

## CAPITAL PROJECTS ADVISORY REVIEW BOARD

1500 Jefferson Street SE; Presentation Room  
Olympia, Washington 98504

### Minutes

January 8, 2020 – SPECIAL Meeting

#### MEMBERS PRESENT

Walter Schacht (*Chair*)  
Rebecca Keith (*Vice Chair*)  
Brian Belarde (*Telecon*)  
Garett Buckingham (*Telecon*)  
Caleb Carlson (*Alternate*)  
Bill Dobyns,  
Bill Frare  
Senator Bob Hasegawa (*Telecon*)  
Matthew Hepner  
Charles Horn (*Telecon*)  
Santosh Kuruvilla  
Mike McCormick  
Karen Mooseker (*Telecon*)  
Mike Shinn  
Robynne Thaxton (*Telecon*)  
Andrew Thompson  
Jane Wall  
Janice Zahn (*Telecon*)

#### REPRESENTING

Architects  
Cities  
Construction Trades Labor  
Public Hospital Districts  
Senator Judy Warnick  
General Contractors  
State Government  
Senate (D)  
Construction Trades Labor  
Insurance/Surety Industry  
Engineers  
Higher Education  
School Districts  
Specialty Contractors  
Private Industry  
General Contractors  
Counties  
Ports

#### MEMBERS ABSENT

Irene Reyes  
Rep. Mike Steele  
Rep. Steve Tharinger  
Lisa van der Lugt  
Vacant

#### REPRESENTING

Private Industry  
House (R)  
House (D)  
OMWBE  
Specialty Contractors

*Staff & Guests are listed on the last page*

#### WELCOME & BOARD MEMBER INTRODUCTIONS

*Chair Walter Schacht called the special Capital Projects Advisory Review Board (CPARB) meeting to order at 9:05 a.m.*

Chair Schacht acknowledged the venue hosts for providing a meeting room for the Board's special meeting.

Members present and participating by telecon provided self-introduction. A meeting quorum was attained.

#### Approve Agenda - Action

Chair Schacht reviewed the agenda to discuss SB 5457, a bill introduced during the 2019 legislative session. The bill was reintroduced during the 2020 legislative session and has generated much interest within the construction industry.

***Rebecca Keith moved, seconded by Bill Frare, to approve the agenda as presented. Motion carried unanimously.***

#### Invitation for Public Comments

Vice Chair Keith invited public comments throughout the meeting.

Chair Schacht noted that SB 5457 has significant implications for capital projects in Washington State. The role and responsibility of the Board as designated by statute extends to all aspects of capital construction procurement even though the Board's specific focus is on RCW 39.10. The purpose of the special meeting is to provide an opportunity for everyone to offer input on the proposed bill. Regardless of the Board's action to render a position on the legislation, the Board serves as a forum for everyone to share ideas. The Board will determine its course of action after the discussion. The intent of the discussion is for the Board to learn about the bill, share information, and how it benefits the legislative process. The Board will also need to consider what, if any, potential implications SB 5457 might have on RCW 39.10. The current language in SB 5457 excludes Job Order Contracting but is silent on Design-Build and GC/CM, which are fundamental to RCW 39.10.

**SB 5457**

**Bill Origin – Information**

Andy Thompson thanked Matthew Hepner for providing the meeting venue for the Board's special meeting on such short notice. He acknowledged the efforts of Talia Baker with Department of Enterprise Services (DES) for organizing the meeting.

Mr. Thompson shared that the bill has been of legislative interest each year since he has been a member of the Board. The bill consumes time and energy and although the Board's primary focus is alternative delivery, the Board is the proper forum for considering the issue because of stakeholder interest in the bill. Each year the bill is either supported or opposed by industry stakeholders represented by CPARB members. Public agencies and the Legislature are seeking the Board's input and clarity on the issues surrounding the language within the proposed legislation. He encouraged the Board to be open-minded and consider whether it is possible for all parties to identify issues of importance to arrive at some decisions that would be acceptable to all stakeholders.

Chair Schacht asked whether members have a clear understanding of the implications of the proposed legislation or a sense of the pros and cons. He invited Mr. Thompson to summarize the bill to help frame the discussion.

Mr. Thompson reported that as a representative of general contractors, general contractors as a whole oppose the bill because it requires a listing of all subcontractors at the time of bid and would create a number of consequences to include the potential for protests and a reduction in the opportunity for small businesses to participate. There could be other alternatives to address some of the concerns by the sponsors of the bill. He currently serves as an estimator for Granite Construction and the idea of being required to list all subcontractors at the time of bid would result in jobs being protested, projects delayed, increased costs, and many firms not listed as the original low bid receiving work. Those consequences will end up increasing the cost of public works projects based on his experience as an estimator and as a general contractor. He is also aware that there are some specific concerns by labor that should be addressed.

