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W. Michael Anderson
Assistant Secretary of Marine Operations
Executive Director

DATE: **SEPTEMBER 19, 2006**

TO: **INTERESTED PARTIES**

RE: **NEW 144 - AUTO FERRIES**
DESIGN - BUILD CONTRACT NO. 00-6674

NOTICE NO. 13

Attached is a letter received by WSF from Todd Pacific Shipyards Corporation on September 6, 2006, regarding concerns over the RFP documents.

Attached is WSF's September 15, 2006, reply.

Sincerely,

David H. Humphreys
Vessel Project Engineer
Washington State Ferries

TODD PACIFIC SHIPYARDS CORPORATION

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ISO 9001 Certified

Mr. David H. Humphreys, Project Engineer
Washington State Ferries, Vessel Engineering
2901 Third Avenue, Suite 500
Seattle, Washington, 98121-3014

September 6, 2006

via e-mail to Humphreys@wsdot.wa.gov

Dear Mr. Humphreys:

This letter is to provide information on the numerous most serious issues in the 144-Auto Ferry Request for Proposal (RFP), as noted in my letter to you of August 22nd. Simply put, the WSF proposed contract requirements create a system that is designed to fail. Were Todd Pacific Shipyards to be so foolhardy as to abandon all business judgment and opt to participate in this contract as WSF currently envisions it, the result would embarrass us as a contractor and embarrass the state. So extensive and defeating are the RFP flaws that isolated item-by-item changes will not be sufficient to justify the enormous business risks embedded in the program and keep Todd as a participant. Only a fundamental change in the WSF acquisition strategy accompanied by a major rewrite of a number of showstopper contract sections and a substantial overall edit of the RFP, can keep this project from becoming an unmitigated disaster.

The RFP does not reflect the design-build partnership envisioned in the 2001 enabling legislation. The unprecedented and unilateral WSF / DOT rights claimed within the RFP to control the precise content and sequence of the work at the smallest level of detail are wholly inconsistent with a firm fixed price contract, a compressed period of performance, and the total transfer of responsibility to the contractor with essentially uncapped liabilities.

Todd has no choice but to withdraw if major changes are not forthcoming in a reasonable time. This statement is not a threat, just the expression of basic business reality, because the RFP as currently drafted offers virtually no potential of reward to a contractor, as compared to almost incalculable risks and exposures. At this time, it would be impossible to present to our Board of Directors a compelling reason for project participation.

It is most disappointing to witness how WSF has so quickly forgotten the lessons learned from the Jumbo Mk II construction program. It was our belief that following the resolution of contract issues at the conclusion of that newbuild project, WSF had adopted a series of improved contract provisions for major projects in 1999 through 2000, and that the design-build partnership defined in 2001 would be a further extension of such an improved contract environment. As envisioned at that time, the design-build partnership would allocate contractual responsibilities consistent with WSF's expertise to define an efficient hull form conforming to minimal wave making and to WSF terminal interface requirements. This approach would allocate contractual responsibilities to the shipbuilder to perform detail design and for remaining arrangements and systems meeting a WSF-provided, high-level specification. The contractual responsibilities in such a design-build partnership would have been similar to established commercial shipbuilding practice using an owner's basic design.

Unfortunately, rather than stay the course of improved WSF-contractor relations over the past several years, the current newbuild RFP seems to have been overly influenced by another state's claim-plagued ferry project from 1998 to 2001, has borrowed much of the acquisition strategy and many of the most unworkable provisions from that project, and has even attempted to create a more perfectly one-sided contract. However, such unbalanced contracts are demonstrated to be unaffordable to the buyer, do not ultimately serve the interests of either party, and are counter to the spirit and intent of the legislatively mandated design-build partnership.

