

CAPITAL PROJECTS ADVISORY REVIEW BOARD
Office Building 2
1115 Washington Street SE
Conference Room SL-04
Olympia, Washington
January 25, 2007
9:00 AM

Final Minutes

<u>MEMBERS PRESENT</u>	<u>REPRESENTING</u>	<u>MEMBERS ABSENT</u>	<u>REPRESENTING</u>
Daniel Absher	General Contractor	Representative Dan Kristiansen	House of Representatives (R)
Ed Kommers	Specialty Contractor	Senator Phil Rockefeller	Senate (D)
Carolyn Crowson	OMWBE	Vacant	Senate (R)
John Lynch (Chair)	General Administration	Rodney Eng	Cities/Counties/Ports
Larry Byers	Insurance/Surety Industry		
Michael Mequet	Cities/Counties/Ports		
Nora Huey (via conference call)	Cities/Counties/Ports		
Gerald "Butch" Reifert	Design Industry		
Dave Johnson	Construction Trades Labor		
Olivia Yang	Higher Education		
Wendy Keller	Public Hospital Project Rvw Bd		
Dan Vaught	School District Project Rvw Bd		
Rocky Sharp	Specialty Contractor		
Representative Kathy Haigh (Vice chair)	House of Representatives (D)		

STAFF & GUESTS

Nancy Deakins, GA	Susan Cruise, AGO
Searetha Kelly, GA	Julie Murray, Association of Counties
Cheri Lindgren, Puget Sound Meeting Services	Rick Slunaker, AGC
Pam Johnson, OST	Donna Gregg, ESD #112
Chris Hirst, K L Gates	Ashley Probart, AWC
Rick Benner, Western WA University	Adam Lawrence, GA
Dick Lutz, Centennial Contractors	Gary Baldasari, WSF/WSDOT
Miriam Israel Moses, Rebound	Dick Goldsmith, AWPMD

Welcome & Introductions – Chair's Comments

Chair John Lynch called the Capital Projects Advisory Review Board (CPARB) meeting to order at 9:05 a.m. A meeting quorum was attained. He noted the January 11, 2007 regular meeting was cancelled due to inclement weather. Ms. Crowson announced she is leaving the meeting early to testify before the Legislature and will return at lunch.

Approve Agenda

Mr. Johnson moved, seconded by Mr. Absher, to approve the agenda as presented. Motion carried.

Approval of December 14, 2006 Meeting Minutes

Ms. Deakins reported she recently reviewed the Board's operating procedures. The procedures require a majority of six favorable votes to pass a motion regardless of how many voting members (11) attend the meeting. Several motions during the December meeting were passed with five rather than the required six votes. The issues are reflected on the updated decisions issue list and require another vote by the Board. The minutes reflect that the motions with five votes passed. Discussion ensued about what constitutes a quorum of the Board and what happens if motions fail to obtain a majority of six votes to pass. Chair Lynch said a motion that does not attain six favorable votes doesn't pass.

Ms. Crowson moved, seconded by Mr. Johnson, to approve the December 14, 2006 minutes as presented. Motion carried.

Discussion followed about Ms. Huey's attendance via teleconference and voting.

Mr. Johnson moved, seconded by Ms. Yang, to recognize members attending by teleconference are considered present for purposes of voting. Motion carried.

Public Comment

Representative Haigh reported on her early departure from the meeting. She thanked Board members for their hard work and efforts. She said she received the bill last week that contained two signatures and is working closely with Senator Rockefeller on a senate companion bill. Details about the responsible bidder bill still need to be worked out. The code reviser is unsure how to incorporate the responsible bidder language based on its current format. Chair Lynch and Mr. Johnson conveyed that they will follow up and work with Marsha Reilly.

Mr. Vaught arrived at 9:17 a.m.

Dick Goldsmith, AWPHD, asked whether Representative Hunt has committed to hearing the bill. Ms. Deakins said it is scheduled for February 2, 2007 at 8:00 a.m. Discussion ensued about attendance at the hearing. Representative Haigh suggested the Board select three members to attend, talk about the process, and represent the Board as a whole.

Mr. Mequet arrived at 9:19 a.m.

Mr. Absher thanked Representative Haigh for her work with the Board and with the construction industry.

