

SHB 1621 Review Committee

Meeting Notes 9/12/2023

Page 1 of 9

Committee Members: (7 positions, 4 = Quorum)

- | | |
|---|--|
| X Keith Michel, General Contractors—Co-Chair | X Mark Nakagawara, Cities—Co-Chair |
| X Bruce Hayashi, Architects | Mark Riker, Construction Trades & Labor |
| Sharon Harvey, OMWBE | X Michael Transue, Contractors (MCAW) |
| Irene Reyes, Private Industry | |

Alternates:

- X** Josh Swanson (proxy for Mark Riker)

Guests & Stakeholders:

- | | |
|--|--|
| Liz Anderson, WA PUD Association | Monique Martinez, DES |
| Randy Black, Lakewood Water District | Diane Pottinger, North City Water District |
| George Cann, Washington PUD Association | Roe Pulalsi-Gonzales |
| Joren Clowers, Sno-King Water District Coalition | Rob Wettleson, Forma Construction |
| Patricia Collins, Maul Foster & Alongi, Inc. | Maggie Yuse, Seattle Public Utilities |
| Nancy Deakins, DES | Janice Zahn, Port of Seattle |
| Brandy DeLange, AWC | |

The meeting began at 11:33

Review/Approve Agenda

Michael Transue moved to approve the agenda and Josh Swanson seconded. The agenda was approved on a voice vote.

Review/Approve Notes for 8/29/23 Meeting

Michael Transue moved to approve the 8/29/23 meeting notes and Josh seconded. The notes were approved on voice vote.

Welcome and Introductions

Josh introduced himself and said he was attending the meeting as Mark Riker’s proxy.

Discussion Highlights:

Agenda Items

Co-chair Michel informed the committee that he and Co-chair Nakagawara had drafted a report and shared it with committee members. However, they decided not to formally send the draft report to the Capital Projects Advisory Review Board (CPARB) as a component for the pre-reads for the upcoming September 14th meeting. Instead, they wanted to give committee members the opportunity to provide feedback on the draft report.

Nancy Deakins inquired if the report would be sent to CPARB before the CPARB meeting. Co-chair Michel explained that the draft report is available on the SHB 1621 webpage but that they wanted to gather input from the committee first. Nancy and Janice Zahn suggested that even a preliminary report would be useful for CPARB, emphasizing the importance of sharing progress with the board.

Review Report Outline

Submitting comments and feedback

Co-chair Nakagawara requested that committee members with comments on the draft report submit their feedback via email. This approach would enable the Co-chairs to capture the nuances of committee member comments, which are considered valuable for the report. Co-chair Nakagawara emphasized that the nuances and corrections provided by committee members are highly beneficial in refining the report.

SHB 1621 Review Committee

Meeting Notes 9/12/2023

Page 2 of 9

Comments from water/sewer perspective.

Diane Pottinger opened the discussion about the report outline with a few comments she was not able to submit before the meeting.

Diane mentioned that water/sewer districts were satisfied with Prudent Utility Management (PUM) and suggested a revision to the language in the report. She proposed changing the statement, "The subcommittee has expressed concerns regarding the term 'Prudent Utility Management...'" to "Some of the subcommittee expressed concern." This revision would reflect that not all members of the subcommittee had concerns about the term.

Diane recommended changing the heading "Subcommittee Responses" to "Member Responses" in the draft report. Her suggestion was based on the fact that not everyone who contributed to the report is officially a member of the subcommittee.

Joren Clowers suggested incorporating the word "stakeholder" into the draft report. This addition could help clarify the various individuals or groups involved in the discussion or decision-making processes discussed in the report.

Diane noted that the water/sewer districts were content with the language in the fifth bullet, which states that "...water/sewer districts were open to consider the simplification of applying a \$300,000 threshold limit in lieu of the 'equipment' (material) cost waiver as part of the \$300,000 threshold calculation." This suggests that the wording "open to consider" accurately reflects the water/sewer districts' stance on the matter.

Contractor feedback

Michael Transue concurred with the Co-chairs' outline of the three areas of concern, which included Prudent Utility Management (PUM), equipment definition and equipment cost exclusion, and bidder responsibility determinations. These areas were recognized as encompassing the key issues that the committee had been addressing.