Just as in that other state's ferry project, the current RFP seeks to provide WSF / DOT full escape from all vessel design responsibilities for the meticulously detailed vessel design that WSF has created with millions of taxpayer dollars. The transfer of design responsibility is the norm in performance type shipbuilding contracts, where the Owner is willing to accept the shipbuilder design for a vessel meeting the Owner's general performance requirements. However, the current RFP also provides WSF / DOT with absolute control of every minute detail of the work, an approach associated with build-to-print type contracts, or US Navy cost reimbursable type projects. The intermixing of these two vastly different contract regimes is inherently inconsistent, especially when further combined by WSF with severe cost and schedule constraints, burdensome administrative requirements on the contractor with no corresponding WSF time constraints, and the broadest possible termination rights for WSF to use against the shipbuilder. By contrast, the WSF Jumbo Mk II construction contract, although not perfect, represented a more balanced approach to the respective rights and obligations of the contractor and WSF.

Our letter of August 22, 2006 explicitly stated that three overriding issues all needed to be addressed by WSF for continued Todd participation, (1) equitable allocation of design responsibility for work performed, (2) scope and extent of Phase II deliverables to be reduced, and (3) duration of Phase II design period to be extended. Addendum 17 recently issued by WSF addressed only the duration of Phase II effort.

The following are the most significant RFP topics that must be addressed. Further details are contained in the attachment to this letter.

- Design Responsibility For Basic Vessel Performance
- Scope Of Deliverables For Phase II Design Period
- Controlling Changes During Project Performance
- Schedule Ownership & Float
- Drawing Review & Approval
- Bonding & Insurance
- Changes In Law & Regulations
- Risks, Price & WSF Budget
- Waiver Of Claims
- Acceptance Criteria For Key Vessel Parameters

Although identified and listed individually, the most onerous provisions of the RFP being imposed by WSF are cumulative in effect on the contractor. As an example, the completion date of the vessels is paramount with essentially unlimited liability imposed on the contractor. However, the contractor is precluded from following the normal sequential design process, or starting any stage of construction without WSF approval of interference control drawings, followed by separate WSF approval of all detail design drawings, and separate WSF approval of working drawings. Even within the construction program WSF has imposed WSF inspection hold points at an excessive number of routine construction activities, with the stated right to withhold progress payments if work proceeds without requisite WSF approvals. Further, should the contractor fail to achieve a milestone WSF can terminate the contract. It was demonstrated on the Jumbo MK II program that WSF drawing approvals frequently were

arbitrary and based on extra-contractual or trivial criteria, such as yet-to-be-agreed-on Change orders or editorial details that fail to affect the technical content of the drawing. Similarly, the current contract provides for WSF to be the sole interpreter of published construction standards. The foregoing illustrates the potential cumulative effect of arbitrary WSF actions regarding drawing approvals, change orders, construction inspections, payment withholding and termination.

WSF / DOT must address all of the specific areas addressed in the attached remarks in a meaningful and equitable manner. It is highly unlikely that selected unilateral revisions drafted by WSF working in a vacuum without shipbuilder participation can introduce the nature and extent of balance into the RFP necessary for the project to move forward with Todd as a participant.

Notwithstanding the many serious issues addressed herein, *it is not our intention to derail this project.* We have invested considerable time and money in it already, and the State needs these new ferries. We worked hard with many others to establish the Build-Them-In-Washington drive, and we want to see that effort come to fruition. We urge WSF/DOT to establish a forum whereby RFP issues can be openly discussed and acceptable provisions mutually agreed. We suggest that small teams made up of experienced, knowledgeable shipbuilding experts from the Proposer's and WSF / DOT should be convened to address the issues. We believe this is the most likely scenario for success. We further believe a successful outcome, developed quickly, balanced, and accepted by the parties is achievable with proper leadership and a deliberate short time line.

Todd is proud to have constructed many of the current WSF vessels and we have already invested substantial resources over the past few years to prepare for the current newbuilding program. However, only a return to a properly balanced design-build partnership will allow us to participate in the current newbuild program.

Todd considers this letter to be a "written request for clarification" per Section 5.1 of Volume II of the RFP. In consideration of the time limitations for filing of "Protests" to the RFP, we would request a WSF reply to this letter no later than September 15, 2006.

Please contact the undersigned at your convenience to discuss these issues.