Jane Wall asked for information or some clarification as to the rationale of the proposed bill.

Mr. Hepner shared that he previously worked in the electrical trade. His family owns a contracting company. He asked whether skilled trades already have standards in place. Mr. Thompson advised that the plumbers, mechanical, and electrical trades are required to list at bid time if the project is over \$1 million. Mr. Hepner commented that in some sense, many of the trades within the industry are currently complying. His company has not encountered any problems to date. The model is effective and some of the crafts and other trades are attempting to achieve the same higher standard of ensuring transparency and addressing bid shopping. The goal is to seek transparency and stakeholders are more than willing to identify solutions. The concern exists for many in the trades industry.

Bill Frare said he understood that the origination of the bill was because of bid shopping. Some instances have occurred where contractors winning a bid require subcontractors to reduce pricing or they provide another sub with an opportunity to bid on the project. That scenario has occurred and although it does not reflect most of the work in the industry, the perception is that it continues to occur. The proposed bill was introduced in both the House and the Senate to stop the practice and to provide the same protections to plumbers, electricians, and other trades for subcontracting. The bill would require listing of all bids followed by a process to enable substitution of subcontractors.

Bill Dobyms remarked that although bid shopping is a plague on the construction industry and everyone wants to eliminate the practice, some practical applications in the bidding process makes the proposed process very cumbersome and prone to mistakes that likely would not benefit public owners as the bill is envisioned to accomplish. The bill could be re-crafted to help benefit the industry by reducing bid shopping and providing the other trades with the same benefit without placing burdens on the process undertaken by the prime contractor to the detriment of public owners.

Brian Belarde spoke in support of the proposed bill. Bid shopping and the issue of signatory contractors with non-union or union bidders would give the union a chance to address issues before commencement of work on a project. Bid shopping is an issue in the industry.

Mr. Thompson asked for clarification of the comment concerning signatory non-union and union. Mr. Belarde explained that signatory contractors accept bids from non-union and union contractors, which gives the unions an ability to view the subcontractor list and address subcontractors prior to commencement of work in order to secure a signed union contract.

Mr. Dobyms questioned how that scenario would prevent bid shopping. Mr. Belarde said it would not prevent bid shopping but contractors would be required to submit a full listing of subcontractors. It would not address bid shopping, but it does address the union's ability to view the full list of contractors to avoid a switch after the bid has been submitted.

Mr. Thompson questioned the importance of knowing whether the contractor was an open shop contractor versus a union contractor. Mr. Belarde responded that it is very important to construction trades labor because it speaks to why unions are involved and the ability of 'Article 7' which speaks to any signatory contractor required to provide a portion of the work to signatory contractors. He represents construction trades labor and not just his specific union. He believes it would be beneficial in the long-term if the bill was passed.

Mr. Thompson expressed appreciation for the explanation and insight but as a union contractor and estimator for a general contractor, he understands union stakeholder concerns in that environment. He asked whether it would make sense to insert the requirement within the bid environment at bid time or whether there was another way to receive a list of the subcontractors within a reasonable time that would still satisfy the concern surrounding the identification of subcontractors.

Mr. Belarde responded that today, the industry standard is when a signatory contractor accepts bids from a non-union contractor they reach out to the unions to try and secure a one-time job agreement for the project. At that point, a request for replacement could be conveyed or a meeting could be scheduled to sign the contract. The bill would help support that ability to view the full list of subcontractors the contractor plans to use.

Mr. Thompson shared that his company has received quotes from non-union contractors for various scopes of work and there is a business decision at some point involving phone discussions with different union stakeholders in an attempt to be as competitive as possible while also making some decisions within a competitive environment. The issue is whether publication of the list could occur outside the bid window but within a reasonable period to enable receipt of the information to ensure the best interest of the bid environment, e.g. the public body, organized labor, the public, or a contractor. As an estimator, he prefers eliminating the requirement from the bid environment and delaying publication of subcontractors for some length of time.

Mr. Hepner asked whether the suggestion would address the issue of bid shopping. Mr. Thompson advised that as an estimator, if he had a reputation as an estimator who shops bids, he and his company would only receive quotes at the last moment prior to bid closing. As a long-term employee with Granite Construction, he receives bids early because everyone knows he does not shop bids. However, he cannot speak to the industry as a whole.

Mr. Hepner requested clarification as to the early notification of the bids process. Mr. Thompson responded that prior to the release of the bid it is not unusual to discuss the project scope with a subcontractor(s). On the day of the bid, bids are received for a scope of work. Not all bids are perfect. The two areas of interest to an estimator are the exclusions and whether use and sales tax is included, as they can be major elements in a bid. The price is not as important because it reflects only a number. If someone inquires about the price when turning in a bid, he does not divulge that information. Divulging that information can impact a contractor's reputation as a bid shopper.

