

SHB 1621 Review Committee

Meeting Notes 8/29/2023

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Committee Members: (7 positions, 4 = Quorum)

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

Guests & Stakeholders:

Liz Anderson, WA PUD Association

Randy Black, Lakewood Water District

George Caan, Washington PUD Association

Joren Clowers, Sno-King Water District Coalition

Patricia Collins, Maul Foster & Alongi, Inc.

Nancy Deakins, DES

Brandy DeLange, AWC

Monique Martinez, DES

Diane Pottinger, North City Water District

Abigail Vizcarra Perez, MetroParks Tacoma

Maggie Yuse, Seattle Public Utilities

Janice Zahn, Port of Seattle

Meeting started at 11:33 a.m.

Discussion Highlights:

Welcome & Introductions

Co-Chair Keith Michel asked George Caan to introduce himself. George said he is the Executive Director of the Washington Public Utility District (PUD) Association. All other attendees have introduced themselves in previous meetings.

Review/Approve Agenda

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

Approve notes from the last meeting (8/15/23)

Michael Transue moved to approve the notes from the 8/15/23 meeting and Sharon seconded. Notes were approved on a voice vote.

Review committee comments to SHB 1621

Co-Chair Michel said that a central issue was the definition of Prudent Utility Management (PUM). The committee has identified this as a term that could use better clarity. A secondary issue is if the term PUM should be used by other entities. He asked the committee if there were any discussion points about those issues.

PUM

Michael Transue wondered if the term was better off as being defined for each entity. He gave examples of Prudent Fire District Management, Prudent City Management, etc. He strongly suggested the committee consider using the right word for each entity. Brandy DeLange said that the cities put forth language that would replace the term PUM for cities but that if other stakeholders are comfortable with that language, the cities would be fine to carry the language through those stakeholder's sections. She said that the committee thoroughly discussed the language cities proposed in the last meeting and suggested the committee ask the questions does this language work for others, is this language something that is acceptable for cities, and how can the committee better refine the language, if necessary.

Exigent Circumstances

Michael Transue said that the word that jumps out from the city language is *exigent* circumstances. He said that whether there's an exigency is covered in general public works statute, and he doesn't feel that the word *exigent* should be in the language for cities. He said another concern is that the terms "efficiency or financial

needs” offer a lot of flexibility. He said that he understood that cities were concerned about the 1 percent over capital budget issue for first-class cities. Michael Transue said he sees the language that the cities proposed as a big jump. He doesn’t think that contractors could support the use of *exigency* overall in the bill given that it is properly addressed in RCW 39.04.

Co-Chair Mark Nakagawara said that if an emergency was declared, an entity would have the ability to hire a company or use in-house crews. Because of the limitations of \$75,000 and \$150,000 the in-house crews could only be used for certain bodies of work. Also, many times an entity does not have the ability to do in-house work because they don’t have the experience, so the entity would hire outside contractors. Further, cities are limited by the 1 percent rule and by the ordinary maintenance their in-house crews must do.

Michael Transue pointed out that the 1 percent rule only applies to first-class cities and not to other entities. He restated that “efficiency and financial needs” are overly broad and don’t create consistency around the state. He reminded the committee that the water and sewer districts said they would use this for training, and he suggested the water and sewer districts should indicate if the words “efficiency and financial needs” would make training available for their crews. He stated that he feels that the proposed language from the cities provides a lot of flexibility for a \$300,000 project, which is a project size that many contractors would consider to be a decent project.

Co-Chair Nakagawara said that when the committee talked about PUM, his original thought was that the term has no boundaries. He wondered how Michael Transue would take more exception to the proposed language, exigent circumstances, which is more limiting than PUM. He said that he doesn’t believe that *exigent* as described conflicts with the emergency public works aspect because it’s not the competitive bid situation that RCW 39.04 addresses.

Michael Transue suggested that in exigent circumstances there would be no bid process and a local government would have the authority in an exigent circumstance to do away with bidding and have the authority to hire their own employees. Co-Chair Nakagawara asked Michael Transue if he was more comfortable with the term PUM and Michael Transue said he was less comfortable with that term.