Michael Transue pointed out an issue related to the report's section discussing Prudent Utility Management (PUM). In the report, it was stated that "the term's usage and applicability is less common with water/sewer districts, first-class cities, second-class cities, and fire districts." However, Michael Transue disagreed with this characterization, stating that, from his perspective, the term does not exist with water/sewer districts and other entities. He clarified that PUM is currently only associated with Public Utility Districts (PUDs). This highlights a discrepancy in the report's portrayal of the term's usage among different entities.

Michael Transue quoted a portion of the report that described the intent of the proposed language, which was to narrowly define the circumstances when regularly employed personnel would be allowed to work on projects with values up to \$300,000.

He expressed concern on behalf of contractors regarding the exclusion in the bill. Contractors believe that projects may not be effectively limited to \$300,000 because the bill excludes material costs up to that amount. To illustrate this concern, he provided an example of a project that could have \$299,000 in materials and still involve \$500,000 worth of labor.

In response to this concern, Michael Transue suggested that the committee report should provide clarification regarding the limit and specify what is included in the calculation, ensuring that the intent of the bill is accurately conveyed.

Michael Transue recommended a change in the language used in the equipment section of the report. Specifically, he suggested that the phrase "costs of equipment are waived from the calculation of the work threshold of \$300,000" should be revised to use the word "excluded" instead of "waived." This change in

wording could provide a clearer and more precise description of the treatment of equipment costs in the context of the \$300,000 threshold.

Michael Transue conveyed contractors' concerns and questions regarding the term Prudent Utility Management (PUM) and its potential expansion into other jurisdictions since the legislation's adoption. Contractors had submitted numerous questions to the committee, and while they received answers, these responses raised additional questions.

He highlighted that when the bill left the legislature, it was seen as a compromise with a delayed effective date and CPARB review. However, based on the discussions and information provided by committee members and stakeholders, contractors still have reservations. Michael Transue stated that, in their view, proponents have not adequately demonstrated the necessity of using PUM for other jurisdictions beyond its current application.

Michael Transue emphasized that contractors have heard arguments from other entities about the need for flexibility, but they firmly believe that such flexibility is already addressed through existing mechanisms. He cited the Small Works Roster, exigent and emergency situations, and the implementation of best practices for bidder responsibility and contract oversight that CPARB is already employing as examples.

He further stated that, based on the current information and discussions, contractors are not inclined to support the expansion of Prudent Utility Management (PUM) to other entities.

Michael Transue expressed contractors' perspective that many of the examples put forward for the expansion of Prudent Utility Management (PUM) into other jurisdictions could be attributed to issues of contract management and improved facilities planning. According to him, these issues could potentially be addressed as exigent circumstances.

He also raised the question of why the current Small Works Roster process, which has a \$350,000 limit, is not used more extensively to address these situations. This suggests that contractors believe that the existing tools and mechanisms, such as the Small Works Roster, should be leveraged to handle projects and situations where flexibility is needed, rather than expanding the use of PUM.

Michael Transue emphasized that there has been significant effort to include minority, women, and veteran-owned businesses in the procurement process. He noted that smaller contracts provide an essential avenue for smaller businesses to secure contracts and gain entry into the procurement world.

In his view, the implementation of Prudent Utility Management (PUM) could potentially undermine the progress made in promoting diversity and inclusion in procurement.

From a policy perspective, Michael Transue conveyed contractors' uncertainty regarding whether training value should be the driving factor behind a specific bid process or if it should lead to contracts being removed from the public bid process altogether. He pointed out that familiarity with a certain type of infrastructure could be developed without the need for specific legislation.

He also mentioned that contractors are unsure whether this legislation would ultimately result in more affordable utility rates or increased system reliability as a consequence of additional emergency work being performed by in-house crews.

Michael Transue provided calculations based on a \$50,000 limit established in 2002, factoring in a 4% annual increase for inflation. According to his calculations, this would equate to approximately \$118,000 today.

He mentioned that contractors would be open to considering a recommendation to increase the existing \$50,000 limit across the board, suggesting a new threshold of \$75,000 for single work and \$150,000 for

SHB 1621 Review Committee

Meeting Notes 9/12/2023

Page 4 of 9

multiple trade work. This proposed adjustment would reflect the increased costs associated with inflation over the years.