Sincerely yours,

Robert A. Gilbert
Senior Director of WSF New Construction

Cc: Welch, Marsh, Nierenberg, Penner, Reinmuth
Encl: Todd Remarks on Specific RFP Issues

Controlling Changes –

- On the Jumbo Mk II construction project, WSF was unable to refrain from making excessive Changes to the vessel design that WSF itself had created. Excessive means *many hundreds of Changes*, not solely, but predominantly initiated by WSF almost continuously throughout the duration of the project. The quantity and extent of these Changes drove the contractor off his project execution strategy and resulted in cost increases, schedule slippage, and disputes.
- There is no indication in the current RFP that WSF recognizes the project risk of excessive Changes, even though Todd has provided suggestions for how WSF might structure the contract to limit them.
- The present RFP gives WSF unrestrained latitude to direct Changes any time for any reason (Contract par. 17).
- And to make them retroactive to delivered ships (Contract par. 12).
- Todd suggested defining "essential" vs. "non-essential" Changes, with differential ability to impose them unilaterally, as follows. None of these provisions, or any language resembling this in concept or intent, is contained in the current RFP:

> We believe that one of the most effective precautions to prevent delays and cost increases in the New Build project is to absolutely avoid changes to the finally agreed contract documents. After a one year Phase II period, the contract documents should be close to perfect and any discretionary changes should be non-existent. It is our strong view based on WSF Jumbo MK II and other conversion projects that there should be a stringent change provision, to avoid changes, except for changes mandated by Regulatory Bodies.
>
> We would therefore propose that language be developed to implement the following key concepts and included in the RFP Changes provision;
>
> 1. Create a definition for "essential" and "non-essential" changes. "Essential Changes" are defined as changes necessary to gain Regulatory Body certification for the vessel, or an item certified by WSF Technical Manager as essential for safety and reliability of the vessel. All other changes are "non-essential".
>
> 2. All changes, essential and non-essential shall only be incorporated after a written agreement on cost and schedule adjustments to contract price.
>
> 3. In the absence of agreement on cost and schedule, WSF shall retain the right to direct contractor to implement Essential Changes with the cost and schedule impact to be resolved by negotiation of the parties, or following the dispute resolution provisions of the contract.
>
> 4. WSF shall not have any right to direct the implementation of "non-essential" changes.

The foregoing works to the benefit of both WSF and the contractor, while preserving all necessary rights of WSF. The inability of WSF to direct non-essential changes greatly increases its defense against any contractor claims.

- One critical premise of the approach described above to limit Changes, is the collaborative and exhaustive Phase II effort by Proposer's together with WSF / DOT to develop a thoroughly defined and acceptable ship design.
- At Contract par. 17.6.8, WSF will establish a "fee" which it is stated will fully compensate the contractor for Changes. Nothing in the fee language addresses the costs of contract extensions. As written, the development of the fee is controlled by WSF. The contractor does not bid this fee – it is unilaterally set by WSF. The preset limitation on a "fee" that is intended to cover actual costs for an unlimited range of potential Changes, over the entirety of the Contract, is patently inequitable and wholly unreasonable.
- At Contract par. 17.6.3, if a Change requires additional days on dry dock, but does not require a contract extension, the costs of the added dock days is not allowed in the cost of the Change.
- The compressed schedule for detail design and construction in Phase III along with the extraordinarily restrictive language on critical path delay criteria (Contract par. 26.1) for schedule extension, i.e. substantial acceleration measures, makes the WSF rights to impose unlimited Changes and limit their price, with a high probability for less than total recovery for all costs and impacts, a totally unacceptable provision.

Schedule Ownership & "Float" –

- Certain milestones are required to be established by the Technical Specification (100.4.6.2). Failure to achieve "any milestone" on time is potentially grounds for a determination of default (Contract par. 53.3).
- There is no reasonableness test or requirement for multiple instances forming a pattern – just slip one milestone one day on anyone of almost fifty (50) milestones to be held in default. This over-reaching approach to micro-management of a firm fixed price "performance" contract is typical throughout the RFP drafted by WSF.[1]
- A prudent contractor might therefore, as is common industry practice, establish earlier, internal milestones and plan his work to achieve those. However, at par. 26.3 of the Contract, if WSF delays the contractor beyond his planned, internal milestones, there are no consequences to WSF. Only if WSF causes delays that affect the final *Delivery* milestone, does WSF accept responsibility and recognize the contractor's entitlement to a schedule extension.