Diane Pottinger said that for a utility of her size, using in-house employees for a \$300,000 contract would not be possible because it was too much work. She said that perhaps a larger utility would use the full amount, but those larger utilities wouldn’t use that opportunity to use brand new people and train them. This would be used for times when it’s 4 a.m. and the utility can’t find a contractor.

Mark Riker said that the construction trades and labor continue to struggle with the ability for in-house performance up to \$300,000. He sees the following challenge: that in-house performance does not require payment of prevailing wage that is supported by labor standard requirements. He said that construction trades and labor do not support transitioning away from the standard labor requirements. Co-Chair Nakagawara said that cities aren’t paying less than prevailing wages, and Mark Riker said that they are for in-house performance. Diane said that it’s difficult to find someone to do the work and Mark Riker responded that there would always be times where labor is hard to find; there are other times when it’s hard to find work for the labor.

Potential Workable Language

Brandy said that the cities have attempted to create workable language and asked Michael Transue if he could put forward language that contractors, construction trades, and labor would be comfortable with. Michael Transue said that from his perspective the Capital Projects Advisory Review Board (CPARB) review and this committee’s charge was to provide proof of concept. He said that construction trades and labor are struggling with the level of flexibility that “efficiency and financial needs” would provide because efficiency and financial needs are in the eye of the beholder. Construction trades and labor would prefer that this would only be used in specific, narrow circumstances. The bill says that the work is not to exceed \$300,000 in material, and he

would like the terms *material* and *equipment* clarified because a job could have \$280,000 worth of equipment and \$1 million worth of labor. Michael Transue said that construction trades and labor continue to wonder how the Small Works Roster with \$350,000 limit ties into this bill. In those circumstances it can be \$150,000 and go out to anyone on the Small Works Roster. He stated that this is a combination of a lot of flexibility to a lot of entities which doesn't make things consistent around the state. Michael Transue stated that construction trades and labor want to make the language the best it can be. It's his opinion that perhaps proof of concept hasn't occurred yet.

Brandy said that one solution suggested in the previous meeting was a reporting requirement, which cities aren't opposed to. She wondered how such a requirement might play out. Michael Transue said that construction trades and labor haven't thought through what a reporting requirement would be other than what was mentioned last time, a direct reporting requirement. He said that labor and industry has a public works system and something like this could be inserted.

Consensus items

Co-Chair Michel said that it was his belief that the committee did find consensus in the last meeting for some items. One point was having no exclusions, meaning that if a \$300,000 threshold exists for self-performed work by an entity, it should not have exclusions. The cost of work should be in the scope of the project. He said that would eliminate flexibility or ambiguity from the language. Co-Chair Michel said that another point of consensus was that the justification to use this option were the words, "exigency, efficiency, or financial needs," and these terms help justify or demonstrate the type of circumstance in which an entity could self-perform the work. These words are narrower than the broad term PUM.

Co-Chair Nakagawara said that the bottom line is that the law will come into effect in June 2024 and use PUM. He pointed out that for some reason, PUM excludes things that he considers materials. His view is that the way the bill is written now, there could be a bunch of public entities that could exceed \$300,000. He said that the language the cities introduced was attempting to reign that in. His belief is that the cities' objective is the \$300,000 limit for cities with no exclusions. The cities' suggestion for the report is to clarify the circumstances of when it should be used instead of using the term PUM. He said he sees the need for standardization statewide but that it would be hard for it to be really prescriptive because other entities have different concerns.

Thinking about how PUDs have used PUM

Janice Zahn wondered if there were some recommendations for legislative cleanup and if there are best practices that wouldn't go into the statute but that the committee might agree on about how the work is done. She wondered if the committee could think about two buckets. One is the committee can live with the bill and agree in practice that users are doing the right thing and not going beyond the boundaries of the bill. The second is being cognizant of time and that the committee needs to send a report to CPARB. She wondered if the bill has been in place for some time for PUDs, if there is data that already exists about how PUM has been used.

Co-Chair Michel said he was not clear if PUDs have this flexibility. Janice said that they do and that a focus might be aligning and calibrating what exists with the new public owners that will have this authority. She said that she has heard concerns about flexibility that exists in the bill and about the potential question about how the current language might not be consistent for entities other than PUDs that might use these tools. She said that the bill is an expansion, but of things that have existed for some time for PUDs.

