bidder. The second option is similar, only with the caveat that either the sheltered bidder's bid wins outright or is within a stated percentage of the winning non-sheltered bid. In either circumstance, the award will go to the best sheltered responsive and responsible bidder. We'll go over these two options in more detail. Next slide.

**[Slide 11 Option One]** So option one – open to all bidders (sheltered and non-sheltered) but awarded to the best sheltered bidder. Practice tip: the solicitation must clearly state the intent to award the contract to a sheltered bid first, and then if there is no responsive and responsible sheltered bidder, then you at least have that pool of non-sheltered bidders to choose from.

This could be a good option when you know that there is a pool of small businesses and/or veteran-owned businesses that can compete for the contract. You would know this after conducting outreach and seeing that there is a good pool of small businesses to potentially bid on this contract.

This can benefit the state's effort to award to a small and/or veteran-owned business by having those businesses compete amongst each other rather than competing with larger businesses. It's harder to shine when you're a small business competing with large businesses that have a lot more resources than you do.

So, some other pro tips you can do?

Use an RFI or Sources Sought (a synopsis posted by an agency that seeks possible sources for a good or service) to get the word out that there are contracting opportunities in the state, making vendors aware, putting it on their radar that this is going to happen and they as a potential bidder might want to prep for bidding on that solicitation.

It's also always good to consider adding a "not to exceed" parameter just to make sure that vendors don't inflate the bid prices too much. Having a good pool of small/veteran businesses could act as a price control, because the sheltered businesses would still need to compete against each other.

Now let's talk about the evaluation and contract award.

This point says, “regardless of bid evaluation scoring,” which may be confusing, because you wouldn’t want to completely disregard the evaluation scoring.

In the criteria for what is a responsive bid, it's good to have some wording that says, “responsive means at least this threshold score.”

So, there's a minimum score, because you don't want to award to the poorest quality bidder, for example if someone scores 10 out of 100, you're not going to want to give it to them.

It’s a good idea to make sure there's at least that minimum score that counts as responsive, so that way the apparent successful bidder can at least meet that minimum threshold.

And then regardless of that scoring above the minimum, the bidder’s status as a small or veteran-owned business can be considered.

And then if there's no responsive and responsible sheltered bidder, then you can go with the highest scoring responsive and responsible, non-sheltered bidder

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Perez, Ernesto (DES)

**[Slide 12]** Some advantages and challenges for option one, we'll just do a quick summary.

It’s a good way for small businesses to compete amongst each other rather than competing with large businesses, the latter of which could be more difficult.

Very Likely Successful Procurement: you have that backup with the non-sheltered bidders in the event that you don't get a sheltered bidder and to answer a question in the comments, sheltered bidder is the small and/or veteran-owned businesses. I can’t include “diverse” because we are legally required to stay race and gender neutral. So “sheltered bidders” refers to small and/or veteran-owned businesses.

Challenges: with a small business who may not have the resources that large businesses have, the cost might be a little bit higher.

But remember, we're at best value state, so try to keep that in consideration. We're helping the state. We're keeping Washington dollars here in Washington, so although reduced competition may lead to higher pricing, it’s okay to pay a reasonable amount more so long as it aligns with the market price range.

And then there’s the challenge of sustainability over time. Large businesses might think “well, if we're not getting it, if the preference is for sheltered bidders, why should we bother to bid?”

If that happens, we lose our backup for if there is no sheltered bidder so that is a challenge to consider, of course.

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Perez, Ernesto (DES)

**[Slide 13]** Option 2 is pretty much the same as option 1, but the sheltered bidder is awarded the contract if its bid is within a stated percentage of the winning non-sheltered bid. So, this one could be more beneficial for procurements where you do your market research looking in WEBS and other databases, and there just aren't that many small businesses in that market to potentially bid on the

solicitation. In which case, since the few small businesses found may be the only sheltered bidders within that market, there is a higher chance of them bidding with higher prices due to less competition. It might be, for example, that a vendor can think “Oh well, since I’m the only vendor, let’s milk the state for all I can get,” which hopefully is not the case.

It’s best to be prepared for that situation too. So, in those events, it might be good to include some “not to exceed” language.