[1] It may have been WSF's intent to insert the term "major" milestone within the Contract at 53.3, however, this alteration to reduce almost fifty (50) milestones to just six (6) "major" milestones does not alter the unacceptable nature of this provision.

- Contrary to all shipbuilding and other major construction project practices, where the contractor "owns" the float, WSF has presumptively taken "ownership of the float" from the Contractor.
- This is another example of a grossly over-reaching set of contract terms. WSF repeatedly takes control, but shirks responsibility for its own delays throughout the contract.
- Per Contract at 26.1, WSF can deny schedule extension, if WSF can unilaterally create a scenario whereby schedule delay could have been avoided by resequencing the work, or other reasonable alternatives. Therefore with many weeks or months of after the fact knowledge, all WSF has to do to deny a time extension is create a resequence scenario that WSF maintains would have avoided the delay. There is no nothing within the provision that indicates WSF would even compensate the contractor for the "resequence" and the Change Order clause has already placed a cap on the "fee", which includes resequencing, so there would be no added compensation to the Contractor.
- A further major issue from almost all shipbuilding contracts, is that while the shipbuilder and WSF discuss the shipbuilder's entitlement to an extension in time, the Contractor has no alternative but to accelerate the work in an attempt to mitigate the delay and starts to incur substantial added costs. Whether or not schedule extension is eventually granted, there is no further recovery for such acceleration costs, as they are again limited by the capped "fee".

Drawing Review & Approval --

- On the Jumbo Mk II project, drawing submittal and approval became a major area of disagreement between the parties. The submitted drawings were often initially not up to the required "as-built" standards, but the deficiencies were often trivial for construction purposes (font size, title blocks, line weights, etc.). Drawings often did not contain pending or just authorized Change orders and were not submitted as a package with supporting vendor documentation. WSF used these deficiencies to reject the drawings, and since work could not proceed without drawing approvals, the contractor was tied up in knots trying to perform to contract schedules in a fixed price environment. As the detail design process is on the critical path and is almost always resource constrained, the contractor must frequently allocate resources to perform only construction dependent tasks, rather than all the formalities of "as-built" documentation.
- WSF clearly recalls the drawing approval issue from the Jumbo Mk II project. Rather than understand the true interdependence of the design-construction process, WSF has modified the Technical Specifications at Section 100 to impose several further layers of control over the drawing approval and numerical control lofting processes. Such provisions are impracticable from a design perspective and are inconsistent with the compressed Phase III schedule.

- Under this contract (section 10), WSF has 21 days to review drawings. The contractor cannot perform the work contained in unapproved drawings (unless he is willing to forego being paid for that work).
- If a contractor submits a drawing prior to the scheduled submittal date, the 21-day clock does not start until the scheduled date.
- If WSF fails to provide review by the 21st day, contractor has no right to delay or cost recovery from delay.
- After the 21st day, the contractor can write WSF requesting delinquent reviews be expedited, or request (at WSF's sole discretion) authority to perform the work in the drawings despite the lack of approval. However there is no consequence in the contract to WSF if WSF never responds to or acts on the contractor's written requests, or never reviews the drawing at all (Contract 10.1).
- Approval by WSF of the Final Technical Proposal (Phase II design) does not prevent WSF from later determining during Phase III that the design was flawed. This contractor accepts responsibility for our own design errors. However, if WSF approves and accepts the Proposer's design, WSF should not be able to later find that design insufficient (latent defects aside). This is inconsistent with "accepting the design" and with a "design...partnership." Refer to Vol. II, par. 3.2.
- Design approval given by WSF during Phase III, may not prevail if the configuration is subsequently questioned by WSF vs. the Technical Specifications, even during construction, or through the warranty period.
- In short, the contractor risks payment for the work if he proceeds with unapproved drawings, but WSF has no obligation to <u>ever</u> review, much less approve them, AND, even if approved the work remains subject to WSF's evaluation of conformance to the Technical Specifications *despite their drawing approval.*
- As importantly, the notion embedded in the RFP that drawings can be rigidly scheduled for submittal inherently ignores the very nature of the design spiral and a design process potentially impacted by hundreds of Change Orders. It is one thing to have a bone fide plan as a roadmap of intentions, and another to rigorously tag every checkpoint along the way. For example, there is no distinction between the structural design being complete, and some minor outfitting question being resolved. WSF must accept the realities of the design process and acknowledge that the design submittal schedule will be dynamic. This is another aspect of the *partnership in design* described in the enabling legislation, which has been countermanded in the RFP.
- Compounding the drawing review and approval process is WSF's right to review and approve every level of design: interference control, working drawing and shop sketch prepared for the project with the sequential requirement that interference control drawings be prepared before working drawings are submitted. [Technical Specification at 100.12].