Co-Chair Nakagawara said that when the PUDs talked about the circumstances of how PUM would be used, the cities developed language in response to that information; it tried to capture what the PUDs had explained. He suggested that what the committee is discussing is whether the language is refined enough. Co-Chair Nakagawara said that at a minimum if the committee cannot get consensus, that information is something that can be included in the report: the discretionary use or description of when PUM is appropriate to use for a public utility, municipality, a fire district, etc.

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Janice wondered about the utilities that live inside cities. She said she was trying to understand the size of the breadbox. Co-Chair Nakagawara said that the City of Seattle doesn't have first-hand knowledge of PUM so the city is trying to find descriptive narrative the committee could use to justify the circumstances where it was used: exigency, efficiency, or financial needs.

Best practices

Janice returned to her previous point that there are times when things are not included in statute. For those there are best practices. Co-Chair Nakagawara said that the cities' objection is using a term that doesn't have meaning to a municipality. He said that the committee could try to develop best practices but that the weakness of the statute as written is using a term, PUM, that only applies to or is used by a select group.

Bidder responsibility guidelines

Michael Transue said that in a previous meeting, Nancy Deakins reminded us about the bidder responsibility guidelines that were updated in October 2019. He said that some instances that were given as examples reflected a contract management issue, not a public works issue. Nancy sent the suggested guidelines for bidder responsibility to the committee that included many best practices. Michael Transue noted that while the statute is set to go into effect in June, the committee could recommend that the statute not go into effect. He stated that the bill has a lot of flexibility, and the committee can talk about ways to reduce that flexibility. He shared the perspective from his involvement with the Small Works Roster process the ability to contract with anyone or do the work in-house was raised from \$150,000 to \$300,000, and that's a big jump.

Availability and documentation

Co-Chair Nakagawara said that if an entity could identify a contractor to do the work, it might not have availability; however, the entity would know their own crew's availability. If an entity was using exigent circumstances as a justification and had to wait nine months for in-house crews to do the job, then the justification for exigency would evaporate. He suggested that this is the point where accountability would come into documentation. That was the objective of the language on documentation that cities suggested. He said that cities approve of auditing and documentation, and that he doesn't think this process would be used often; when it is used for special circumstances, cities would be required to document the reasons.

PUM examples by Public Utility Districts and summarizing the committee's current understanding

Co-Chair Michel shared the document from Joren Clowers that gave examples of when PUM was used by public utility districts and sewer and water districts. He said that the document included examples of types of projects. He summarized that the committee's inclination is to leave PUM with utilities. He said that the first- and second-class cities have proposed language and that some people on the committee are concerned the language is too broad. In both categories the committee agrees that justification of selecting the option to self-perform this work should be more prescriptive. Co-Chair Michel said the committee hasn't yet agreed on what those circumstances and limitations might be, but that for the PUDs this is woven into the PUD document from Joren. He said that Brandy's proposed language feedback about "exigency, efficiency, or financial needs" perhaps needs feedback from the members of the committee or from CPARB about how the committee can clarify "exigency, efficiency, or financial needs" to narrow the terms. Co-Chair Michel said that perhaps then the committee could reach more consensus to support an adjustment.

Clarifying about proposed language

Janice asked if the committee was saying that when it looks at the statute for cities that the document for the PUDs is narrower than would be appropriate for cities? She summarized that the discussion so far has been that PUDs have been using PUM, and as the legislation broadens to include cities, the work that cities must confront is broader than for PUDs, so cities need a different definition because of the work they do. Construction trades and labor feel that the definition provided by cities is too broad. She wondered if it would be helpful to clarify the additional types of projects and critical work that would be included.

Co-Chair Nakagawara gave the example that if a city were to have a street lighting issue under the terms of PUM, the city could do a lot of work because it wouldn't have to count streetlights and lighting toward the \$300,000 limit, counting streetlights and lighting as equipment rather than materials. He said that what the cities are proposing is more limited than PUM because under PUM, cities wouldn't have to count any material, because PUM calls material equipment. Mark Riker stated that this is a bigger liability than exceeding the \$300,000 threshold, and that the magnitude of the definition is out of character and creates the biggest liability from the intent. Co-Chair Nakagawara said that the cities' proposed language was more restrictive rather than lenient. Michael Transue said that the terms "efficiency and financial needs" are narrower than PUM—not by much, but a little.