But again, you’ll likely have done your research. You’ll have searched market pricing to see what a good and reasonable price range is. So that way you can make a reasonable estimation of what pricing to expect. So based on research we think that this shouldn’t go over this amount so that we can keep costs under \$150,000 and reasonable. That way businesses are not bidding an excessive amount over the non-sheltered bidders or even amongst each other.

And consider what will be a responsive, responsible, and best value bidder. The contract award can also be within a defined percentage of the highest scoring responsive bid’s best value. An example could be some contract wording such as, “can be within 20% of the average score.” The Handbook contains useful examples of solicitation and contract language. It is very handy.

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Perez, Ernesto (DES)

**[Slide 14]** Advantages: this option is great for increasing small/veteran vendor participation and competition. It can improve cost/price containment since you’d have that “should not exceed” clause in the solicitation so that bids are contained within that range. And then for determining an apparent successful bidder, you have that safety valve of the bid being open to ALL bidders; non-sheltered bidders will be available if the sheltered bidders end up being considered non-responsive due to cost.

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Perez, Ernesto (DES)

And then challenges are similar to those of option one: what if after a while non-sheltered bidders just stopped bidding? In which case then the sheltered bidders really do become the only options and have more likelihood as the limited supplier to push the cost/price pressure, quality, and things like that.

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Perez, Ernesto (DES)

**[Slide 16: Draft Regional Sheltered Market Procurement]** Here is a sample sheltered market procurement. Here, we have an example for what a sheltered market contract or RFP section might look like.

It’s really hard to read here, but if you email me or the PIE Program: [ernesto.perez@des.wa.gov](mailto:ernesto.perez@des.wa.gov) or [DESPIEProgram@des.wa.gov](mailto:DESPIEProgram@des.wa.gov), we can send this to you if needed.

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Zavatsky, Drew (DES)

Also, all of the items that we’re referring to, including the PowerPoint, will be posted to our web site, including the transcript of this meeting. And yes, each of our email addresses is our name @des.wa.gov. [Drew.Zavatsky@des.wa.gov](mailto:Drew.Zavatsky@des.wa.gov)

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Mroz, Zoe (DES)

**[Slide 17 Questions]**

**Question #1** Our first question – and I think there have been a couple of follow-ups echoing this – but is this part of the Handbook mandatory or just a suggestion for the under \$150,000 contracts?

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Zavatsky, Drew (DES)

**Answer #1** The Policy is mandatory.

Strategies are mandatory for usage, but we acknowledge that not every strategy is going to apply to every single procurement, right?

Strategy C.4 says that it applies to all contracts that are \$150,000 in value or less, and that the policy section is mandatory.

The intent of the Policy is that the sheltered market strategy is one of several tools that agency procurement professionals will use to increase commerce within the state by expanding the spending with small and veterans' businesses.

This is exactly what the governor has ordered us to do in Executive Order 22-01.

Mroz, Zoe (DES)

**Question #2** What constitutes a contract?

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Zavatsky, Drew (DES)

**Answer #2** A legal contract has the following elements:

- a. An offer
- b. Acceptance
- c. Mutual consideration (an exchange of things of value)
- d. Between legal parties (entities that may enter into an agreement)
- e. For a legal purpose

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Mroz, Zoe (DES)

Let's see, I'm wondering if someone can monitor the bottom of the chat in case there are follow up questions for the ones answered because I'm now at the top of the chat so I can't see if there are any follow up for those.

**Question #3** So with the best value exception, in the event that there is a small/veteran owned business bid, they pass from the responsiveness/responsibility perspective, and they score significantly less or have a clearly inferior product to a non-small business, can we just say the large business offers best value and award to them and this will meet the policy requirement?

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Cipolla, Brandon (DES)

**Answer #3** That's going to be a very specific circumstance and the inferior product would need to be

clearly defined around why you're determining that, because this determination, it will be available for the contractor to view and for the other bidders to view. It'll be public information, so there's risk there in how it's determined that their product is inferior to another.

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Zavatsky, Drew (DES)

And in that circumstance, by all means, give us a call, and I'm saying that as a policy wonk and I admit it, I'm a policy wonk, not as your attorney, right? I can't give you legal advice, but I can tell you what the scope of the policy is, and that's an important distinction, because if you're going to act on something and say, wait a minute, my lawyer said to do this.

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Mora, Douglas (OMWBE)

**Question #4** So Drew, following up on the question about what is a contract. So, in this context, a contract, you know, offer, acceptance, and consideration, what you outlined, but is an MOU and MOA considered to be a contract or just any purchase agreement.