Mr. Dobyms agreed that if a contractor has a reputation for shopping bids, the subcontractor market ensures the contractor pays a penalty by making the bidding process much more challenging. The bidding process is currently a very complicated process and if a bid is due to the owner by 2 p.m. the contractor may have several hundred subcontractor bids that the contractor must analyze and compare to assemble the bid to the public owner. Two drywall bids for the same cost might result in one bid excluding the disposal of scrap or another bid including painting. Analysis must be completed on all bids to ensure the bids are equal prior to the contractor assembling the bid with correct information for submittal to the owner by the deadline. Missing the deadline by only a second disqualifies a bid. Completing that volume of analysis in such a short timeframe creates a pressure-packed process and it is where bid errors occur most frequently. Misinterpreting a subcontractor's scope is a frequent error. Bid shopping occurs when the contractor is trying to offset costs to align with its bid submittal. The goal is not creating a situation where the contractor submits a bid to public agencies with errors because it is detrimental to the industry as a whole. The proposal of creating a list of subcontractors at that moment eliminates the contractor's ability, especially for small contractors lacking sufficient staff, to submit a precise and correct owner's bid.

Mr. Thompson added that Granite Construction, as a large contractor, has the staff to review bids during bid day; however, smaller companies bidding on projects worth \$5 million to \$10 million have only one estimator and the owner making it extremely difficult for the smaller and disadvantaged business enterprises because of the lack of staff resources. For comparison on a typical bid day, Granite has a room staffed by 10 individuals. Small general contractors typically only have an estimator and lack the staff to close the bid properly at bid time. Adding another requirement to list all subcontractors will result in more errors for the smaller companies. Bid closure could be categorized as 'organized chaos' as everyone involved has a responsibility. However, small contractors lack the resources.

Mr. Hepner questioned why the problem is not as prevalent for specialized subcontractors as electrical, mechanical, and plumbing are not experiencing similar problems even though the transparency measures are in place. He questioned why the remaining crafts in the industry would not benefit from the same transparency.

Mr. Dobyms said it speaks more to a timing issue. Current law allows identification of three names of the electrician, plumber, and heating and air condition subs. In terms of resources, and as a contractor, he assigns one individual to ensure that each of the three bids are properly identified and then conveys that information to another individual on the phone who conveys the information to another individual who is completing the bid for submission to the public owner. His company has provided bids in other states that require the listing of subs if the value of the bid is one-half of 1% of the general contractor bid at the time of the bid. He might assign four to six individuals to create the sub list and nothing else, such as analyzing bids or assisting in providing better numbers for the owners bid. His company has the resources to complete that task. Small contractor do not have similar resources. Often, small companies use their estimators to complete that task instead of being focused on whether the estimate is correct because if the list of subcontractors is not accurate, the bid is disqualified. The goal is affording sufficient time for prime contractors to complete an accurate bid as competitively as possible and within the deadline and then give prime contractors some time to develop the list. Listing the three trades as required by law generally consumes an hour. On a large public works project, his company can receive up to 30 to 70 subcontractor bids. Identifying and listing those companies and including them within the owner's bid creates a substantial task that often results in bid errors. The focus should be on completing the most accurate and competitive bid submittal.

Ms. Wall asked whether bid window timelines vary. Mr. Dobyms said the timeline for the prime contractor bid is due at a specific time. Typically, public owners release the bid with a 30-day window for submission. Prime contractors advertise a bid closure prior to the close of the owner's bid. The goal is to receive subcontractor bids as early as possible to complete analysis of the bids. Ms. Wall asked what inhibits the prime from asking for bids from subcontractors 15 days prior to an owner's deadline. Mr. Dobyms replied that contractors typically do not receive early bids and the response is less if the deadline for subcontractor bids is earlier.

*Mike Shinn arrived at 9:44 a.m.*

Mr. Frare advised that current law requires the listing of three subcontractors within an hour of the bid. For larger contracts over \$10 million, the number of first tier subcontractors can be numerous. For smaller projects, the list is smaller. When DES contracted for the 1063 Building, 75 subcontractors worked on the project. His concern speaks more to the integrity of the bids rather than general contractor errors. DES has encountered two bid protests and three to five disqualified bids every year because of errors. At times, DES has disqualified the top four bids because of confusion surrounding bid documents or other issues. The proposed bill introduces opportunities for errors. The department's track record is good as DES negotiates approximately 400 contracts a year. Increasing the listing of three primary subcontractors for a vertical construction project to include all subcontractors increases opportunities for errors. Over time, he anticipates more bid protests, more disqualified bids, disqualification of all bids, rebidding of projects, or injunctions or litigation. As a representative of an owner, each time he is involved in one of those actions, costs increase and delays have been introduced into the contract. If a process could be developed that still protects small contractors from bid shopping and the interests of the owner relative to errors occurring on bid day, he could support a proposal. However, he continues to have real concerns about the proposed bill as introduced.