Michael Transue asserted that expanding PUM to other entities is step that goes too far, according to contractors. He expressed contractors' concerns that PUM provides excessive flexibility and opens the door to potential abuse.

Michael Transue pointed out that the broader policy questions and the implications for contractors engaged in small public works projects have not been adequately addressed. This highlights the contractors' reservations about the potential consequences and the perceived lack of clarity regarding PUM's applicability.

Michael Transue presented a list of considerations that contractors would like the committee to examine if SHB 1621 were to move forward:

- **Prudent Utility Management (PUM):** He emphasized the need for a clear and precise definition of PUM to be incorporated into each proposed receiving jurisdiction as statutory language. He also stressed the importance of tracking PUM usage, as it is currently perceived as too subjective.
- **Materials and Equipment:** Michael Transue highlighted the importance of clearly defining materials vs. equipment in the report. He indicated that committee members generally understand equipment as items used for construction, while materials pertain to the project itself.
- **1 Percent Rule:** Michael Transue suggested that the 1 percent in-house work maximum applicable to first-class cities should be considered by proponents.
- **Lowest Responsible Bidder:** Michael Transue recommended removing the language about the lowest responsible responsive bidder for second-class cities.
- **Rollout:** Michael Transue proposed a gradual rollout for PUM, similar to the approach taken with General Contractor/Construction Manager and Design-Build processes. He suggested that initially, only larger entities should have the ability to use PUM, with a subsequent evaluation of its effectiveness.
- **Reporting:** Michael Transue expressed a desire for reporting requirements and performance measures to be included.
- **Training:** Michael Transue mentioned that the report language regarding training in first-class cities may not be necessary, as other sections already address training. He believes that part of SHB 1621's purpose is to provide training, and the report language should reflect this.
- **Qualifications of Exigency, Efficiency, and Financial Needs:** Michael Transue recommended changing the language from "or" to "and" in the phrase "qualifications to address exigency, efficiency, or financial needs" to ensure that all these aspects are relevant.

Michael Transue conveyed contractors' discomfort with the current state of PUM and their reluctance to see it move forward at this time.

Reporting

During the discussion, Diane inquired about the type of reporting that Michael Transue would envision. In response, Michael Transue suggested that reporting could involve notifying relevant entities, such as the Department of Labor and Industry or the Auditor's office. Additionally, he proposed that the report should be shared with the oversight body of the jurisdiction, such as the jurisdiction's board of commissioners.

SHB 1621 Review Committee

Meeting Notes 9/12/2023

Page 5 of 9

He emphasized that PUM's use is currently uncertain and flexible, and as such, there should be transparency in the process through reporting. Diane raised the point that implementing a reporting requirement would necessitate training individuals, and she suggested that the process should be clearly outlined to facilitate compliance.

PUM defined

Co-chair Nakagawara mentioned that while PUM may not have been defined or used in the Revised Code of Washington (RCW), it had a meaning for public utilities and water districts. Diane clarified that PUM was not in use before SHB 1621, and its introduction was a result of the bill. She explained that utilities were hoping to use the term when the bill was written.

Joren added that PUM may not be present in the existing water/sewer RCW, but it does have significance for water/sewer districts, and it can be implemented for utilities. He emphasized that, in terms of utility operational concerns, PUM has implementable meaning.

Michael Transue expressed the need for a clear and consistent definition of PUM, as the absence of a defined meaning could lead to varying interpretations across different districts. He believed that the meaning of PUM should be assigned in statute to ensure uniformity. Josh agreed with this perspective and mentioned that the responsible bidder statute is very specific, emphasizing the importance of defining PUM. He and Mark Riker had been working on a document that they believed would be beneficial to the committee and would address some of the challenges associated with PUM.

Language in statutes

Co-chair Nakagawara pointed out the challenge of incorporating precise language into statutes, noting that many statutes use phrases like "including but not limited to," which do not provide the level of certainty that Labor and Contractors would prefer. He explained that it can be nearly impossible to capture all circumstances for both small and large districts or entities within statutory language. This highlights the difficulty of crafting legislation that accommodates all scenarios and preferences while maintaining clarity.