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Zavatsky, Drew (DES)

**Answer #4** Yeah, that's a great question. So, it raises a very separate issue, which is what is an MOU, right? Agencies oftentimes will use an MOU or say that something is an MOU because – MOU stands for Memorandum of Understanding – which sounds like an agreement and in many cases it actually is. The difference is what you mean by an MOU. Some agencies say MOU, but they actually mean an Interagency Agreement.

Years ago OFM, they were making the distinction that an MOU is only an agreement between agencies if it is not an exchange of dollars. Example: you can have a Memorandum of Understanding between two adjacent jurisdictions, sheriff departments, that we will allow you to chase, you know, to conduct a high-speed chase that starts in one jurisdiction but ends up in another. That's a Memorandum of Understanding.

But if there is money involved, it really is an Interagency Agreement.

Now, that being said, they're both contracts.

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Mroz, Zoe (DES)

**Question #5** Next question, is this a policy we can apply on a discretionary basis, i.e., when it makes sense to do so because there are no sheltered bidders on our roster under that category?

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Zavatsky, Drew

**Answer #5** I look at it this way when I'm applying another agency's policies, or I'm looking at a DES policy but it's in an area that I don't typically work in. So, for example, let's say I'm doing some groundwork on my property. It's around my residence and all I'm doing is digging a ditch to irrigate my crops. My little project has no possibility of releasing fossil fuels into the ground for what I'm doing, so all of the EPA and Department of Ecology requirements for being careful about, you know, not spilling fossil fuels are irrelevant.

Similarly, if you don't have any sheltered market entities in your business area that you're trying to purchase from, it probably doesn't apply, however, and this is the important part, there's other parts of the policy that are relevant.

Have you done outreach?

Have you forecasted your agency's market needs?

Was the forecasting done in a timely manner, such that you're not doing that outreach and that market research at the last second, so that you can actually know whether there are small and/or veteran's businesses available to fulfill your needs? And even if you establish that there are no business entities that you are aware of, what if, when you put out the competitive solicitation, it turns out Ooh look, one of the bidders is a small/veteran business.

At that point, you do have to consider them.

So yeah, at some point, you know it is really going to change how you're doing a competitive solicitation. What does it do? It modifies how you decide who the apparent successful bidder is. Because of that, there's a bunch of suggested language that we're encouraging you to use.

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Mroz, Zoe (DES)

Yeah, Drew, I would add to that too. Like what you were saying about the language that you'd put in the solicitation for these contracts, if you get no small/veteran businesses submitting bids, you're not going to award to a small/veteran business if you didn't receive any bids from one. So, the language, and we do have sample language available in our handbook which would allow for that award to happen to a non-small/veteran business in the event that you did not receive bids from one.

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Zavatsky, Drew (DES)

Oh, and here is a related concept: If you do a competitive solicitation and it turns out there are no either small or veteran businesses that bid, make a note of that because at some point if you collect enough of those gaps in available bidders, you need to let us know so that we can do one of our statewide outreach campaigns. That will help us to start encouraging more of those businesses to become aware of opportunities because one of the things that can happen – and I've seen it before and I'm sure it's not going to stop – is that some small businesses may decide “oh, WEBS isn't for us.”

But if you're not in WEBS, you're not a player in the game, and if you're not a player in the game, you don't learn about the opportunities.

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Perez, Ernesto (DES)

Yeah, actually that's a really good point. In a situation when you are not finding anyone (qualified small or veteran bidders), at least email my team with the [despieprogram@des.wa.gov](mailto:despieprogram@des.wa.gov). Email us because one of our strategic goals is to create a pipeline of small and diverse businesses, because in order to do more business with small businesses, we have to have a good selection of them. If there are any business industries where you're just not finding bidders, let us know and we can do outreach.



We are trying to prepare small businesses and getting them ready to do business with the state. So, if you can't find any, let us know and we will either try to find some or if we can't find any, we'll find relevant businesses and hopefully build them up to be ready to do business with the state for next time.

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Zavatsky, Drew (DES)

And you can tell from our comments that a lot of these aspects, a lot of the strategies that are in the policy, end up not interchanging or interrelating to each other. The different parts of the policy form a net; it contains a number of ways to increase contracting with small or veteran businesses. The bigger the net, the more commerce you can do with these businesses.