> "Working Drawings for each Vessel **will not** be accepted for review **prior** to WSF approval of the interference free composite drawing for that Vessel."

These requirements provide WSF the arbitrary basis to hold up all work while minor outfitting details are being resolved before primary work can be performed.

- The degree of WSF design control is so draconian, that they even seek to restrict the contractor from proceeding with sequential computer design development tasks until the predecessor internal computer design task is reviewed by WSF (at Technical Specification 1C.9)

> "No Work shall proceed on the preparation of templates, development of numerically controlled tape, or the preparation of offsets on frame lines until this basic computer-developed lines plan has been reviewed by WSF for conformance to the Technical Specification."

- Although the forgoing drawing approval fears may seem unfounded or paranoid, in fact this is exactly the arbitrary drawing approval actions employed by WSF on the Jumbo Mk II ferry construction project. The current RFP provisions only enhance the contract language to allow WSF to undertake such actions with impunity. Provisions such as this make it impossible to achieve the compressed schedule imposed by WSF and are wholly inconsistent with the performance type contract responsibilities WSF seeks to impose.

Bonding & Insurance --

- Bonding for marine new construction is not available in the market place.
- The bonding amounts were reportedly reviewed and approved by WSF / DOT, but that was with respect to whether the required amount covers their risk. Refer to the Contract at par. 37.
- WSF / DOT do not appear to have reviewed whether that bonding is actually available to bidders in the marketplace.
- At Instructions To Bidders, Vol. III, par. 4.3, and the Contract at 37.5 bonding requirements can be unilaterally increased, and payment for work may be suspended until the increased bonding is provided.

Changes in Law or Regulation –

- The contract requires the Proposer to accept the risk of all changes in law or regulations that may occur after contract award, including retroactive modification of work, even of entire vessels, already completed without price adjustment. Refer to the Contract at par. 3.1 and Contract at 5.3.
- If this were merely potential changes to the ships, it might be one thing. But this is not limited to the ship configurations. Any changes, to business

practices, labor laws, insurance, even changes it is not possible to meet, must be met at the contractors' expense and within the prescribed delivery schedule.

- This requirement, like others designed to avoid all risk for WSF, will reduce competition, increase prices for the indefinable risk, and add to the layers of risk that the shipbuilder's must evaluate.
- Normal marine practice is for the Owner to accept this risk of future changes in law or regulation, and only pay for any changes that are necessitated during the design or construction period of the contract, as needed.