PUD examples

Diane mentioned that she and Randy Black had provided example projects where PUM might be applied. She asked if the committee had reviewed those examples and if members agreed or disagreed with them. She explained that, in practice, she would refer to these examples to determine whether PUM was suitable for a particular situation.

Michael Transue responded that he had looked at the examples provided by Public Utility Districts (PUDs) and found that most of them could be covered by existing situations, such as exigent circumstances, regular capital facilities, or a change in circumstances under the Mike M. Johnson ruling. He mentioned that permit fees were significant for all entities, and everyone had to pay them.

Co-chair Nakagawara asked about the issue with the Mike M. Johnson ruling, as it appeared to grant cities the ability to waive competitive bids. Michael Transue agreed but clarified that this waiver only applied in emergency situations, and cities were still limited to a \$150,000 threshold. Co-chair Nakagawara mentioned that there was no provision in the competitive bid waiver to exceed that threshold. Michael Transue noted that some thresholds listed in the statute were \$50,000, and there was a proposal to increase those amounts for uniformity.

Adding additional terms to PUM

Co-chair Michel suggested that the committee agrees that PUM is most applicable to Public Utility Districts (PUDs) and that it's also relevant to water/sewer districts. However, for first- and second-class cities and other entities, the proposed language includes "exigency, efficiency, and financial needs" as the justification. He asked if the committee wanted to add "exigency, efficiency, and financial needs" to PUM.

SHB 1621 Review Committee

Meeting Notes 9/12/2023

Page 6 of 9

Diane clarified that she wasn't proposing to add "exigency, efficiency, and financial needs" to PUM. Co-chair Nakagawara explained that cities were advocating for this language only for first- and second-class cities, and it wasn't related to PUM. Michael Transue asked if Co-chair Nakagawara would be willing to remove the term PUM and insert "exigency, efficiency, and financial needs" in the cities' section. Co-chair Nakagawara agreed to do so, emphasizing that Cities proposed this language because PUM had no meaning for cities. He stated that if PUM worked for other districts, it should remain as PUM.

Suggested language

Co-chair Michel suggested that the committee keep PUM with the entities that already have it and also with water/sewer districts, but not with the others. He said that the question remained what to use for the others. He brought up the wording Janice introduced during the previous meeting. Co-chair Michel said that Janice's proposed language was balanced and aligned with what Michael Transue with the MCA and Josh with Labor are looking for. To justify a higher threshold and potentially reducing public bid opportunities that are meaningful for small businesses, he asked the committee if there is a problem with the language "delay, a disruption to public service, a liability issue," or similar issues that would justify taking the self-performed option. He asked the committee if they had feedback about Janice's proposed language.

Janice clarified that the language she suggested was her own and did not represent any specific group or organization. Co-chair Michel emphasized that the proposed language strikes a balance between providing clear criteria for self-performed work and not being overly prescriptive, making it a potential solution that both Contractors and Labor might find acceptable. This discussion aims to refine the criteria for self-performed work in different entities.

\$300,000 exclusion

Co-chair Michel indicated that there seemed to be consensus within the committee regarding the \$300,000 limit in self-performed work without any exclusions. He highlighted that this particular limit, without exclusions, could be advantageous for Contractors, subcontractors, and Labor.

Single and multiple craft thresholds

Co-chair Michel noted that the committee might not be in agreement regarding raising the limits beyond inflation. He emphasized the importance of defining the reasons and circumstances under which these new single or multiple craft thresholds could be exceeded. He expressed interest in the subcommittee attempting to provide specific details about these circumstances.

Clarify timeline

Diane wondered about the timeline for upcoming meetings given that the draft will be heard by CPARB on September 14. Co-chair Michel said he anticipated there would be CPARB feedback to the report and the subcommittee will continue discussion. He said that the committee will establish the ongoing meeting schedules before CPARB's 12/31 deadline.

Potential organization method

Janice emphasized the importance of finding common ground among committee members, as the upcoming CPARB meeting will be the first time the board sees information about the committee's discussions. She suggested structuring the report to highlight areas of agreement, areas of partial agreement, and areas of disagreement.