Vice Chair Keith reported that as a representative of a public owner, she appreciates the intent and understands Mr. Frare's concerns. However, the prior implication that the statute works correctly is not accurate as she is aware of numerous public agencies that have encountered bid protests based on the statute. A survey of the Department of Transportation, King County, City of Oak Harbor, City of Seattle, Port of Seattle and several other public owners have raised some questions with respect to the interpretation of the statute as the City of Seattle has received several protests based on the current statute. One example is the listing of more than one electrical contractor if they have a different specialty focus. One example is lower tier subcontractors, as one theory stipulates that one subcontractor could be listed for three trades with the contractor utilizing lower tier subs to do the work. She is aware of public owners that have experienced delays and received protests based on the statute. Public owners are also not uniformly interpreting the statute equally. She wants to correct the idea that the statute is working fine. As a representative of a public owner, she questions how the prime bidder has complied because the owner's obligation is to deem the bid low and responsive. When the bids come in close, the second bidder often challenges the successful bidder. In terms of mistakes, the bidder must complete the owner's forms, but it doesn't require completion of subcontractor packages. She asked how the public agency is expected to ensure that the contractor listed all subcontractors and that the bid is responsive.

Janice Zahn said one of the largest challenges surrounding the current statute pertains to the matter of responsiveness as there is no opportunity for a bidder to remedy responsiveness after the fact. If bidders do not understand or complete the forms incorrectly, they have failed because of a process not because of the incorrectness of the bid. It is important to note that bidder responsibility can be rectified after the bid but bidder responsiveness cannot be remedied if some part of the form was filled incorrectly or a sub was listed incorrectly.

Vice Chair Keith said the issue has cost public owners money. The issue is not theoretical as the City of Seattle has lost low responsive bids.

Mr. Belarde offered some alternative language to SB 5457 in the spirit of partnership. Within lines 13 through 25 of the bill, five reasons are listed for substitution on the list of subcontractors. He suggested adding a fifth reason stating, "Documented mistakes for subcontractor disqualifications would be a reason for substitution."

Chair Schacht recommended identifying the problems to solve as the discussion speaks to some issues that are imperfect in the current statute. Some practices in the industry have generated concerns and there is concern that attempting to address all issues with specific language might not achieve the desired outcome. General contractors have indicated the need for some flexibility in assigning Sub-trade bids to determine that the cost offered to the public owner is viable. In terms of architects, he questioned whether the issue is bid shopping or bid evaluation. Even though the Board might agree conclusively not to condone bid shopping, some method is necessary for the general contractor to validate bids. That continues to be a general contractor issue. The public owner issue is the responsibility of the owner to determine that it received the lowest responsive bid and as more

criteria are included for responsiveness, that decision becomes more difficult. Public owners want some assurance that when identifying the lowest responsive bid, it has been completed in good faith, which is challenging without the benefit of data that could be tracked. The Sub-trade industry wants some assurance that if they undertake an effort to submit a bid in good faith, the general contractor is not going to use that information to compare to another bid to receive a better price after submittal of the bid as a way to make the Sub-trade reduce its bid. Finally, labor is concerned about having the information upfront to provide the opportunity to ensure labor has a fair advantage to participate in projects.

Vice Chair Keith said the Board is likely lacking perspectives from women or minority-owned businesses because of the lack of attendance by the members representing those stakeholders.

Chair Schacht invited public comments on the issues.

Curt Gimmestad with Absher Construction said he is representing AGC of Washington. Mr. Schacht succinctly described the issues. AGC of Washington is opposed to the bill. He met with Senator Keiser to provide her with an understanding of what a bid process entails. Bid day is nothing but chaos. In terms of bid shopping, when quantifying and developing a good clarification as to a responsive bid from several hundred bids on bid day, it is important to understand that the company is not receiving complete scopes of work from trade partners. Often, bids are submitted with different values. As the company evaluates several hundred bids for electrical and mechanical, the timing of the bids prevents the ability to vet each number in the hopes that all bids are equal. The goal of receiving clarity and a responsive bid from each submittal is not practical. What actually occurs when the general submits its bid is a review of the bid to re-evaluate whether the bid included the right price and the prime correctly assessed what was or was not included. His company spends much time talking with subcontractors to ensure values are apples to apples. Often, subcontractors accuse his company of bid shopping. However, the company is only attempting to understand the bid from an inclusion and exclusion standpoint. If the intent is to eliminate the perception of shopping bids, subs should provide a bid with numbers that have no exclusions and includes the entire project scope. One of the reasons mechanical and electrical trades have been managed so well in today's environment is because of the ability to build up the plans and means to deal with those trades. His company spends hours working on particular scopes with those trades and often the company does not receive a bid from those trades until minutes before the bid needs to be turned in to the public owner. He often has to quickly turn in numbers on the bid form and submit the bid to the owner. Asking the industry to do the same process with hundreds of particular bidders on any project is not practical in the current timeframe. The industry has managed the process relatively well for mechanical and electrical trades. However, it would now entail hundreds of evaluations of subcontractor numbers during a short window of opportunity to determine scope and whether the numbers accurately represent the scope. He is unsure if the proposed bill would solve shopping of bids. Sometimes the perception of bid shopping is inaccurate as it often entails discussions about bid clarity to ensure the subcontractor bid is responsive at the end of the day. He does not believe SB 5457 solves all the problems and is hopeful the Board's conversation might lead to another solution as he believes SB 5457 makes it worse.

