

# ADMINISTRATION TEAM MINUTES

**Date:** January 19, 2007  
**Time:** 9:00 am  
**Place:** Tacoma AGC Building

<b><u>Attending</u></b>	Mark Borton	___	David Mariman	✓	Mark Rohde	✓
	Jerry Brais	✓	Craig McDaniel	✓	Glenn Schneider	___
	Forrest Dill	___	Tina Nelson	✓	Mark Scoccolo	✓
	Paul Gonseth	✓	Cathy Nicholas	✓	Joe Spink	✓
	Tim Hayner	___	Ken Olson	✓	Dave Standahl	✓
	David Jones	✓	Roger Palfenier	___	Greg Waugh	✓

**Miscellaneous Business – Personnel changes**

Kevin Dayton has been appointed as Regional Administrator of Olympic Regions after the retirement of Randy Hain, leaving a vacant seat for State Construction Engineer.

Scott Bernhard has left the Max J. Kuney Company. Very few details are available yet.

**New Business –Force Account Damage Waivers**

Some contractors have experienced a higher incidence of equipment vandalism and theft on project sites. Copper wire has been pulled, generators and pumps have been stolen, and trucks are being stripped of wire and turbo units. When rented equipment is used on force account work, payment is made according to the current AGC/WSDOT Equipment Rental Agreement. Is the loss compensable by force account?

The Agreement specifically states that the cost of any form of damage insurance, such as damage waivers, is not compensable and will be deducted from the invoice. Some rental companies automatically add the damage waiver to the rental agreement. WSDOT has denied payment of the damage waiver because the contractor’s loss is covered by insurance, and force account markups include an allowance for insurance.

So why is the loss not compensable? Why would the cost of protective services such as secure storage, night watchmen or other means of protection not be eligible for force account payment? It would be easy enough to conceal the damage waiver by inflating the hourly rental rate in the invoice, but it would be preferable to just be above board and be paid for the damage waiver. It was stated that the markups provided for equipment do not cover the actual cost of insurance deductibles when a loss occurs, and the markups should be increased to cover actual costs. Does the current agreement place an undue

amount of risk on contractors? It was stated that contractors treat rental and owned equipment the same; they protect themselves from the liability associated with loss.

The reason that some work is paid for by force account is because it cannot be defined enough to be estimated reasonably. But the risk of loss associated with force account work is no greater than that of other work. That risk is the burden of the contractor, and force account markups include payment for insurance to cover that risk. When a loss occurs, it generates a business decision for the contractor whether to pay a higher insurance rate or buy the damage waiver next time. Both affect bid prices. From a local agency standpoint, additional payment for damage waiver would be unacceptable because force account markups already include an insurance element. It was stated that the risks should be assigned to whoever can best manage the risk, and that the results should provide a level playing field for all bidders.

Action Item: Great significance is placed on whether FHWA has an opinion of this issue. Cathy stated that she would look into FHWA's view of the matter.

#### **New Business – Data Files Provided to Bidders**

Can contractors obtain electronic digital terrain models or other design files from WSDOT during the bid period? Regions are not providing them when requested. WSDOT has made cross-sections available to view or copy, but is not making the data files available. If the owner has the data, why not provide it? Contractors would use the electronic data to determine if the design is correct, if quantities are good, and how to approach the work.

Any information provided to an individual bidder would need to be provided to all bidders in order to provide a level playing field. It seems like any data that is provided would surely come with disclaimers. Providing data may sound easy to do at first, but WSDOT may not always have data to provide. Also, a standard format would need to be determined and accepted by Industry.

The use of digital data and electronic bidding is becoming more prevalent and is likely to evolve in this direction. A company named "Earthwork Services" currently provides mass diagrams and quantity takeoffs developed from DTM's. It would be interesting to know what they require for input, and what they produce for output.

Action Items: Joe Spink will provide more information on "Earthwork Services" products. Dave Mariman will see who should participate at WSDOT and gather input.

#### **New Business – Good Faith Efforts**

A proposal was made to discuss Good Faith Efforts for DBE goals pertaining to inconsistencies among what WSDOT is accepting for Good Faith Efforts. This discussion did not occur, and will be added to the 'Round 'Tuit' list for a future agenda.