Brief Reports from Subcommittees

Data Collection and Draft Report – Nancy Deakins

Chair Lynch suggested using information from the data collection presentation to draft bullet points for references purposes for the hearing before the Legislature next week.

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Ms. Deakins reviewed the changes found within “Preliminary Capital Project Data Review – January 2007 Update” slides. In summary, the overall completed project count did not change, project cost data did not change, and the “Schedule Data Issues Analysis” was revised. General Contractor Construction Manager (GC/CM) projects with construction schedule data issues were reverified and corrected with data from a previous survey. For projects that could not be verified, the actual construction start date was voided if the database date was the same as the actual design start date. Mr. Lawrence confirmed there are 18 Design Bid Build (DBB) projects in the data collection. He noted the events of 9/11 impacted start/stop construction activities.

Ms. Deakins said the 32% no response for DBB projects seems high concerning the slide, “Was the project completed to meet the owner’s cost expectation?”

Chair Lynch suggesting selecting several points from the slides that are positive without caveats, such as the “yes/no” surveys rather than the data pieces. Mr. Kommers said the number of respondents for DBB is low. Some members suggested emphasizing that developing the data collection system is ongoing.

Dick Lutz, Centennial Construction, said legislators might ask why Job Order Contracting (JOC) is part of the legislation due to the lack of statistics for the delivery method. Chair Lynch noted the Board should be prepared to answer the question. The data collection was focused more on GC/CM projects.

Mr. Johnson said the data is a preliminary review. Data collection has just begun and should not be interpreted as an exhaustive study.

Industry-wide Issues – Nora Huey

Ms. Huey reviewed the January 22, 2007 “Bidder Responsibility – Draft Legislation – CPARB Industry-Wide Subcommittee Recommendations” document. Initially, the intent was to replace the terms “municipality” and “state” with “public body.” However, the words “municipality” and “state” are used throughout the statute. The subcommittee decided not to implement the change. The term “award” has been defined. “Contract” also means a contract awarded under a small works roster process. A definition for “responsible bidder” was created that includes four criteria. An outstanding subcommittee issue concerns special licensing and whether to include a requirement to check the licensing of electrical, plumbing, and potentially other subcontractors. A new section 2 was added that enables owners to draft supplemental criteria specific to a project. She reviewed the new language requirements. A new section 3 is proposed where a contractor and subcontractor check the responsibility of its subcontractors.

Ms. Crowson said her staff has created methodology and procedures about how OMWBE determines that a firm is properly licensed. She said she will forward the document to subcommittee members.

Discussion ensued about item (b) on page 3, specifically if one must be a “bidder” (versus an “extremely interested individual”) to request that the state or municipality modify the criteria. Ms. Huey said to allow the general public to make the request slows down the procurement process. Chair Lynch asked if a subcontractor is considered a bidder. Ms. Huey replied no. Mr. Absher suggested it should read, “potential bidder.”

There was general consensus from the Board to implement Mr. Absher’s suggested change on the second line within (b) on page 3 to read in part, “... a potential bidder may request that the state or municipality modify the criteria.”

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Mr. Johnson commented that the two major issues before the subcommittee were how and where to include licensing and certification language and whether CPARB has the authority to write the guidelines versus a subcommittee under another agency such as General Administration (GA).

Chair Lynch said GA has occasionally found following a bid that a contractor's license has lapsed. GA requires the contractor to renew the license prior to awarding the contract. He said he would like to retain that flexibility. Also, when GA awards a bid, GA wants the subcontractor criteria submitted immediately. A general contractor might not know who the major subs are at that point in the process. A public agency shouldn't have to wait to make an award until the subcontractors are identified. Ms. Huey replied that subcontractor criteria are not required at the time of contract award. Section 3 is a contract administration issue requiring the obligation of the time and subs to verify before they enter into their contracts with other subcontractors. Chair Lynch said an owner could include the information in the bid documents. A general contractor could then deal with the subcontractors and second tier subs.