Mr. Gimmestad was asked whether subcontractor bid submittals are uniform. Mr. Gimmestad responded that subcontractor bids are not uniform but bids to the owner are uniform. General contractors are required to fill out bid documents provided by the public owner. Subcontractor bids submitted to general contractors are not uniform.

Mike Shinn noted that every bid package is different. The GC/CM bid package includes a written scope of work and sub-bids are much easier to secure. However, line item bids require general contractors to break down numerous line items for specific areas to ensure costs are listed in the right area. Additionally, not all public entity low bid packages are similar as many low-bid projects include different scopes that require a different bid package.

*Robynne Thaxton joined the meeting at 10:05 a.m. via telecon.*

Chair Schacht commented on the fundamental difference between GC/CM/Design-Build and Design-Bid-Build. A contractor who has been involved with the owner and the design team and is preparing to bid the sub-trades, has a good knowledge base after months or years of involvement on the project as to what the work will entail and can strategically package the request for bids from the Sub-trades to align with a higher level of certainty of the work, as well as work with the design professional to document specific items to conform to the bid package. In Design-Bid-Build, in addition to the chaos with numbers submitted at the last second, a significant misalignment can occur as to how the design professional develops documentation, identifying the most efficient way of bidding the work, and dealing with three or four general contractors who have different approaches. He cited a case in point involving a large state building with a small contractor. The design team's approach was to include all lab case work in the lab design drawings, which included different divisions for different types of labs to enable the lab designer to secure the best cost for the public owner and taxpayers. Subsequently, because the architectural drawings and the lab case drawings were different, the general contractor bidding the project on a three-week turnaround had not studied the drawings sufficiently to identify the differences between the different drawings and within the different divisions. Partway through the job, the submittals for one of the divisions were never reviewed and subsequently the state was required to spend another \$50,000 to rectify the situation. Sufficient time is essential to review all drawings for a Design-Bid-Build project. Similar mistakes should not occur for an alternative project delivery. However, for Design-Bid-Build projects, the issue is identifying a solution to achieve certainty in qualifying the costs for the general contractor. Design professionals are nervous about the proposed bill because of concerns of incurring liability, which is unfair as design professionals do a good job packaging the proposal. It is important to identify a fair set of measures to address owner concerns that the information provided is a low responsive bid. Sub-trades want to be treated fairly and labor is interested in knowing the assignment of bids in advance. Resolving those issues would likely be possible.

Mr. Thompson asked for feedback from general contractor stakeholders on a possible path to resolve the issues that would be acceptable to labor as well. Mr. Gimmestad offered that it would be possible to pursue some conversations with general contracting interests as to how resolution might be possible; however, it is important to ensure the discussions speak to the same issue that the effort is trying to solve. It is possible to continue to pursue conversations with stakeholders as it speaks to the conversations with Senator Keiser to provide some understanding as to how the system works today as it relates to the request. Another piece of the conversation is identifying union contractors bidding on particular scopes of work as he is also a signatory contractor. He would be unable to contract with anyone that was also a signatory for the same work and does not understand how the proposed bill solves the problem.

Mr. Vanderwood said he is meeting with Senator Keiser later in the afternoon to share ideas for a potential compromise. However, he would prefer to defer to Senator Keiser before sharing feedback with the Board. Suffice it to say, there are some 'dials' that should be turned.

Mr. Thompson urged the Board to consider some resolution to avoid the issues returning each year. Each year, stakeholders expend much time on the same issues and it appears it would not be too difficult to define a solution to protect some contractors and address some of the concerns of organized labor and help public owners avoid paying more money because of project delays.

Mr. Gimmestad said he does not believe Senator Keiser would approve of a different approach as she now has a good understanding of the challenges that have been identified during the conversations nor does he believe she would allow deferral of the issues in order to address it next year.

Mr. Thompson supported the Board addressing the issues with stakeholder input to develop an acceptable resolution for all interests rather than having opposing conversations in the Legislature and continuing to defer the issues to the next session.