#### **New Business – Bonding Legislation**

Craig distributed a copy of proposed legislation for review and comment (see attached). The legislation proposes to require bonding in an amount that adequately protects 100% of the department's risk, but not less than \$80 million on contracts of \$80 million or more. This means that bonding costs for large projects may be less. This is in recognition that bonding is not available for projects over \$250 million. It is good public policy for the department to look at this, and to set the bond at a level commensurate with the risk.

How will this affect local agencies? What input is offered by FHWA? Does AGC support it?

Action Item: Please provide feedback to Craig McDaniel.

### **Old Business – Retainage**

Dave Jones reported that WSDOT has obtained recommendations regarding the current laws that govern retainage. WSDOT was advised that eliminating retainage would place the performance bond at risk. If WSDOT does not hold adequate retainage then the department becomes liable for liens. It appears that WSDOT is bound by law to retain money, and the only remedy to the issue is to change the legislation.

The discussion was impassioned, and many questions arose. Why can Oregon reduce retainage but not Washington? Federal Lands does not hold retainage, nor does DoD, Corps of Engineers, or GSA. Doesn't the legislation provide any flexibility? Doesn't the Owner's risk decline as projects near completion?

It was noted that contractors may provide a bond in lieu of retainage. Respondents stated that sureties don't like to write a retainage bond. Also, liens are generally filed against both bonds, as it is easier to recover against the retainage than to recover against the performance bond. It was stated that if there are entities that have rights to the retainage, then they should not have additional rights against the performance bond. It was further noted that there may be deductibles on performance bond depending on the surety.

ODOT releases certain amounts to the prime for completed subcontract work by means of partial acceptance. ODOT also reduces retainage upon reaching specified contract milestones. WSDOT proposed a specification change to reduce retainage to zero upon completion of 50% of the work and reviewed it with the Office of the Attorney General. WSDOT was advised that the Department would be liable if inadequate funds were retained, and it should not be done.

So where do we go from here? The Team discussed the need for further review of RCW's 60.28.10 and 60.28.11. Both regulations cover the issue in different ways, but the latter is newer.

FHWA published regulation in the Federal Register in 2003 ruling that state highway agencies have 3 options for compliance with the new DBE rule concerning retainage.

WSDOT has responded that the CFR conflicted with state law, and requested a waiver. This issue was shoved to the back burner due to the legal challenge of the DBE program, and remains unresolved today. FHWA and WSDOT need to continue this discussion now that DBE goal setting has resumed. A survey conducted in 2003 reveals that 19 states had zero retainage, and some (including Colorado) had eliminated retainage completely based on the CFR.

Action Items: FHWA and WSDOT will meet in the near future to continue the discussion that started in 2003 upon establishment of the CFR pertaining to DBE's and retainage.

Contractors will continue to provide their insight after further reviewing the laws, and as this issue evolves.

### **Old Business – Utility Delays**

As a result of the Scoccolo decision and the discussion at our last meeting, WSDOT reviewed the provisions of Section 1-07.17 – Utilities. This review revealed ambiguous language regarding costs associated with utility delays. The provisions address extensions of time for delays by others, but do not address costs specifically attributable to delays. Rather, the provisions state that any costs are the contractors' expense. This last statement is inconsistent with how WSDOT does business and needs to be revised.

Revisions to the Standard Specification and the GSP for Section 1-07.17 were distributed (see attached), and a heated discussion ensued. The written notice required by the third paragraph of the Standard Specs is lacking detail, and unclear whether it constitutes notice according to Section 1-04.5. The clause makes no reference to delays or impacts affecting critical activities. The reference to Section 1-08.6 was questioned, and evolved into a general discussion of the content of that Section. A thorough review of Section 1-08.6 has been on the Team's to-do list for quite some time.

There needs to be some guidance for how to fill-in the date for completion of utility relocation contained in the GSP. A bigger question is how does the Owner get commitment from the Utility? Local agencies may need to tighten-up their franchise agreements, and will certainly need to coordinate more closely with utility owners. A suggestion was made that there might be a need for multiple GSP's to address utility relocation that occurs before execution, and relocation occurring during performance of the contract.

Action Item: Dave Mariman will continue to work on the amendment and GSP's for Section 1-07.17, with specific focus on clarifying the written notice and the correctness of referring to Section 1-08.6. A detailed review of Section 1-08.6 will be elevated on the "to-do" list, and Mariman will study the issue of why this provision says what it says.