Rick Slunaker, AGC, commented that it is illegal for a contractor to submit a bid if not currently registered. Discussion ensued about licensing requirements identified in the Revised Code of Washington (RCW). Ms. Huey said the state code indicates it is illegal for a contractor to submit a bid if not properly licensed. Another provision found in the RCW states a public owner cannot execute a contract if the contractor does not have a license. Attendees at the subcommittee meetings made it clear that a contractor should be currently registered when bidding a project.

Chair Lynch said if the Board approves the draft language in concept, he said he and Mr. Johnson will work with Ms. Reilly to draft language in bill format within the next several days.

Mr. Johnson moved, seconded by Mr. Kommers, to approve the concept of the January 22, 2007 Industry-wide Subcommittee recommendations as modified.

Discussion ensued about addressing CPARB's rulemaking authority with the proposed legislation. Ms. Huey suggested discussing the issue at a future date if it's determined that the Board doesn't have the authority. Ms. Deakins said the word "suggested" could be added.

Mr. Slunaker suggested the Board could docket the issue as a future agenda discussion topic.

Mr. Johnson said that the CPARB developing guidelines or saying guidelines will be developed is an important issue to labor. He said he is willing to commit the time to work on guidelines in the interim.

Miriam Israel Moses, Rebound, echoed similar comments. Many industries are adamant that there is a reference to guidelines in the legislation.

Mr. Johnson said Ms. Moses pointed out that the responsibility criteria guidelines were eliminated from statute provided the stakeholders develop a set of guidelines that are agreeable to everyone, and that a reference there are guidelines would remain in the legislation. Ms. Crowson agreed it is important to develop the guidelines. Further conversation about developing general guidelines (safety and compliance with laws) rather than project specific guidelines followed.

Motion carried unanimously.

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Members discussed changes to RCW 39.04.180, *Trench excavations – Safety systems required*. Ms. Huey said the subcommittee recommends deleting the last two sentences. Ms. Deakins reviewed previous Board and subcommittee consideration of the proposed language.

Mr. Absher moved, seconded by Ms. Yang, to drop a bill that modifies RCW 39.04.180 by deleting the last two sentences. Motion carried.

Ms. Crowson left the meeting.

Ms. Yang suggested clustering both the responsibility criteria and trench excavations bills together.

Chair Lynch recessed the meeting from 10:20 a.m. to 10:36 a.m. for a break.

Review Draft Legislation

Chair Lynch reported the main bill has been dropped in its drafted form. Any changes will result in a substitute bill representing the Board's recommendation. Members referred to a "CPARB Decision Issues for January 25, 2007" document. Ms. Deakins outlined new topics that were not reflected on an earlier decision issues draft.

Mr. Absher reviewed the changes proposed within #2, a, items 1, 2 and 3 on the first page. Concerning item 3, the subcommittee recommends no action. Other issues include the effective date of the new legislation and what happens when:

- Which statute applies for an Alternative Public Works (APW) project that is initiated before the effective date but not awarded until after the effective date of the new legislation?
- A public agency wants to use the new statute that is not yet effective. Can an owner pick and choose what projects to initiate when?
- Will owners rush to get their projects through the Board prior to a requirement for certification?

Ms. Keller inquired about public hospitals and school projects that have received approval prior to a new law carry forward under the prior rules. Chair Lynch said the concept of item 3 is that projects advertised for selection of GC/CM or Design Build (DB) teams do not have to go to the Project Review Committee. Ms. Keller added that there could be projects that have not been advertised but have been presented to Public Hospital Project Review Board for review.

Mr. Goldsmith noted new section 502 on page 40 of the draft legislation states in part, "Projects approved by the school district project review board... before July 1, 2007 may proceed without the approval of the committee established in section 104 of this act." Chair Lynch said he anticipates few projects will overlap the effective date of the new statute.

Discussion ensued about the proposed public body certification requirement. Ms. Huey asked whether an owner that is certified for GC/CM projects is also certified for DB and DBB. Mr. Absher said when an owner is certified, the certification is for all APW delivery methods.

Mr. Goldsmith referred to new section 107 on page 9, beginning on line 20 of the draft, that states in part, "Once certified, a public body may use the contracting procedure for which it is certified on individual projects ... without seeking committee approval." Chair Lynch asked whether the Board wants certification to apply to

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APW contracting procedures. Mr. Kommers said a distinction is that a public body must have demonstrated success in managing at least one APW project within the previous five years. Once certified, an owner can apply the experience to one or the other. Mr. Absher said the Project Review Committee will decide. Most owners will seek certification for both GC/CM and DB delivery methods.