Design & OMD Issues –

- The RFP as presently written places total responsibility for design on the shipbuilder.
- The original industry / WSF plan for a design-build partnership, was for WSF to issue a brief (10 – 20 page) Statement of Requirements, and provide a lines plan that would work at the interface to ferry terminals and with the WSF provided propulsion system. The shipyard was to design the ship based on these limited, high-level requirements.
- The existing Specification is 1139 pages of requirements. By issuing such detailed requirements, WSF has constrained the design so that they are effectively controlling the outcome, but taking no responsibility for it. This is an unacceptable perversion of design-build, and is certainly no partnership.
- This is an extremely expensive, time-consuming effort by the bidders and by WSF to participate in design reviews, drawing reviews, etc. Phase II, the current design phase could be much less expensive, if WSF would accept responsibility for meticulous design efforts they have performed for hull form and propulsion, as they did on the Jumbo Mk II program. Also, WSF should yield a modicum of control, in favor of abbreviated requirements. The current 170 required drawing submittals for Phase II is completely over-done. Phase II even requires physical samples of lavatories, sink fixtures, etc. be submitted. This is an extreme, unreasonable, and impractical extent of requirements.
- Todd estimates we will spend between $1M and $2M just to get a bid in the door. The Honorarium of a mere $500K for unsuccessful bidders in no way makes this a useful exercise. We argue for reducing the requirements to more practical levels, not increasing the Honorarium.
- Addendum # 17 issued 8/29/06 by WSF/DOT extended the time for performing the Phase II design to eight (8) months in response to requests from Proposer's. Until we progress further into the design effort, we will not know whether new model towing tank tests are necessary. Tank testing will run four (4) to six (6) months. The new, extended design period of eight (8) months will not accommodate tank testing, if needed.
- WSF has provided the Owner's Model Design (OMD), but accepts no responsibility for any use by Proposer's of this multi-million dollar WSF-funded product.

- As presently written, the RFP makes the contractor responsible to meet vessel speed requirements. However, WSF is providing the propulsion system. If the vessel does not achieve the required speed, given that we are required to use the propulsion equipment provided by WSF, it makes no sense that the contractor should be held responsible for speed – but that is the contract requirement now.
- Todd proposes that WSF / DOT should accept responsibility for the design to the extent of the lines plan, speed, power, maneuvering, wake, stability, and the weight estimate. The Proposer's should accept responsibility for the remainder of the design. We also propose that the requirements for Phase II design products and submittals be substantially reduced to more reasonable levels, reflective of the millions already spent on the OMD by WSF.

Risks, Price & WSF Budget –

- Todd concurs with a number of statements (below) in the Expert Review Panel report number 2 of 7/31/06; Almost certainly, WSF lacks sufficient funds, when all the risk-based contingencies are added to the underlying cost of designing and building the ships;

  > "The RFP places certain marketplace / contract risks on the proposer which some proposers may conclude are significant. Proposers may include significant contingencies in their firm fixed price proposals to cover such risks... we do observe that...proposers [may] value such risks in a manner that results in the addition of large contingencies, and in turn, high bid prices... [WSF] should be prepared to deal; with bids, all of which are greater than budgeted funds."
- Bonding, schedule, and design risks have been addressed above. In addition, other risks assigned to the bidders include all costs associated with materials and services escalation, foreign exchange, overheads, labor, and supplier price and deliveries / availability. Refer to the Contract at par. 2.3.
- The contract includes Liquidated Damages (LD's), a normal contract clause establishing a fixed value per day for late delivery, rather than have the parties go through protracted disputes over the actual costs to the Owner of a late delivery. However, WSF's contract includes LD's *AND* provides for actual costs too. Refer to the Contract at par. 25.3.
- Another example is cash flow. The contract limits the spread of the total price among the vessels, to 28%, 25%, 25%, and 25% maximum, respectively (refer to the Contract at par. 6.3). However, with escalation risk and design costs in the first ship, these limiting values do not match the contractor's cash flow. Another contingency will be required, that in effect places the contractor in the position of charging interest for being WSF's banker.

Waiver of Claim (Contract at 2.2) –

- The Contract at 2.2 states the Contractor is waiving any rights to seek an increase in contract price or an extension in contract time related to any issue related to the Contract Documents.