### **New Business (continued) – Standing DRB**

The provisions currently used by Idaho (ITD) for a Claims Review Board (CRB) were distributed at the last meeting as a possible model to be evaluated for this type of work. The discussion was unanimously supportive of using Disputes Review Boards.

WSDOT is currently adding an existing DRB from one contract to another contract by change order. If the change order method works, can we add DRB's by change order for future issues as well, and skip the standing DRB? Local agencies would prefer this to be included in the Standard Specifications unless the issue is entirely specific only to local agencies. The consensus of the Team was that not all parties will be willing to agree on a change order, and a standing Board is still desired.

So, at what point would a standing DRB be brought into the project? Bringing the Board in at the earliest opportunity enables them the ability to become familiar with the project, the players, and the issues. DRB's, as they are currently used, are an integral part of the process and members stay in touch with the issues as they occur. Including them at the claim stage would require substantial effort to bring them up to speed, and may inhibit their effectiveness.

WSDOT has had great success with DRB's. Approximately 10 Boards are employed per year, and Craig McDaniel gets involved in each DRB that produces a determination. Sometimes the individual talents of the Board members will vary the results (as to whether legal expertise is represented, for example). But will accessibility to a DRB encourage issue escalation, and result in less effort expended to resolve issues? Practical experience seems to indicate that the opposite is true. Sometimes, the threat of an issue going to a DRB drives resolution, because it is preferable to keep the issue within your immediate control. Once an issue is given to a DRB, it could go in any direction. Although the findings of the Board are nonbinding, they are admissible if the dispute continues to litigation. Generally, if your position is not supported by a favorable finding from a group of industry experts that comprise a Disputes Review Board, your chances in front of a jury of laymen are poor.

Action Item: This discussion will continue. A few key questions remain, including: can this be added to the standard specs, and at what time is it appropriate to employ the Board?

The meeting adjourned at 12:00 noon.

**NOTE:** The DBE Goal setting methodology promised at the previous meeting was distributed to the Team (see attached).

### **Future Meetings**

March 16, 2007

May 18, 2007

February 16, 2007

April 20, 2007

Subject Area	Sponsor
Section 1-08.6 Suspension of Work	Dave Jones / David Mariman
Section 1-08.7 Maintenance During Suspension	Joe Spink
Review, Summarize Region Specials	Craig McDaniel

**Team's "Round Tuit" List**

1. Bid Item for On-site Overhead
2. Joint Training—Documentation
3. Payroll, Wage Administration procedures
4. Web-Based Construction Management
5. LS Traffic Control and Force Account
6. DBE Good Faith Efforts – inconsistent evaluation

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**SENATE BILL 5208**

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**State of Washington**                      **60th Legislature**                      **2007 Regular Session**

**By** Senators Swecker, Marr and Haugen

Read first time 01/12/2007. Referred to Committee on Transportation.

1            AN ACT Relating to bond amounts for department of transportation  
2 highway contracts; and amending RCW 39.08.030.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4            **Sec. 1.** RCW 39.08.030 and 2003 c 301 s 4 are each amended to read  
5 as follows:

6            (1) The bond mentioned in RCW 39.08.010 shall be in an amount equal  
7 to the full contract price agreed to be paid for such work or  
8 improvement, except under subsections (2) and (3) of this section, and  
9 shall be to the state of Washington, except as otherwise provided in  
10 RCW 39.08.100, and except in cases of cities and towns, in which cases  
11 such municipalities may by general ordinance fix and determine the  
12 amount of such bond and to whom such bond shall run: PROVIDED, The  
13 same shall not be for a less amount than twenty-five percent of the  
14 contract price of any such improvement, and may designate that the same  
15 shall be payable to such city, and not to the state of Washington, and  
16 all such persons mentioned in RCW 39.08.010 shall have a right of  
17 action in his, her, or their own name or names on such bond for work  
18 done by such laborers or mechanics, and for materials furnished or  
19 provisions and goods supplied and furnished in the prosecution of such

1 work, or the making of such improvements: PROVIDED, That such persons  
2 shall not have any right of action on such bond for any sum whatever,  
3 unless within thirty days from and after the completion of the contract  
4 with an acceptance of the work by the affirmative action of the board,  
5 council, commission, trustees, officer, or body acting for the state,  
6 county or municipality, or other public body, city, town or district,  
7 the laborer, mechanic or subcontractor, or materialman, or person  
8 claiming to have supplied materials, provisions or goods for the  
9 prosecution of such work, or the making of such improvement, shall  
10 present to and file with such board, council, commission, trustees or  
11 body acting for the state, county or municipality, or other public  
12 body, city, town or district, a notice in writing in substance as  
13 follows:

14 To (here insert the name of the state, county or  
15 municipality or other public body, city, town or district):

16 Notice is hereby given that the undersigned (here insert  
17 the name of the laborer, mechanic or subcontractor, or  
18 materialman, or person claiming to have furnished labor,  
19 materials or provisions for or upon such contract or work)  
20 has a claim in the sum of ..... dollars (here insert the  
21 amount) against the bond taken from ..... (here insert the  
22 name of the principal and surety or sureties upon such  
23 bond) for the work of ..... (here insert a brief mention or  
24 description of the work concerning which said bond was  
25 taken).

26 (here to be signed) .....

27 Such notice shall be signed by the person or corporation making the  
28 claim or giving the notice, and said notice, after being presented and  
29 filed, shall be a public record open to inspection by any person, and  
30 in any suit or action brought against such surety or sureties by any  
31 such person or corporation to recover for any of the items hereinbefore  
32 specified, the claimant shall be entitled to recover in addition to all  
33 other costs, attorney's fees in such sum as the court shall adjudge  
34 reasonable: PROVIDED, HOWEVER, That no attorney's fees shall be  
35 allowed in any suit or action brought or instituted before the  
36 expiration of thirty days following the date of filing of the notice  
37 hereinbefore mentioned: PROVIDED FURTHER, That any city may avail

1 itself of the provisions of RCW 39.08.010 through 39.08.030,  
2 notwithstanding any charter provisions in conflict herewith: AND  
3 PROVIDED FURTHER, That any city or town may impose any other or further  
4 conditions and obligations in such bond as may be deemed necessary for  
5 its proper protection in the fulfillment of the terms of the contract  
6 secured thereby, and not in conflict herewith.

7 (2) Under the job order contracting procedure described in RCW  
8 39.10.130, bonds will be in an amount not less than the dollar value of  
9 all open work orders.

10 (3) On highway construction contracts administered by the  
11 department of transportation with an estimated contract price of eighty  
12 million dollars or more, the department shall fix the amount of the  
13 bond to adequately protect one hundred percent of the state's exposure  
14 to loss. The amount of the bond shall not be less than eighty million  
15 dollars.

--- END ---

### **1-07.17 Utilities and Similar Facilities**

The Contractor shall protect all private and public utilities from damage resulting from the work. Among others, these utilities include: telephone, telegraph, and power lines; sewer and water lines; railroad tracks and equipment; and highway lighting and signing systems. All costs required to protect public and private utilities as provided in this section shall be at the Contractor's expense.

Chapter 19.122 of the Revised Code of Washington (RCW) relates to underground utilities. In accordance with this RCW, the Contractor shall call the One-Number Locator Service for field location of utilities. If no locator service is available for the area, notice shall be provided individually to those owners of utilities known to, or suspected of, having underground facilities within the area of the proposed excavation.

If the work requires removing or relocating a utility, the contract will assign the task to the Contractor or the utility owner. When this task is assigned to the utility owner and work is not complete before the Contractor begins work, the Contractor shall immediately notify the Engineer in writing.

Any authorized agent of the Contracting Agency or utility owners may enter the highway right-of-way to repair, rearrange, alter, or connect their equipment. The Contractor shall cooperate with such efforts and shall avoid creating delays or hindrances to those doing the work. As needed, the Contractor shall arrange to coordinate work schedules.

To ease or streamline the work, the Contractor may desire to ask utility owners to move, remove, or alter their equipment in ways other than those listed in the plans or special provisions. The Contractor shall make the arrangements and pay all costs that arise from them.

In some cases, the Plans or special provisions may not show all underground facilities. If the work requires these to be moved, the Engineer will provide for other forces to move them, or issue a written change order requiring the Contractor to do so as provided in Section 1-04.4.

~~All costs required to protect public and private utilities as provided in this section shall be at the Contractor's expense. When others delay the work through late removal or relocation of any utility or similar facility, the Contractor's loss of time will be adjusted by extending contract time in keeping with Section 1-08.8~~ Engineer will evaluate the affects of the delay according to Section 1-08.6.