Mr. Kommers moved, seconded by Mr. Absher, to approve item 2, a, items 1 through 3, and replace “Alternative Public Works” with “GC/CM or DB” within the second line of item 1. Motion carried.

Mr. Absher reviewed proposed language changes for items b, c, d, e, and f as shown on the decision issues document. The Associated General Contractors (AGC) of Washington prefers a strong threshold, particularly for DB. There are many reasons to use the DB method for parking garages. He suggested the Board eliminate the total project cost threshold of \$10 million for parking garages (item b), that the reject all proposals requirement apply only to DB and GC/CM when rejecting all bids of subcontractors (item c) (an owner does not have to provide reasons for rejection in writing to all proposers for a “straight” GC/CM selection), adopt the language discussed at the last meeting to set the maximum allowable construction cost (MACC) at 90% for GC/CM (item d) (without an early agreement clause), adopt a \$10 million threshold for DB only (except parking garages) eliminate the \$10 million threshold for GC/CM (all GC/CM projects under \$10 million require Project Review Committee review) (item e), and that DB not apply to operation and maintenance (O&M) for a period greater than three years (adopt the wording as outlined in item f).

Mr. Absher moved, seconded by Mr. Kommers, to accept the compromises outlined for items b, c, d, e, and f.

Members discussed concerns for flexibility in setting the MACC at 90% (unless parties agree to set it at a different time). Mr. Absher said the early agreement clause results in a contractor not having equal bargaining position with an owner. Mr. Mequet expressed concerns about a rigid 90% MACC requirement. Ms. Yang said there is a working number between the public body and the GC/CM that provides a level of comfort. Chair Lynch agreed.

Ms. Huey said the Washington State Department of Transportation (WSDOT) has the authority to use DB for projects under \$2.5 million. She asked if an exception on the limits for DB could be adopted for roads for cities and counties in addition to parking garages. Mr. Absher said several AGC members are against such a proposal. Additional dialogue concerning the \$10 million threshold followed.

Motion carried (8-2). Mr. Mequet and Ms. Huey opposed.

Mr. Mequet said he agrees with all the proposed changes with the exception of the rigidity of the 90% design definition.

Members discussed the maximum dollar amount for work orders. Mr. Lutz referred to paragraphs (1) and (2) within new section 404 on page 38 of the draft bill and asked if the two conflict. The explanation provided in item g clears up any confusion, such as; delete section (2) as it is inconsistent with the intent in section (1) as modified: “The maximum dollar amount for a work order is three hundred thousand dollars, except that two work orders of three hundred fifty thousand dollars each are allowed *in a 12-month contract period.*”

Ms. Yang moved, seconded by Mr. Absher, to approve the correction outlined for JOC within section 404.

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Mr. Slunacker said the proposed change reflects a different policy compared to current law. Further discussion about the intent followed.

Motion carried unanimously.

Members discussed the issues addressed in Mr. Johnson's January 8, 2007 memorandum. Mr. Johnson said the Washington State Building and Construction Trades Council cannot support legislation that does not incorporate the first two amendments summarized as follows:

- Add the following language to section 303, subsection (3): "No public body may disqualify or rate a proposal for General Contractor/Construction Manager services on the basis of terms of a collective bargaining agreement to which the proposing entity is bound."
- The following language should be added to section 305, subsection (1): "In preparing subcontract bid packages, the General Contractor/Construction Manager shall not be required to violate or waive terms of a collective bargaining agreement to which it is bound."

Mr. Johnson said neither the awarding agency nor a contractor can force a GC/CM to violate the terms or conditions of a collective bargaining agreement. The proposed language simply states that the public agency cannot require the general contractor to violate its collective bargaining agreement. Chair Lynch said he's not aware public agencies have done that. He asked if it's currently occurring. Mr. Johnson replied no, but that there was a situation where a public body changed its bid documents and told the GC/CM it had to accept the lowest responsive bidder. Mr. Absher provided an example of the problem. Open shop contractors say they have a right to bid the work and that the GC/CM cannot enforce the open shop contractors to comply with the GC/CM collective bargaining agreement. It puts the union, owners, and GC/CM in an awkward position to sort it out.