Mr. Hepner referred to the three main issues and his experience working with the Legislature as it requires an explanation of the ideas to legislators who lack industry knowledge. Condensing the issues to the lowest common denominator for messaging purposes would be preferable.

He recommended the following messages:

- Bid shopping is bad and should be eliminated
- Owner qualification of lowest and responsive bidder – An owner’s evaluation of a lowest and responsive bid includes much detailed information making it impossible to certify as owners lack of information as to whether the general contractor listed each subcontract or project element. The issue surrounds the level responsibility the owner should assume should the owner be subject to a claim if it was determined that the owner could not validate the information.

*Senator Karen Keiser arrived at 10:19 a.m.*

Chair Schacht welcomed Senator Keiser. Board members provided self-introduction.

Senator Keiser shared that she was able to meet with a general contractor to review the bid process to become more informed about the process.

*Senator Bob Hasegawa joined the meeting via telecon at 10:20 a.m.*

Chair Schacht reported on the extent of the conversation since the beginning of the meeting. The Board has identified major areas of concern and he senses broad agreement that the bidding process of Design-Bid-Build could be improved. The issue surrounds how to improve outcomes without creating new and different challenges. He summarized the issues as:

- From a public owner perspective, the challenge of a requirement for all sub-trades to be listed in the primary bid is a subsequent requirement for the public owner to identify who had submitted the lowest and responsive bid, and if the lowest and responsive bid must list all sub-trades, what, if any, is the capacity of the public owner to know all sub-trades were listed. Additionally, considering the chaos of the bid deadline, another issue is whether the general contractor had the opportunity to identify all sub-trades, as the list might not include all sub-trades.
- A general contractor challenge is understanding that the numbers align given the last minute challenge of receiving numbers from the sub-trades to avoid any gaps because of possible exclusions in bids or that the numbers have not been doubled thereby doubling an owner’s cost.
- From the design professional (architects and engineers) perspective, the issues are parallel as they want to avoid a general contractor beginning a project knowing that they haven’t fully defined the scope of the project. Design professionals document the scope of the project by aligning with the way a general contractor bids the job without the benefit of working with the general contractor.
- Sub-trade concerns revolve around being unfairly put in the position in which following the submittal of a reasonable cost they are constantly being asked to reduce the amount.
- Labor has an underlying interest in knowing which subcontractors are being bid the work so they can engage in a dialogue about the benefits of using union shop labor and ensuring fairness in overall procurement.

Mr. Hepner asked which of the issues address bid shopping. Chair Schacht responded that the concerns surrounding sub-trades would address bid shopping.

Chair Schacht added that the language in SB 5457, as currently proposed, excludes Job Order Contracting but does not speak to Design-Build or GC/CM within RCW 39.10. The Board believes that there might be an underlying conflict. Within the procurement method of GC/CM, the general contractor is selected during schematic design and no later than at the end of schematic design as required by the statute. The statute targets bidding the project at 95% completion of construction documents, as well as the subcontract packages. The Board believes that GC/CM should be excluded from SB 5457, as well as Design-Build because a Design-Build project requires the selection of the design builder to develop the scope of work with bidding of the sub-trades occurring later in the process. He recommended excluding RCW 39.10 from SB 5457.



Chair Schacht added that historically, the Board has participated in a broad range of discussions bringing multiple stakeholders together to develop a solution that works for all stakeholders. Similar discussion have never occurred during a special meeting, rather, the Board typically establishes a committee to work on the issues over the course of a year to develop consensus. The issue with respect to this bill is the lack of time during this legislative session. The Board has completed its best work on behalf of the state of Washington when all interested stakeholders have been convened as a committee to develop a solution that everyone agrees with.

Mr. Belarde reiterated his previous suggestion to add language to SB 5457 within lines 13 through 25 of the bill adding to the five reasons listed for substitution on the list of subcontractors. He suggested adding a fifth reason stating, "Documented mistakes for subcontractor disqualifications would be a reason for substitution."

Senator Hasegawa cited another issue of concern regarding meeting the Minority Business Enterprise (MBE) requirement for some contracts with some subcontractors excluded after the bid was awarded.

Chair Schacht said the issue is meeting state goals for diverse business inclusion. The Board discussed the much higher challenge small businesses face when validating numbers on bid day for a Design-Bid-Build project as staff resources are limited to review bids from up to 100 sub-trades versus a large general contractor with sufficient staff resources. It places a higher level of burden and creates more risk for small business in general.

Vice Chair Keith added that the Board's representatives for women and minority businesses are not in attendance and their input should be considered as well. She asked about the process moving forward as the bill was not generated by the Board and the Legislature has not formally asked the Board for input.

Mr. Thompson thanked the Senators for attending the meeting. The issue is continually raised each year. He encouraged the Senators to take advantage of the Board's forum to assist in efforts that would be acceptable to address through a bill or other framework that would satisfy all stakeholders.