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Mora, Douglas (OMWBE)

**Question #6** So, what if you run a solicitation that is estimated to be \$350K But we award to multiple vendors and the resulting contracts are all under \$150K... Does this policy still apply? And this has me thinking about the net you mentioned. This kind of relates to unbundling, that you'll be talking about later at a lunch and learn, but can you comment generally on that specific example?

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Zavatsky, Drew (DES)

**Answer #6** So yeah, it sounds like the hypothetical is that a solicitation is done and it's for multiple vendors, right? And each contract itself will be under \$150,000.

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Mora, Douglas (OMWBE)

Ashley said yes to that, to that question.

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Zavatsky, Drew (DES)

Yeah, that is a fantastic question. Hmm. The reason it's got me kind of befuddled right now is trying to distinguish between a contract that has been unbundled versus a contract that is perhaps meeting a need across geographical areas, right? Multiple vendors are being sought.

If I'm hiring 4 contractors to provide services and each of them are going to cost \$130,000, but all of them are being hired to provide services for the agency to conduct a particular project. Are the contracts part of a single whole and that therefore it's really a \$520,000 contract with parts? Or is it in fact four discrete contracts because you know you have contractor number one who only has capacity to do one part at a time, and the same is true for the other contractors. And to flush out the hypothetical, it turns out that each of the contractors are working for different projects.

I would say this: if in fact your analysis is that each of the contracts are in fact independent, even though they're arising under the same solicitation so that you can legitimately say to the auditor years later, "hey, look, even though that solicitation created a bunch of commerce, there were four separate contracts and we can show you why and all of them were less than 150,000." That situation would be within Policy section C.4.

But if the contracts are not really that separate or they're not separate at all, then really, they're part of the contract/project and therefore, outside the scope of C.4.

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Perez, Ernesto (DES)

However, this could be a circumstance where it would make sense to use the Reserved Award strategy, under Policy section C.7(c).

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Zavatsky, Drew (DES)

Yes. Now I would say the reserved award is separate from the sub \$150,000 strategy. We will consider it further and then post an answer to our web site along with all the Q&A that we're receiving today.

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Barehand, Shana (DES)

I would just be surprised if you were doing a multiple award and the award was under \$150,000, so I would be curious to know if there are contracts out there for \$150,000 where there's multiple awards. Generally, a multiple award would be when it's a larger contract and you need multiple vendors because there's so much work.

Remember too that we at DES are here for consultation if you need help on strategies. Our contract specialists have been using these strategies for the last two years. We would all be willing to help on these strategies. Thanks.

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Zavatsky, Drew (DES)

Well, and to be more assertive, we would help. People have been coming to us for the last two years for these supplier diversity issues.

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Barehand, Shana (DES)

We actually have a procurement consulting team even here at DES.

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Mora, Douglas (OMWBE)

And recognizing limited time, Drew, how do you want to proceed? We've got 4 minutes left. We have two hands raised and we have some questions about availability of slides and documented Q&A and recordings of the conversation today. So do you want to answer those first really quick and then see if we have time to get to Simon.

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Zavatsky, Drew (DES)

I mentioned earlier on, we are being transcribed. We're going to clean up the transcript a little bit. We'll get it on the website, the same area I believe, where you registered for this session and we're going to have a Q&A. It'll take us a little longer for cleaning up the transcript, but the Q&A will also be in that location on the website.

We're going to be doing similar presentations in the next three lunch and learns, and then we're going to have more lunch and learns in September. The time for the sessions will be same as today, Tuesdays at 12:05 pm.

Any last question that's caught somebody's eye that we can address?

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Mora, Douglas (OMWBE)

**Question #7** Do the words “initial value less than \$150,000” mean that unbundled contracts should be excluded?

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Mroz, Zoe (DES)

**Answer #7** Yeah, we'll have to think on that one, Simon. It's a great question.

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Zavatsky, Drew (DES)

But listen, I want to thank you for your time and attention and your fantastic questions. We don't improve unless we get good questions, and Lord knows, even though there's obvious room for improvement, you know, we do quality improvement when you're interactive, so. I won't close the meeting for the next couple minutes so that you can copy that and then that's where we'll put the transcripts, the Q&A and hopefully the chat transcript. So, thank you once again and I look forward to our next virtual meeting.