Thresholds for single trade and multiple trades and how it interacts with PUM

Co-Chair Michel asked if there is a relationship between the thresholds for single trade and multiple trade when the thresholds are increased. For any project that falls under public works, the number of trades involved dictates terms of the increased thresholds. He wondered what makes self-performed work up to \$300,000 needed or viable? Co-Chair Michel asked beyond flexibility, why would the amount have to be increased and PUM or its equivalent added?

Co-Chair Nakagawara said that the why was for special circumstances, which the cities define as exigency, efficiency, or financial needs. The only real circumstance those terms would reflect would be times where cities had potential loss of use as he explained in the previous meeting with the water pipe example. He said that the \$75,000 and \$150,000 limitation has been in effect and that is what the city crews are limited to. Ordinary maintenance is not defined as public works. Public works is always limited by \$75,000 for single trade and \$150,000 for multiple trades. Co-Chair Nakagawara said that because public works is significantly broad, it limits almost anything. He said that cities are often sued by constituents for ADA violations and the like. When there are big issues that need to be addressed and they don't meet exigency, efficiency, or financial needs, city crews won't do the work. He said that crews have ordinary maintenance to do and are spread thin. Cities are still limited to 1 percent of total capital budget. His objective is to provide cities with the ability to defend the use when it is needed, and he doesn't think there would be ability based on staffing and budgets to take on more self-performed projects.

Co-Chair Michel said he was intrigued with Co-Chair Nakagawara's point about cities' liability. He said that it makes sense to use the justification of avoiding an interruption. Trying to ensure an uninterrupted public benefit could be useful from a recommendation standpoint for the language the committee is trying to achieve.

Proposed language

Janice commented in the chat: "An idea: circumstances not constituting a legally defined emergency, but otherwise requiring immediate action to avoid significant adverse consequences to public health, safety or property." She then wondered if the committee could shape her proposed language into public health, health and safety, property or something that defines an immediacy. Janice said that she hadn't vetted this statement with public owners.

A few minutes later, Janice included an update to the language in the chat: "maybe this: delay in addressing the situation will likely result in significant cost increases or adverse schedule impacts to the public agency or private property owners."

Michael Transue said that Janice's language is an improvement but that he needs time to evaluate it. He said he would like to compare the language to the examples that the water districts put forward. He said he didn't know whether RCW 35.04 allows the use of in-house employees to address exigent circumstances, but it seems it would include that.

Diane said that her group looked over the document from the perspective of public utilities and water and sewer districts and that Randy Black's work was very thorough and covered many examples.

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Co-Chair Michel stated that the committee is outlining a middle ground. It's more than maintenance and not quite public works, or it is public works with the right justifications to self-perform the work. He said he likes the examples because they spur critical thinking and analysis about how to justify the types of effort.

Review/Update Matrix

Second lowest bidder language

Co-Chair Michel showed the Excel matrix to the committee. He pointed out a placeholder in the matrix: cities are considering whether the removal of second lowest bidder would be supported for both first- and second-class cities. Brandy said that in the last meeting she stated that cities were comfortable removing the language from first-class cities but not second-class cities because that language was established outside of SHB 1621. Joren said that water-sewer districts are okay with removing the second lowest bidder language from their section.

Other items in the matrix

Co-Chair Michel pointed out that lines 10 and 14 in the matrix indicate issues the committee has discussed. These include the definition of PUM and the new proposed language from the cities, and he said that he is hearing agreement from the committee on keeping these issues separate. Co-Chair Michel said that the matrix will spur conversation at CPARB's level. He noted that process-wise, at a minimum if this committee can't find a clear recommendation that everyone can support, then CPARB will continue try to define the changes and recommendation for the bill.

Review Report Outline

Multiple perspectives

Co-Chair Michel said he has a succinct outline that was reviewed in the previous meeting and circulated via email. He suggested that the report might include multiple stakeholders' opinions individually. He suggested this could be valuable to communicate to CPARB and legislators the different aspects of what's at stake with this bill for labor, small business, and public entities in the desire for more flexibility.

