

**CPARB ISSUES**  
**March 8, 2007 - Discuss**  
**April 12, 2007 - Prioritize & Assign to Subcommittees**

**Summary**

<b>ITEM</b>	<b>Priority</b>	<b>Subcommittee</b>	<b>Target Date</b>
<b><i>Alternative Public Works Issues</i></b>			
1. Design build threshold/demonstration			
2. DBOM Demonstration projects			
3. GC/CM Contract Award, Sec. 303			
4. GC/CM MACC, Sec. 304 (1) negotiation			
5. GC/CM MACC, Sec. 304 (2) major bid pks			
6. JOC – other public bodies can use			
7. JOC – Change back to 80% subcontracted			
8. Reappointments to CPARB			
9. DB – Negotiations, Sec. 202 & 204			
10. DB – Best & Final Proposal/Offer, Sec. 204			
11. DB – Honorarium Payments, Sec. 204(5)			
12. New Alternative Public Works Methods			
13. Project Review Committee (2SHB 1506)			
<b><i>Industry-Wide Issues (listed in priority recommended by subcommittee)</i></b>			
1. Notice Provisions (Mike M. Johnson)			2008 Session
2. Responsible Bidder Supplemental Criteria Guidelines (SHB 2010)			2008 Session
3. GC Liability for Prev. Wages/defaulting subs			2008 Session
4. In-state Preferential Bidding			2008 Session
5. Cleanup Current Laws: Retainage, Prompt Pay			2008 Session
6. Pay Undisputed Amts of Changes Promptly & Discuss Unsupported Claims			2008 Session
<b><i>Other Industry-wide Issues not prioritized by subcommittee</i></b>			
Apprenticeship Utilization			
Subcontractor Bid Listing Statute RCW 39.30.060			
Reject All Bids			
Appropriate Contracting Laws			
<b><i>Other Issues</i></b>			

**Details – Alternative Public Works Issues**

- 1. Reexamine Design Build threshold for road & utility projects and demonstration projects (Counties issue 2/8/07)**

**2. Design Build Operate Maintain (DBOM) – Demonstration projects (UW & Ed Kammers proposed, ref. SHB 1506 Sec 201):**

(4) Except for utility projects and demonstration projects for design-build-operate-maintain, the design-build procedure may not be used to procure operations and maintenance services for a period longer than three years.

Add new paragraph:

(5) Demonstration Projects for Design Build Operate Maintain. For design-build projects authorized under this section, public bodies may procure operation and maintenance services as a part of the design-build procedure subject to the following conditions:

- a. The Design Build Project must be approved by the Project Review Committee or be performed by a public body certified to use design-build. Demonstration DBOM projects may only be proposed by certified public owners?
- b. The procurement procedure for operation and maintenance services proposed by the public body must receive approval from the Project Review Committee. CPARB shall develop procurement procedure guidelines for operation and maintenance services.
- c. The Project Review Committee shall not approve more than two demonstration projects using the design-build-operate -maintain procedure.

**3. GC/CM Contract Award, Sec 303 (From UW)**

(5) Public bodies may contract with the selected firm to provide services during the design phase that may include life-cycle cost design considerations, value engineering, scheduling, cost estimating, **site investigations**, constructability, alternative construction options for cost savings, and sequencing of work, and to act as the construction manager and general contractor during the construction phase.

**4. Maximum Allowable Construction Cost, Section 304 (1) (From Dan Absher)**

(1) The maximum allowable construction cost shall be used to establish a total contract cost for which the general contractor/construction manager shall provide a performance and payment bond. The maximum allowable construction cost **shall may only** be negotiated between the public body and the selected firm when the construction documents and specifications are at least ninety percent complete.

**(2/8/07 Dan Absher withdrew proposal, CPARB did not vote to work on for 2008 session.)**

**5. Maximum Allowable Construction Cost, Section 304 (2) (From UW)**

(2) Major bid packages may be bid in accordance with Section 305 of this act, **with the approval of the public body**, before agreement on the maximum allowable construction cost between the public body and the selected general contractor/construction manager. The general contractor/construction manager may issue an intent to award to the responsible bidder submitting the lowest responsive bid. **(2/8/07 UW withdrew proposal, CPARB did not vote to work on for 2008 session.)**

**6. Job Order Contracting (JOC) - Opportunities for other public bodies to use**  
(various owners & Jim Anderson, JOC from Eastern Washington)

**7. Job Order Contracting (JOC) - Change subcontracted % back to 80%** (Jim Anderson, JOC from Eastern Washington)

**8. Reappointments to CPARB not included in draft 2007 language** (Dick Goldsmith)

**9. Design Build – Negotiations, Sec. 202 & 204** (Dan Galvin, WSDOT AAG)

Concern that the public owner's authority to negotiate (Sec. 204) with the proposer on a design-build RFP prior to award of the contract may be limited by Section 202.