Chair Lynch said he's noticed contractors have a mix of subcontractors and some are union while others are not. It is typical for most of the larger jobs. Mr. Johnson said the language as proposed states the awarding agency or public body cannot require a GC/CM to violate its collective bargaining agreement.

Ms. Huey expressed concerns that the proposed language prohibits all nonunion contractors from bidding on jobs. It's a significant issue about limiting who can come to work on APW projects. There are nonunion prime contractors that qualify as a responsible GC/CM that will not be able to bid through the GC/CM if the GC/CM has collective bargaining agreement prohibiting that. Mr. Johnson countered that the public body or awarding agency cannot require the general contractor to violate its collective bargaining agreement. Further discussion followed about concerns related to the language changes and how the matter has been resolved in the past.

Ms. Yang said higher education has dealt with the situation. Higher education understands both sides of the argument. She said she will abstain from voting on the matter.

Mr. Mequet asked Mr. Johnson whether he is agreeable to language stating that at least an attempt has to be made to work things out with the subcontractor and the union. Mr. Absher pointed out that 90% of the time it's the subcontractor that refuses to work it out with the union and not the other way around. It doesn't hurt to incorporate the language.

Chair Lynch commented that the proposal removes the owner from the mix, which he appreciates.

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Ms. Huey asked why the language is needed. Mr. Johnson said the situation continues to come up. Ms. Moses added that the issue has come up with at least one public agency and there were threats of litigation.

Mr. Johnson moved, seconded by Mr. Sharp, to accept the proposal as outlined in item #3 on page 3 of the issues paper. Motion carried 6-2. Mr. Mequet and Ms. Huey opposed. Mr. Absher and Ms. Yang abstained.

Chair Lynch recessed the meeting from 11:47 a.m. to 12:19 p.m. for lunch.

Continue Reviewing Draft Legislation

Ms. Crowson returned during the lunch break.

The Board reviewed items a, b, and c under #4 on page 3 of the issues document regarding the Mechanical Contractors Association (MCA) January 23, 2007 e-mail. Mr. Kommers reviewed draft language amendments. Four handouts were distributed:

- MCA Amendment to Section 305 Sub Bid Procedures (add some “due process” for a bidder to protest)
- MCA Amendment to Section 307 PreBid Determination of Subcontractor Eligibility (add some “due process” for a firm seeking eligibility to protest)
- MCA Amendment to Section 308 Subcontract Agreements (add “claims” to section 5, a subcontractor would only have to waive bond, retainage, and claims to the extent paid)
- MCA Amendment to JOC Section 403 (allow a “mechanical JOC” and require that it only subcontract 70% of the job) (item d)

Mr. Absher said he can support the suggested amendments proposed for items a, b, and c, but cannot support the amendment to paragraph (2) of section 308 that the GC/CM has a duty to coordinate subcontractors. It adds a task upon generals that may or may not currently exist in law. Mr. Kommers agreed and suggested striking the words, “duty to coordinate subcontractors and” within paragraph (2) of section 308.

Discussion of the term “interested party” within paragraph (1) of section 307 and how it compares to the language found in paragraph (6) followed.

Mr. Kommers moved, seconded by Mr. Sharp, to accept all three amendments (a, b, and c) as presented and strike, “duty to coordinate subcontractors and” within paragraph (2) of section 308. Motion carried.

Mr. Kommers reviewed the two options outlined in the JOC amendment document. The current draft states in part, “At least 90% of work contained in a JOC contract must be subcontracted to entities other than the job order contractor.” The proposal is to change the 90% to 70% for electrical, mechanical, and/or specialty contractors that will allow self-performance at 30%, or subcontract 70% of the work.

Mr. Lutz said there is no language in the current legislation that precludes an owner from doing an electrical or mechanical JOC. A concern with a percentage change is potential concerns that a subcontractor or JOC contractor is double dipping.

Ms. Crowson said she opposes moving from 90% to 70% for one particular group.