Mark Riker said that he appreciates the idea of multiple considerations because this bill did not include them on the frontend, and this still frustrates labor. He said that he is having trouble trying to amend the language to something labor can get onboard with because there is a lot in the bill that labor has been opposed to for a long time. He said that labor is trying to find points to support and help but that it is struggling.

Janice recommended that the committee ensures all corners of the discussion are represented in the report. She does not recommend letters of support or opposition because the benefit of the committee is to indicate where there are common agreements or interests and indicate places where there isn't agreement so that CPARB can find common ground. She said the report is a process piece and should include thoughts the committee and committee members have about the bill, and that CPARB's preference is that those thoughts are embedded in the body of report. Janice reiterated that it's important to identify common ground and where the committee doesn't agree. She said that what she likes about Co-Chair Michel's idea is for members and stakeholders to identify in their own words points of disagreement or alignment.

Draft outline

Co-Chair Michel shared the draft outline and indicated that it's crunch time in the committee's timeline. One point of the draft is narratives about the primary items to consider. He said that to Janice's point, the report will try to embed pros and cons from various perspectives. Co-Chair Michel said he's concerned that he might not be able to include all of the expertise that the stakeholders have provided. Diane said that when she drafts reports, the constructive feedback from committee members helps her capture everything.

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Potential example

Janice said that one example might be the local government committee's report that listed the items that the committee agreed on and also listed areas where there wasn't broad agreement. Michael Transue said that with that report, the committee was able to compartmentalize each recommendation. He said that the same method might be a good way to make recommendations about this bill. Jancie suggested that it might be helpful to see if Mark Riker or Michael Transue could write parts of the report to streamline feedback.

Review Timeline

Co-Chair Michel said that the committee is nearing the date when the report needs to be sent to CPARB. He suggested that the committee will see the draft report at the same time the committee issues it to CPARB. To ensure the document is sent to Talia by Thursday, September 7 so that it can be posted before the CPARB meeting, Co-Chair Michel said that he will share the draft document with the committee on Wednesday, September 6. He will send the draft report to CPARB on Thursday, September 7 and then the committee will bring feedback to the Tuesday, September 12 meeting so that Co-Chair Michel can bring the final report to the CPARB meeting on Thursday, September 14.

Janice wondered if there would be any opportunity to work with Michael Transue or Mark Riker to ensure the first draft has their collaboration before the report is sent to CPARB on Thursday, September 7. That draft will be uploaded online. Michael Transue stated that while both he and Mark Riker are apprehensive about the current and proposed language, he thinks that Co-Chair Michel and Co-Chair Nakagawara need to draft the initial report and then he and Mark Riker will respond. Michael Transue committed himself and Mark Riker to creating a document with high-level concerns as soon as possible so that Co-Chair Michel and Co-Chair Nakagawara can consider that feedback when they draft the report. He suggested that co-chairs are in the best position to filter through the feedback and come up with best committee recommendations, after which committee members can go through the recommendations and give feedback as they did with the Small Words Roster process.

Co-Chair Michel appreciated Janice's comments regarding the handoff to CPARB. He suggested that there might need to be a small group breakout to capture input about the draft report. He noted that hot button topics are broadly categorized in a few points and that will keep the narrative parts of the report concise. The attachments and references will be the things that reflect the nuances.

Establish next meeting agenda

Discuss draft report

Next Meeting: Tuesday September 12

Meeting adjourned at 12:59 p.m.

Action items:

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-Chair Michel will create the draft report.
3. Co-Chair Michel will send the draft report to Monique so she can distribute it to the committee.
4. Co-Chair Michel 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.

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References\Resources:

Action items from 8/15/2023 meeting:

1. Monique will circulate the document Joren submitted.
2. Co-Chair Michel will create narrative bullet points for the report and circulate them.
3. Joren will ask his constituents about the language changes.
4. Brandy will ask cities about the language proposal.
5. All committee members will follow up with feedback.

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

Suggested guidelines for bidder responsibility

Examples of PUDs and water/sewer districts using PUM

Excel Matrix