Section 202 states:

“Notwithstanding the provisions of RCW 39.04.015, a public body using the design-build contracting procedure is authorized to negotiate an adjustment to the lowest bid or proposal price for a public works project based upon agreed changes to the contract plans and specifications under the following conditions:

- 1) All responsive bids or proposal prices exceed the available funds, as certified by an appropriate fiscal officer;
- 2) The apparent low-responsive bid or proposal does not exceed the available funds by the greater of 125,000 or 2% for projects valued over 10 million dollars ; and
- 3) The negotiated adjustment will bring the bid or proposal price within the amount of available funds.”

Section 204 (4) (a) states in part:

"The public body shall initiate negotiations with the firm submitting the highest scored proposal. If the public body is unable to execute a contract with the firm submitting the highest scored proposal, negotiations with that firm may be suspended or terminated and the public body may proceed to negotiate with the next highest scored firm."

Emphasis Added. This language is consistent with a Negotiated Best-Value procurement where the contract is awarded to the proposer submitting the proposal providing the best value to the public owner as opposed to the lowest priced proposal.

This Best-Value analysis is also consistent with the fact that Section 204 (1) (d) (ii) provides that the proposal price is just one of the evaluation factors being considered in identifying the highest scored proposal. My concern comes in with the application of Section 202.

With the application of Section 202, what type of negotiations is left in Section 204(4)(a) to take place with the contractor providing the highest scored proposal? The two provisions appear on their face to be somewhat inconsistent. The use of the term "negotiations" in Section 204(4)(a) implies some type of give and take. This could either take the form of a change in scope or a change in price or possibly both. This give or take seems to be eliminated by Section 202. If the intent here is to provide a true Negotiated Best-Value process similar to what Section 204(4)(a) suggests, then Section 202 would be inconsistent. On the other hand, if Section 202 is being correctly applied to restrict the process, then use of the term "**negotiate**" in Section 204(4)(a) would be out of place. Do you have any examples of how these two sections are intended to be used together?

**10.Design Build – Best and Final Proposal/Offer, Sec. 204** (Dan Galvin, WSDOT AAG)  
Concern about the use of the term "best and final proposals" in Section 204 (4)(a). The reference in Section 204 states "Public Bodies may request best and final proposals from finalists." I believe that this is a new provision that has been added by this bill.

As used on the highway side of things, a Best and Final Proposal or Offer (BAFO) is generally used under circumstances where all of the proposal prices come in over the budgeted available funds. WSDOT then enters into discussions with each of the proposers to determine what might be done to reduce costs. Changes are then made to the RFP by addendum and each proposer is asked to submit its BAFO. If all the respective BAFOs exceed the budgeted amount, the RFP is over. If any of the BAFOs are within the budget, the contract is awarded to the highest scored BAFO within the budget. WSDOT may only ask for a BAFO once. Under this process WSDOT does not enter into actual negotiations with any of the proposers but awards based on highest scored proposal that has a price within budget. Is this process what is envisioned in this new bill? If it is, then I would raise the question similar to my reference to Section 202 whether the BAFO process is consistent with the negotiations language under Section 204(4)(a) noted above. The Section 202 language and the ability to do BAFOs should be consistent, in which case, one might consider removing the reference to "negotiations" under Section 204. As to the BAFO process, WSDOT has developed a specific internal process for using BAFOs that it applies to its design-build projects. Is it the intent of either CPARB or possibly GA to develop any specific guide lines as to the use of BAFOs?

**11.Design Build – Honorarium Payments, Sec. 204(5)** (Dan Galvin, WSDOT AAG)

Concern about honorarium payments in relation to the term "best and final proposals" under Section 204(5), which states in part:

The public body shall provide appropriate honorarium payments to finalists submitting best and final proposals.

Emphasis added. As discussed above, the term "best and final proposals or offers" generally has a specific meaning in the design build industry. Consequently, by using such term in Section 204(5) in relation to honorarium payments, the provision unnecessarily limits the applications of honorariums. Clearly the intent of the bill is to provide an honorarium to any finalist who submits a responsive responsible proposal but does not get the contract regardless of whether the public owner calls for a BAFO. This intent is consistent with the requirement of Section 204(1)(f) which addresses the honorarium payment simply in terms of a responsive proposal as opposed to best and final proposal. Section 204(1)(f) requires that "[t]he amount to be paid to finalists submitting responsive proposals and who are not awarded a design-build contract" to be one of the items set forth in the qualification documents. I would recommend that any reference to "best and final proposal" be removed from Section 204(5) and the section use the same or similar language to Section 204(1)(f). The use of the term was left over from the current version of RCW 39.10.051. Although it was not correct there either, it was not as much of a problem as it is now since the new bill specifically provides for the public owner to use the BAFO process.