Diane added that it's crucial to clearly indicate where the committee members disagree. Co-chair Michel acknowledged the challenges of representing multiple issues in the report and the importance of avoiding unintended consequences. Diane suggested including examples in the report, which would allow for responses and clarifications from committee members like Michael Transue. Co-chair Michel agreed and welcomed attachments to the report.

SHB 1621 Review Committee

Meeting Notes 9/12/2023

Page 7 of 9

Mike M. Johnson decision

Michael Transue clarified his reference to Mike M. Johnson, explaining that he brought it up in relation to a note in the report about developer extension projects. In the note, it mentioned that "a developer needs to replace/upsized a portion of water main loop with a larger main and likely frontage improvements." Michael Transue pointed out that if this replacement or upsizing work wasn't included in the original contract, it would typically require a change order rather than being done by in-house employees. He emphasized that the change order provisions in public works contracts were influenced by the Mike M. Johnson decision.

Review/Update Matrix

Co-chair Michel acknowledged the use of the matrix to gather information at the beginning of the committee's work and mentioned that the primary document for the committee's work at this point is the report. Diane shared that she has found the document with PUD examples to be more helpful than the matrix in her work.

Lowest responsible bidder

Co-chair Michel presented the Excel matrix, highlighting that the committee had reached a consensus on the lowest responsible bidder language. When asked about the specifics of this consensus, Co-Chair Michel explained that the agreed-upon language would eliminate provisions in SHB 1621 allowing the rejection of low bidders based on past performance reasons. Instead, the determination of when and how to disqualify the lowest responsible bidder would be based on the bidder responsibility criteria outlined in RCW 39.044-.50. Co-Chair Nakagawara pointed out that current statute 35.23 permits second-class cities to reject low bidders based on past performance. Michael Transue clarified that the intention was to retain this provision for second-class cities while recommending the removal of the lowest responsible bidder criteria from other sections of the bill.

Nancy suggested that the committee's recommendation should involve removing the lowest responsible bidder language from all entities in SHB 1621 except for second-class cities. Additionally, she proposed that the committee recommend further study for second-class cities. Co-chair Nakagawara questioned the idea of making a recommendation outside the scope of SHB 1621. Nancy explained that SHB 1621 aimed to establish consistency by adding the lowest responsible bidder provision, prompting the need for the committee to address this matter in its report. Co-chair Nakagawara inquired about CPARB's role in addressing the language concerning second-class cities. Janice clarified that the committee's recommendations could be interpreted and introduced as a new bill by members of the legislature. The committee had the option to express its approval of the bill as is, recommend further observation, or make specific suggestions. Ultimately, it would be up to the legislature to decide which recommendations to adopt. Nancy emphasized the need for proper stakeholder engagement moving forward, as it had not been adequately addressed during this committee's work.

Michael Transue pointed out that one section of the report indicated that if the committee recommends the proposed edits be removed, then the committee's work is considered complete. He noted that both the legislature and potentially CPARB might inquire why the committee recommended removing certain language. Michael Transue proposed that instead of providing a lengthy explanation, the committee could verbally explain to legislators the need for further study in a simpler manner. He anticipated that the committee might be asked why the "lowest responsible bidder" language wasn't extended to other entities, and the response could be that the committee felt more study was required.

Co-chair Michel asked a committee member to clarify whether the option to go to a second-place bidder already existed for second-class cities in the RCW or within SHB 1621, and whether they wanted to retain this language. Brandy explained that the "lowest responsible bidder" language originated from an existing statute for second-class cities, which was adopted in either 2012 or 2019. She clarified that during the drafting of SHB 1621, this language was lifted from the second-class cities statute and applied to other sections of the bill, such as first-class cities, water/sewer districts, fire/irrigation districts, and PUDs. Brandy stated that in previous discussions, the committee had reached a consensus that this language wasn't suitable for any of the

additional entities, and as per SHB HB 1621, it should be removed from those sections. However, she expressed discomfort with removing the existing authority from second-class cities, as they were not part of the contemplated changes in SHB 1621. She noted that during the last committee meeting, it had been agreed that addressing the language in second-class cities was a separate issue.

Co-chair Michel acknowledged that the language related to second-class cities posed a distinct issue. He recognized the challenges of public owners not always being able to secure low-cost, exemplary contractors. He assured the committee that he and Co-chair Nakagawara would review the language in the report and requested Brandy to provide feedback after reviewing the draft report. He also encouraged committee members to draw attention to the draft report when discussing issues with stakeholders and constituents.