Senator Keiser thanked the Board for scheduling the special meeting. The bill was introduced and considered in committee during the last legislative session. Because the session covers the biennium, the bill is alive during the current session. At this point, the next step is to resolve the status of the proposed legislation. She is scheduled to meet with representatives from AGC and the Building Trades Industry. Some time is available to refine and adjust the language of the bill. She is receptive to any changes but would like to reach a consensus on the bill if possible during the current session. She acknowledged the industry is complicated and she is no expert and would defer to the experts on the issues, but she also understands that there are significant concerns about 'bid shopping' which is illegal. Abolishing that practice is the question, as well as the value of having more public procurement processes. Those two issues weigh on the process.

Mr. Thompson offered that he would support releasing the list of subcontractors but not during the hectic time of bid closure. He suggested delaying the release up to several days as it would still address concerns involving bid shopping and remove the potential for public agencies to incur increased costs and disputes.

Several members pointed out that the window for release of subcontractor information is at the time of bid or within one hour.

Chair Schacht noted that based on his experience, the first step after opening bids is identifying the apparent low responsive bidder. Dependent upon the public agency, it can be up to week or month before all paperwork is filed and reviewed. It is possible for a public agency to identify the lowest responsive bidder and award the bid in 24 hours. However, he has never encountered that experience. It may be possible to require the list of all sub-trades before the assignment of the bid with a required waiting period before the public agency could award the bid giving the sub-trades and labor an opportunity to receive the information.

Mr. Dobyms agreed except for the timing of the award of the bid pending a specific expiration of time following the publication of the list because it might handcuff owners by imposing the requirement because projects are

often dependent upon funds with an expiration date. Adding more time for the award of the contract might jeopardize funding sources.

Ms. Zahn said public owners have protest procedures and durations in place. A specific period is followed for publishing the statement of intent to execute an award that includes a protest period. If the Chair's suggestion is considered as an option, she suggested reviewing the process currently in place versus adding an additional process associated with bidders receiving the information and making a decision about a protest. Public owners also have provisions for owners that elect to use a supplemental bidder responsibility. The options to be explored should also consider what processes are already available to owners and the industry and how they might be aligned into an existing process rather than creating a new process.

Mr. Thompson pointed out that the duration of when a bid is submitted to potentially providing information about contracting should also consider the size of the contract based on revenue. If the requirement was only to list subcontractors that are greater than 10% of the revenue, smaller businesses might have missed an opportunity to bid on a smaller component of the project. It is important to include flexibility both for the duration when the bid is submitted, as well as on the size of the contract.

Mr. Gimmestad commented that his company's bid is due at a particular time to the owner and he is not aware that any sub-bid must be provided to him at the same time. He could receive sub-bids days after submittal of the bid to the owner with a complete scope of work at the same value he submitted to the owner on bid day.

Garett Buckingham asked about the coverage an owner would have at bid time from all subcontractors from a general contractor standpoint and what would be the unintended consequences of the bill increasing the difficulty for smaller owners bidding on public projects valued between \$1 million to \$5 million.

Vice Chair Keith offered that the ideas offered could be effective but would need more vetting to determine if they would be applicable for public owners.

Mr. Gimmestad mentioned the opportunity for the Board to establish a committee to deal with issues as it appears there is sufficient dialogue on the particular challenges associated with the bill that warrant more opportunities to learn and understand how the bill might impact any particular entity within the public procurement process for the purpose of creating a viable and vetted bill that is effective for the entire industry.

Senator Keiser acknowledged Mr. Gimmestad's comments. The bill was introduced last year and it presented an opportunity for CPARB to engage in a process as mentioned by Mr. Gimmestad. She asked why the Board did not pursue that option during 2019. Chair Schacht said that although the statute invites the Board to participate in the dialogue about state policy relative to any procurement of capital projects, the Board's major charge is RCW 39.10 for GC/CM, Design-Build, and Job Order Contracting. Last year, the Board was engaged in revising the Design-Build provisions within the statute. Additionally, if the Legislature had directed the Board to evaluate and offer a recommendation, the Board would have formed a committee.

Senator Keiser shared that she is aware of comments from other entities and in other venues. She is not a hardcore supporter of a bill as introduced and negotiates in good faith to try to achieve consensus. The process is not there yet but she supports continued work on the bill and appreciates the Board for scheduling a special meeting to discuss the issues.

Mr. Shinn commented that one change that has occurred since last year is the requirement for certified payroll, which will have an impact as it will eliminate those not paying prevailing wages.

*Senators Keiser and Hasegawa left the meeting for other appointments.*

Mr. Frare expressed some concern that the process could result in some minor adjustments without the opportunity to vet the issues over a sustained period. He supports Mr. Gimmestad's recommendation to form a committee to study the issue over the course of a year to vet all implications.