Mr. Kommers moved, seconded by Mr. Sharp, to incorporate the proposed paragraph (4) from the JOC amendment document within the draft bill and replace “mechanical” with “specialty.”

Mr. Absher offered a friendly amendment of replacing “specialty” with “mechanical or electrical.”

Chair Lynch said GA could be the agency most likely doing a mechanical or electrical JOC. However, it is unlikely. He said he prefers a bill without the target and is not inclined to support the motion.

The makers of the motion accepted Mr. Absher’s friendly amendment.

Mr. Johnson said he will likely not support the motion and outlined his reasons.

Motion failed 4 in favor, 5 opposed. Ms. Huey and Ms. Yang abstained.

Members discussed items missed in the reviews. Ms. Deakins described item a and asked if the following sentence from current statute should be added in the draft bill: “If the MACC varies more than 15% from the bid estimated MACC due to requested and approved changes in the scope by the public body, the percent fee shall be renegotiated.”

Discussion followed that an owner might already be allowed to renegotiate the fee in some cases and there is no need to include it in statute. Mr. Absher said it’s a good safeguard to have in the law.

Mr. Mequet suggested changing the word “shall” to “may.”

Mr. Absher moved, seconded by Mr. Johnson, to add the clause to the bill draft, replacing “shall” with “may.” Motion carried.

Concerning item 7, b, Ms. Deakins said the reference to a July 1, 2007 effective date should be eliminated from the sentence found in RCW 39.10.100, “Public Inspection of Certain Records – Protection of Trade Secrets.”

Mr. Kommers moved, seconded by Mr. Johnson, to strike, “(Effective until July 1, 2007.)” within RCW 39.10.100. Motion carried.

Mr. Sharp moved, seconded by Ms. Crowson, to accept the previous version of the draft legislative bill in its entirety as amended.

Mr. Absher said it’s important to note that members are voting as CPARB member and may have constituents that don’t agree with all of the amendments.

Chair Lynch reported construction organizations should carry issues forward rather than CPARB members testifying against the draft legislation.

Ms. Huey said the Association of Counties has an issue with DB limits, particularly as it relates to roads. Chair Lynch said the motion is not intended to restrict an agency from coming forward with concerns.

Motion carried unanimously.

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Discussion ensued about members attending on behalf of the Board concerning the draft bill. Chair Lynch said he will attend. Mr. Kommers asked that Mr. Absher and/or Mr. Eng attend to provide background and/or details regarding the draft language. Ms. Crowson said she plans to attend, but will not testify unless an issue is raised. Chair Lynch asked that Mr. Johnson also attend to represent the labor side. Chair Lynch encouraged all members to attend if possible.

Ashley Probart, Association of Washington Cities (AWC), said a potential legislative issue concerns small modifications for parking lots.

In the event he is unable to reschedule another commitment, Mr. Absher asked that Mr. Kommers serve as his back up at the hearing.

Ms. Huey said an Industry-Wide Subcommittee meeting is scheduled for February 2, 2007. Members will receive an e-mail if there is an alternate meeting date.

Members discussed preparation of the responsibility bill for the next Industry-Wide Subcommittee meeting and for the legislative hearing and other necessary clean-up language.

Set Next Meeting Agenda

Chair Lynch said he assumes the Board will continue to meet monthly. Upcoming meetings will include an update and discussion about the main bill(s).

Ms. Yang asked staff to docket an agenda item to discuss the transition and details concerning the Project Review Committee for the February 8, 2007 meeting.

Mr. Absher noted there are bills that impact capital projects that have already been dropped. Chair Lynch suggested scheduling "bills considered by the Legislature that are of interest to the Board" as an agenda topic for the next meeting. GA will compile a list. He encouraged members to keep Ms. Deakins and/or Ms. Kelly apprised of bills that are of interest.

Chair Lynch advised that members will receive copies of draft legislation.

The February 8, 2007 meeting will begin at 9:00 a.m. and end at noon. Chair Lynch thanked everyone for their hard work.

Mr. Absher thanked Chair Lynch for his calm and steady leadership.

Adjournment

Chair Lynch adjourned the meeting at 1:09 p.m.

John Lynch, Chair, CPARB

Prepared by Cheri Lindgren, Recording Secretary
Puget Sound Meeting Services