Michael Transue added that most of the issues listed in the matrix's Column D have been addressed, including the \$300,000 project amount, materials vs. equipment, and the definition of industry practice. However, some issues, like single trades vs. multiple trades, still require discussion. Additionally, he noted that the adjusted \$50,000 threshold, which is approximately \$118,000, aligns with the proposed changes in the bill.

Construction and Labor examples

Nancy expressed her concern about not having heard specific labor-related issues articulated during the committee's meetings. She requested more detailed information on labor's concerns.

Michael Transue mentioned that Contractors would provide the committee with more specific information so that members could better understand the concerns. Josh also explained that Labor is in discussions with MCA, and they will work on providing specific information as soon as possible.

Nancy raised the issue of presenting this information at the upcoming CPARB meeting and the challenge of addressing concerns late in the process. Co-chair Nakagawara mentioned that the committee had started late and without specific examples, making it difficult to address the concerns at this stage. Nancy emphasized the importance of discussing and finding possible solutions to the issues.

Co-chair Michel clarified that Labor's main concern, as communicated by Mark Riker in the previous meeting, was related to raising thresholds. The concern was that higher thresholds reduce bid opportunities for trade organizations across the state. Josh confirmed this as the essence of his conversation with Mark Riker.

Review Timeline

Co-chairs Nakagawara and Michel agreed to continue holding meetings every other week, with the next meetings scheduled for September 26, 2023, and October 10, 2023.

Janice recommended requesting a special CPARB meeting in November after presenting the committee's report on September 14, allowing CPARB to comment and discuss the report. She also raised the question of whether the committee had all the necessary voices represented as members. Co-chair Nakagawara proposed adding a member from water/sewer districts, Diane, and one from PUDs, Liz Anderson, to provide additional representation for these entities.

Michael Transue expressed concerns that if the committee removed the language about the lowest responsible responsive bidder in Section 1, there would be only a small part of SHB 1621 relevant to PUDs, making it potentially unnecessary to have a member representing them.

September 26 Meeting Agenda

Evaluate CPARB feedback and final draft feedback.

Discuss Labor's concerns.

SHB 1621 Review Committee

Meeting Notes 9/12/2023

Page 9 of 9

Items to come and planning for CPARB meeting

Michael Transue noted that construction and building trades are having ongoing discussions while this committee has been working, and many of the concerns he has raised are shared with Labor. Josh added that Labor is creating a document that outlines their concerns, which align with those of construction and building trades.

Nancy proposed creating slides for the CPARB meeting to help focus on the issues, and Janice suggested including some slides with talking points to ensure clarity. Co-chair Michel emphasized the importance of providing context and helping people get up to speed during the CPARB meeting.

Action items:

1. Co-chairs Michel and Nakagawara will send the updated draft report to committee members.
2. Members will gather feedback about the draft report from their constituents and send it to the Co-chairs.
3. Brandy DeLange will look over the draft report and give feedback, especially concerning language for second-class cities.
4. Michael Transue will send a draft document of high-level concerns for distribution to committee members.
5. Co-chairs Michel and Nakagawara will ask to add new members at the CPARB meeting.

The meeting adjourned at 1:03 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

SHB 1621 committee draft report

Excel matrix

Suggested guidelines for bidder responsibility

Examples of PUDs and water/sewer districts using PUM

Action items from the 8/29/23 meeting:

(8/29/2023 action items were accidentally omitted from the notes for the 8/29/2023 meeting)

1. Michael Transue and Mark Riker will create a document ASAP that includes their high-level concerns and send it to Co-chair Michel.
2. Co-Chairs Michel and Nakagawara will create the draft report.
3. Co-Chairs Michel and Nakagawara will send the draft report to Monique so she can distribute it to the committee.
4. Co-Chairs Michel and Nakagawara will send the draft report to Talia Baker by Thursday, September 7, 2023.
5. Committee members and stakeholders will review the draft report and bring their feedback to the September 12, 2023, meeting.
6. Co-Chair Michel will present the final report at the Thursday, September 14, 2023 CPARB meeting.