## **12. New Alternative Public Works Methods**

Evaluate other methods such as competitive negotiation contracting, Best Value, DBOM, etc.

## **13. Project Review Committee (Issues, planning, and appointment of members)**

- (a) **Removal of Committee Member for Conflict of Interest.** A provision allowing a public owner to request the removal of a committee member if the owner demonstrates some bias or conflict of interest.

**Proposed language:** A public owner may challenge the appointment of a member for the project review committee established to review either the certification or recertification of that public owner or review and approve the use of design-build or general contractor/construction manager for that public owner's project. To challenge the appointment of a committee member, the public owner must identify the facts and circumstances evidencing a conflict of interest and such challenge must be presented to the chair or vice-chair of the committee no later than 15 days before the project review meeting. Upon receipt of a timely presented written challenge, the member shall not serve on committee matters relating to the certification or recertification of that public owner or the review and approval of

the use of design-build or general contractor/construction manager for that public owner's project.

(b) **Public Process for Development of Committee Procedures.**

**Proposed language:** The board shall establish a public process for (a) the development of the review committee procedures for reviewing projects and certification applications, and (b) the development of evaluation criteria. This process shall ensure an opportunity for all interested parties to participate and provide comment on the procedures and criteria.

(c) **Effectiveness of the Review Committee.** A provision requiring CPARB to evaluate the effectiveness of the Review Committee, how it is functioning, timeliness, ease of use, and overall value of the process. Depending on the outcome of the review, opportunities for improvement should be evaluated and implemented.

**Proposed language:** Three years after formation of the project review committee, the board shall evaluate the effectiveness of the project review committee, how well the committee is functioning, timeliness of reviews and identify any problem areas. The board shall solicit comments from public owners and the contracting community, identify areas for improvement, and implement appropriate changes to the project review committee process.

## **Details – Industry-Wide Issues prioritized by subcommittee**

### **1. Notice Provisions (Mike M. Johnson)**

Supreme Court ruling on contractors' rights to request compensation from impacts are limited to only when proper notice is given. Watch how HB 1765 comes out in 2007 session. Work on improving this issue at all levels. Bring owners together to discuss prejudice issue.

### **2. Responsible Bidder Supplemental Criteria Guidelines (SHB 2010)**

CPARB to develop guidelines.

### **3. GC Liability for Prev. Wages/defaulting subs**

General contractors are getting stuck when subcontractors do not pay prevailing wages or do not pay any kind of benefit plan/trust fund payments. Issues to address: 1) payments to the trust or benefit plans, 2) payments to the workers. Benefit trusts should provide early notice when subcontractors are not paying into the trust. Need better way to know who the subs are on a job.

### **4. In-state Preferential Bidding**

Representatives Ormsby and Wood are interested in preventing out of state prefabrication contractors from under bidding Washington contractors. Out of state vendors are not required to pay Washington prevailing wages. Ms. Moses indicated that this is a significant issue, especially in eastern Washington. HB 1908 changes RCW 39.12 requiring that prevailing wage are paid to all workers based on the locality of the project, not where the work is being performed. Concerns were expressed as to the legality of HB 1908.

Options under consideration include: (1) In state preferential bidding law for offsite fabrication; (2) Reciprocal Reciprocity – any state with in state preference we will apply a reciprocal preference; and (3) similar provision to Alaska – Title 36 with forestry – buy Alaska law. Require that owner buys Washington wherever practicable.

#### **5. Cleanup Current Laws: Retainage and Prompt Pay**

Clean up out of date public works laws: 60.28.010; 60.28.020; 60.28.050; and, 39.76.010. The statutes related to retainage (RCW 60 as listed) are no longer applicable as they apply to projects prior to September 1992. As other laws are identified to be cleaned up, they will be listed as separate items to track.

#### **6. Pay Undisputed Amounts of Changes Promptly and Address Unsupported Claims**

If there is a dispute on a change order owners sometimes withhold entire value, verses paying undisputed value. The current prompt payment provision does not remedy the situation.

### **Details – Other Industry-Wide Issues not prioritized**

#### **Apprenticeship Utilization**

Determine if this is still an issue. The port and school district bills are still alive in session.

#### **Subcontractor Bid Listing Statute RCW 39.30.060**

Perhaps the responsibility legislation has dealt with the issue. Determine if this is still an issue.

#### **Reject All Bids**

Contractors want owners to provide reasons in writing when all bids are rejected.

#### **Appropriate Contracting Laws**

Issue was not well defined. Cities/counties to submit information. Contractors issues may include projects done in-house by public bodies (day labor?).