  > "...and (3) that WSF expressly disclaims any responsibility for, and the Contractor expressly waives its right to seek, any increase in the Contract Price or extension of Contract Time, arising from, or related to, any Contract Document Issues. "

- This overly broad waiver by the Contractor is a further attempt by WSF for the Contractor to release any rights for what may be issues associated with the Contract Documents. This provision is so over-reaching, broad, and ambiguous it can readily be interpreted to contradict other provisions of the Contract and provide a basis for WSF to reject any claim by the Contractor for anything contained within the Contract Documents.
- As the Contract Documents are unprecedented in their provisions, it is impossible for even the most experienced contractors to foresee how the new contract provisions might be managed by WSF and how they may affect project performance.

Acceptance Criteria for Key Vessel Performance Parameters –

- The Contract as drafted contains no performance requirements and acceptance criteria for critical vessel parameters, such as speed, capacities, deadweights, etc. All technical requirements are contained in the Specifications.
- The current WSF approach is in great contrast to typical shipbuilding contracts, which define selected, critical performance parameters in the Contract, establish a tolerance range for acceptance usually with liquidated damages associated with shortfalls, and then a point of non-acceptance for the vessel.
- By not distinguishing in this traditional manner between critical parameters, and lesser requirements, all requirements are by default, of equal importance.
- Using vessel speed as an example, the Technical Specifications at 1A.8.4 state that the minimum acceptable trial speed shall be the model test trial speed and that such speed shall be demonstrated during Acceptance Trials. There are no specified tolerances on trial speed and the failure to achieve model test trial speed during Acceptance Trials can be a basis for WSF to refuse to accept delivery of the vessel.
- Furthermore, initial (and admittedly preliminary) review of the OMD data suggests the speed and draft achieved by the model, may not reflect the conditions under which the Specifications require that speed to be met (i.e. mid-life displacement) due to issues with the weight estimates.
- The WSF provision regarding speed is atypical of established shipbuilding contracts in numerous material respects, i.e. (1) the contractual obligation of the builder will always include a design margin as compared to model test performance data, (2) a further tolerance is provided with liquidated damages

typically derived with some actual correlation to reasonably expected actual damages, (3) the actual point of vessel non-acceptance is defined and not left to arbitrary determination at the time of delivery when other factors may influence decision making, and (4) the builder may have some ability to affect the parameters which affect vessel performance. None of those provisions is present in the WSF contract.

- With no vessel performance parameters being elevated to define which may have material effect on vessel performance for WSF, every one of the thousands of requirements in the Technical Specifications can be argued by WSF to affect the performance of the vessel and could be used as a basis for non-acceptance. Combined with the overly broad language of Article 31 of the Contract on Termination for Default, it is not beyond comprehension that WSF could assert that a contractor's failure to achieve one or some of the technical requirements was a default under the Contract.

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Michael Anderson
Executive Director

Washington State
Department of Transportation

Douglas B. MacDonald
Secretary of Transportation

September 15, 2006

Robert A. Gilbert
Todd Pacific Shipyards Corporation
1801 16th Avenue SW
Seattle, WA 98134

Re: 144-Auto Ferries (RFP)
Design-Build Contract No: 00-6674
Todd Letter of September 6, 2006

Dear Mr. Gilbert:

WSF has reviewed your letter of September 6, 2006 regarding the 144-Auto Ferries RFP. That letter offers a broad and often general discussion of various concerns Todd has regarding the current requirements of the RFP. While we recognize Todd's considerable efforts in this regard, a response by WSF addressing every issue raised by Todd is neither appropriate nor necessary. However, we do offer the following general comments.

First, the primary purpose of the RFP documents is to serve and protect the interests of the State and the public. Therefore, the documents by design place substantial risks and duties on the successful shipyard. Todd or any other participating shipyard have a number of ways in which to address those risks including, but not limited to careful and thorough development of the Phase II Technical Proposal, appropriate costs and contingency factors in the Phase III bid, or ultimately a decision not to participate in the RFP.

Second, Todd overlooks the unique nature of this procurement which provides it and the other proposers a nine month period in which to develop a complete design meeting WSF's Technical Specification. Use of any WSF provided design information is entirely up to the Proposer, as is the many other design elements and decisions necessary to provide a complete design. This extended development period assures all proposers the maximum ability to identify problems which might occur in the design thereby minimizing the risks that you have identified in your letter. To the extent those risks remain, they are clearly most appropriately borne by the shipyard which ultimately decides the form and content of its design and Technical Proposal.