Chair Schacht acknowledged that some significant stakeholders are exerting pressure on the process to resolve the issues during this session. Some members of the Board also have the attention of key legislators who believe the bill is important. The first question is whether CPARB can organize a committee to commit to a year-long process to develop consensus-based legislation that would resolve the obstacles. Secondly, whether those members who can influence the Legislature are willing to support those efforts and does the Board have the time and resources to assume the work and assign a committee.

Mr. Hepner noted that the bill is currently in play by the Legislature. He questioned whether the Board could offer any amendments.

Chair Schacht replied that the message by the Board is that the issue is a complicated working mechanism and although the Board could assign the bill to a committee to produce amendments rather than a new bill, the feedback suggests that working out the details and stakeholder outreach during a short session is likely not possible and that the Board is also not offering amendments that might do more harm than good.

Mr. Gimmestad added that the bill might not pass out of committee. Senator Keiser might not allow it to pass from the committee based on input from those who want to ensure the bill is right.

Ms. Wall offered that the Board has several options to pursue. The Board could also recommend stepping back and offering a review of the proposal over the next year to develop a consensus-based proposal. It doesn't appear from the discussion that anyone is happy with the proposal. Putting a band aid on the problem is not reflective of a good policy solution for any of the stakeholders. The Board has the capability to do better and could improve the proposal to the benefit of the entire industry.

Mr. Hepner inquired about the timeline associated with the bill. Mr. Gimmestad said that although he is unsure as to the timing of the bill, the conversation has been occurring for decades.

Chair Schacht offered the suggestion of the Board stepping forward, as it would enhance the value of the Board, and pursue a process that produces a consensus-based bill that would be passed by the Legislature.

Mr. Kuruvilla commented that Senator Keiser's remarks about the Board's action to resolve the issues were important and he was appreciative of the Chair's response. However, it is incumbent upon the Board to prepare a response and because of the composition of the Board, it would be nearly impossible to develop one unified voice. However, the Board could offer a position paper or a response authored by the Chair and Vice Chair. The outcome could result in the formation of a committee. He stressed the importance of some sort of action by the Board as opposed to being silent on the bill.

Ms. Zahn said the Board has the benefit of being an advisory board to the Legislature with broad industry knowledge. It would be important not to create a solution to bid shopping that creates other issues that would be worse for public works contracting.

***Chair Schacht moved, seconded by Bill Frare, to direct the Chair and Vice Chair to prepare a letter on behalf of the Board to the Legislature clarifying that the legislation as proposed or amended is in conflict with RCW 39.10 and that RCW 39.10 should be excluded, and offer to convene a committee of the Board of public owners, labor, general contractors, subcontractors, the Office Minority and Women Owned Business Enterprises, and other appropriate stakeholders to evaluate the situation and develop a consensus-based proposal for legislation that would solve the problems that everyone could endorse.***

Discussion ensued on the level of the specific listing of subcontractors. Chair Schacht advised members that the issue would be discussed by the committee.

Chair Schacht added that the Board typically works on policies or responds to requests. The current work underway by MRSC was prompted by a specific legislative request. This request is much more fundamental to the Board's mission. He clarified that the motion would not convey support or opposition to SB 5457, but rather the issues should be referred to CPARB for evaluation and a recommendation.

Members discussed the intent of the motion and the basis of the letter. Chair Schacht said the action is a request to the Legislature to defer action on SB 5457 this year to afford an opportunity for the Board to develop a recommendation.

Vice Chair Keith said that was not her interpretation of the motion. With respect to Senator Keiser's comments that she wanted to get to a 'yes' and was willing to consider amendments, Vice Chair Keith said she could not support a recommendation to defer the legislation. The motion was indicative of the Chair and Vice Chair sending a letter with two points - that the proposed legislation is in conflict with Design-Build and GC/CM and the letter would recommend exclusion of RCW 39.10 as an amendment, and that because of multiple stakeholder concerns, the Board is offering to work through and develop some consensus-based amendments.

***Motion carried. Matthew Hepner abstained.***

Members discussed formation of the committee. Chair Schacht suggested the committee assign two co-chairs representing construction trades labor and public owners to ensure a consensus-based effort.

#### **ADJOURNMENT - Action**

***Bill Frare moved, seconded by Mike Shinn, to adjourn the meeting at 11:13 a.m. Motion carried unanimously.***

#### **STAFF & GUESTS**

Talia Baker, Department of Enterprise Services  
Nancy Deakins, Department of Enterprise Services  
Curt Gimmestad, AGC of Washington  
Valerie Gow, Puget Sound Meeting Services

Senator Karen Keiser, Washington State Senate  
Heather Kurtenbach, Ironworks Local 86  
Jim Rioux, American Public Works Association  
Jerry Vanderwood, Associated General Contractors