If the contract provides notice that utilities will be adjusted, relocated, replaced, or constructed during the prosecution of the work, the Contractor shall carry out the work in a way that will minimize interference and delay for all forces involved. Except for those costs attributable to delays, Any costs resulting from the coordination and prosecution of the work regarding utility adjustment, relocation, replacement, or construction shall be at the Contractor's expense as provided in Section 1-05.14.

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**GSP Directions for Use**

Utilities And Similar Facilities

(~~February 5, 2001~~April 2, 2007)

Use in projects where there are utilities within the R/W and those utilities will be adjusted, relocated or replaced by the utility owner or its contractor during the performance of the contract, or when the utility owner or its contractor will construct new utilities within the R/W during the performance of the contract.

(~~24~~ fill-ins) (~~\$\$\$~~ is the date that the utility owner or its contractor will complete their work. ~~\$\$\$~~ is the name of the utility company or companies, contact person, address, telephone number and e-mail address or other contact information as required to enable the Contractor to identify and contact each utility performing work during the life of the contract.

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**(April 2, 2007February 5, 2001)**

**Utilities And Similar Facilities**

Section 1-07.17 is supplemented with the following:

Locations and dimensions shown in the Plans for existing facilities are in accordance with available information obtained without uncovering, measuring, or other verification.

Public and private utilities, or their cContractors, will furnish all work necessary to adjust, relocate, replace, or construct their facilities unless otherwise provided for in the Plans or these Special Provisions. Such adjustment, relocation, replacement, or construction will be done during the prosecution of the work for this project. It is anticipated that all utility adjustment, relocation, replacement or construction within the project limits will be completed by \$\$\$.

The following addresses and telephone numbers of utility companies known or suspected of having facilities within the project limits are supplied for the Contractor's convenience:

~~\$\$\$~~1\$\$\$

## **DBE PARTICIPATION PLAN**

### **XX. Construction Contract Goals**

WSDOT and the Highways and Local Programs Division each review federally funded projects to determine the appropriateness of establishing DBE goals, prior to soliciting bids. The methodology employed by WSDOT in determining state and local agency project contract goals is described below. WSDOT will periodically review the attainment accomplished through the contract goal setting process to determine its ongoing effectiveness and will adjust its contract goal setting as necessary to meet but not exceed the Department's overall DBE Goal.

#### **A. Elements considered by WSDOT in its contract goal setting process.**

1. Geographic location of the project;
2. Type(s) of work included in the project, i.e., structure, roadway, new construction;
3. Availability of DBEs to perform the type(s) of work;
4. Potential subcontractable items of the work; and
5. Total dollar value of the contract.

#### **B. WSDOT's Contract Goal Setting Process:**

1. Before beginning the process, WSDOT reviews its overall DBE goal and the means to meet the goal (see: XVIII, Overall DBE Goals and XXIII, Means to Meet the Overall DBE Goal);
2. If the contract includes federal funds and subcontracting opportunities, the evaluation process begins which may lead to the setting of a DBE contract goal as described below.
3. The initial step is to calculate the overall percentage of sub-contracting opportunities within the project. This is done by determining what work will be performed by the prime contractor and what work will remain as sub-contracting opportunities, also referred to as bid items.
  - 3.1 The prime contractor is required to perform a minimum of 30% of the total estimated contract. The largest class(es) of work that add-up to a minimum of 30% of the total estimated contract may be considered work performed by the prime contractor. Mobilization is customarily considered the prime contractor's work;
  - 3.2. In order to identify the remaining sub-contracting opportunities, the division looks at the bid items that are sorted by pre-qualification work classes.
  - 3.3 Once the bid items or work classes are identified, the dollar values for all of the bid items or work classes are totaled. The total dollar amount is then divided by the total project cost. The result is the overall percentage of sub-contracting opportunities.
4. The next step is for WSDOT to take the total sub-contracting opportunities percentage and set an appropriate DBE goal taking into consideration other factors such as DBE availability and prime contractor flexibility as described below:

4.1 WSDOT determines if there are DBE firms currently certified who are ready, willing, and able to perform the subcontractable work and takes into consideration whether such firms are ready, willing and able to go to the geographic location of the work.

4.2 Next, WSDOT looks at the subcontractable work to determine whether the Prime has two means to achieve the DBE goal and adjusts the DBE goal to allow that flexibility.

5. If requested, a dollar goal can be established for a contract that is \$2 million or less.