Third, the Contract contained in the RFP documents is based upon both WSF's standard form contract, with which Todd has a long history of experience and much familiarity, and WSDOT's standard design-build contract under which several hundred million dollars of work is presently being performed in this state. WSF does not believe the contract terms are either unprecedented or unusual as Todd suggests, but rather customary and appropriate to protect the State's interests.

More specific comments and actions WSF is prepared to take are addressed in the balance of this letter. Headings reflect those from your correspondence.

CONTROLLING CHANGES

- WSF is evaluating possible revisions to Article 17, Contract Changes in regard to the costs of additional days on dry dock required for a Change and the costs of Contract Time extensions. As to the potential number of changes, we believe Todd's concerns are exaggerated. This RFP provides for a nine month period for development of a design by the Proposers in Phase II and a nearly equal time period for preparation of detailed design drawings in Phase III. These processes should substantially reduce the need for changes during actual construction. WSF also has no intention of implementing changes that are unnecessary. However, it will not place any limitation on the owner's customary right to direct changes in the scope of the work which WSF deems appropriate.

SCHEDULE OWNERSHIP & "FLOAT"

- WSF will issue an addendum modifying Article 53.3 to limit its application to a failure to achieve a "major" milestone. The contract provisions which preclude any claim based on a delay to early completion are not unusual and are necessary to properly protect the State's interests.

DRAWING REVIEW & APPROVAL

- WSF will issue an addendum modifying Article 10.1 to allow the contractor to proceed with work on unapproved drawings under certain circumstances and subject to certain notice requirements. We disagree with Todd's characterization of events on the Jumbo MK II project and believe its drawing approval fears are indeed unfounded. As noted above, the Proposers will have substantial periods of time to develop both a design and detailed design drawings before actual construction begins.

BONDING AND INSURANCE

- WSF is currently investigating the availability of bonding for new marine construction. To the extent WSF determines that such bonding is not commercially available, alternative forms of contract security will be considered.

CHANGES IN LAW AND REGULATION

- The referenced contract provisions are standard and customary for WSF contracts. However, WSF will evaluate possible revisions to the contract to accept responsibility for the costs of changes to the scope of work made necessary by changes in applicable law or regulation after submission of final Technical Proposals in Phase II and not reasonably foreseeable at such time, particularly in regard to Homeland Security requirements.

DESIGN AND OMD ISSUES

- WSF will issue an addendum modifying the RFP Documents to accept limited responsibility for the hull form, propulsion, and certain related factors meeting the requirements of the Technical Specification should a Proposer chose to adopt the WSF hull form in its design.

RISKS, PRICE AND WSF BUDGET

- Please see our prior comments on these topics. Additionally, WSF is evaluating the possibility of addressing certain price escalation factors through Article 17, Contract Changes. WSF also notes that Article 25 of the Contract is a standard WSF term and essentially identical to comparable provisions found in prior WSF contracts. The specified liquidated damages are solely for damages suffered in connection with loss of passenger or other operating revenue and added operating costs or other costs due to the delay. All other damages, including the costs of correcting defective work, are properly reserved.

WAIVER OF CLAIM

- WSF will issue an addendum modifying Article 2.2 to reflect WSF's limited assumption of responsibility for WSF's hull form, propulsion and related factors meeting the requirements of the Technical Specification should a Proposer adopt the WSF hull form into its design.

ACCEPTANCE CRITERIA FOR KEY VESSEL PERFORMANCE PARAMETERS

- Please see our comments regarding Design and OMD issues.

We trust the above addresses Todd's concerns. We anticipate the addenda to the RFP documents described above will be issued by WSF no later than September 22, 2006.

Sincerely yours,

David H. Humphreys
Project Engineer

cc: Steve Reinmuth
Daniel W. Galvin
J. M. Martinac Shipbuilding Corp. (enclosure)
Nichols Brothers Boat Builders, Inc. (enclosure)