

BE/DBI Committee

Meeting Notes 9/20/2023

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Committee Members: (17 members, 8 = Quorum)

X Lekha Fernandes, OMWBE, Chair	Santosh Kuruvilla, Exeltech, Co-Chair
X Irene Reyes, Excel Supply Company, Co-Chair	X Young Sang Song, Song Consulting
X Jackie Bayne, WSDOT OEO	Cheryl Stewart, Inland Northwest AGC
Stephanie Caldwell, Absher Construction	X Chip Tull, Hoffman Construction
X Shelly Henderson, Mukilteo School Dist.	Charles Wilson, DES
X Aleanna Kondelis, Hill International	Linda Womack, MBDA
X Keith Michel, Forma Construction	X Olivia Yang, WA State University
Brenda Nnambi, Sound Transit	X Janice Zahn, Port of Seattle
X Cathy Robinson, University of WA	

Guests and Stakeholders:

Patricia Collins, Maul Foster & Alongi, Inc.
Erin Frasier

Monique Martinez, DES
Laura Preftes, King County

The meeting began at 1:32 p.m.

Welcome and Introductions

Chair Lekha Fernandes said that the meeting would have fewer people because several committee members, including Charles Wilson, are active participants and are attending the Regional Contracting Forum.

Approve Agenda and Minutes from 8/16/2023

Chair Fernandes informed the committee about a change to the agenda, stating that Charles Wilson might not be able to participate in the meeting, and thus, the committee may not receive information about communication within his organization.

Olivia Yang made a motion to approve the agenda and the minutes from the previous meeting held on 8/16/2023. Chip Tull seconded the motion, and it was approved through a voice vote.

Discussion Highlights:

Chair Fernandes presented the committee with the mission statement, indicating that it would be included in the slide deck for all future meetings.

Prompt Pay Discussion

Chair Fernandes discussed the relationship between the Oregon Department of Transportation (ODOT) and Washington State Department of Transportation (WSDOT) Prompt Pay models, focusing on ODOT's method. She highlighted ODOT's partial payment provisions and invoicing requirements, which encompass Architecture and Engineering (A&E)-related, service-related PAs, contracts, and Work Orders/Change Orders (WOCs) with predominant payment methods such as time and materials or cost-plus fixed fees.

Chair Fernandes emphasized the extent of ODOT's invoice submittal requirements, noting that the acceptability of invoices is at ODOT's discretion, as the law outlines the requirements but doesn't specify what qualifies as an acceptable invoice.

She explained that ODOT can make partial payments of up to 40 percent of the invoice, and when ODOT pays this amount, the prime contractor is required to pay subcontractors from that sum within 10 days. However, this payment won't cover the full subcontractor invoice, and the prime contractor must pay a proportional amount. The remaining balance follows contractual terms, with ODOT aiming for a 30-day payment period, but officially allowing 45 days.

Jackie Bayne shared her limited experience with Prompt Pay on a consulting agreement, highlighting the increased complexity in construction projects compared to consulting. Keith Michel pointed out that the documentation shown was for design services and mentioned possible differences for the construction phase. Chair Fernandes explained that ODOT pays promptly once they receive a complete invoice, which triggered a discussion about the payment process and review procedures. Chip suggested that ODOT likely performs an initial review and releases 40 percent upfront, followed by a more thorough review for the release of the remaining 60 percent.

Chair Fernandes emphasized ODOT's confidence in awarding the 40 percent with no issues, particularly for design services. She expressed curiosity about the ease of assembling the necessary documentation for the process. Keith indicated that gathering such documentation was not overly challenging and that firms typically maintain these records for project-specific attachments. He mentioned that, once a process is established, it becomes routine to create and bill with the required documentation. Chair Fernandes noted that the prompt payment process could be more worthwhile due to the quicker payment timeline.

Chip agreed with Keith, stating that the billing process is generally the same and that opportunities arise mainly from an accounting perspective for tracking who received the 40 percent payment. He emphasized the need to keep records and handle any issues arising from client inspections.

Olivia sought clarification on the timing of payments in a scenario involving an A&E firm with three subconsultants. She outlined the process, which involves the owner making an initial payment of at least 40 percent upon receiving a formal pay application. The owner has an additional 45 days (with an aim of 30 days) to pay the remaining balance. Olivia noted that this places the responsibility on the owner to pay the prime contractor, who, in turn, must pay the subconsultants within 10 days of receiving payment.

Jackie pointed out that the discussion might be overcomplicating matters. She clarified that ODOT's requirements are for the prime contractor to be invoiced by the subcontractors and for the prime to pay the sub regardless of whether they have received payment. The prime contractor has 30 days to pay the remaining balance, which is where the complexity arises, primarily from an administrative standpoint.

Olivia expressed concern about the one-size-fits-all approach, considering that ODOT contractors vary in size. Jackie agreed, mentioning that WSDOT has prime contractors that are smaller disadvantaged business enterprise (DBE) firms, and the Prompt Pay program might be less advantageous for them. She acknowledged that the program could be administratively burdensome for smaller primes. However, Jackie emphasized that while the process may be complicated for smaller primes, it offers benefits to companies receiving the 40 percent payment. Smaller firms lower down the chain may not face extended waiting periods for payment, making the program more favorable for them.

Keith inquired whether there is a tool used to track downstream payments for transparency. Jackie explained that payments are currently tracked in B2G Now, but she was unsure about the specifics of monitoring that aspect. Chair Fernandes mentioned that Charles had previously mentioned B2G Now.

Jackie noted that they had not received any Prompt Pay complaints on an \$80 million project. She highlighted that the process appears to be running smoothly without issues.

Young Sang Song shared his firm's experience as a subconsultant on a WSDOT megaproject. He described the process, which involves sending an email with the invoice to the prime contractor. When it's time for WSDOT to pay the disadvantaged business enterprise (DBE), the owner receives an email inquiry about the payment process, including whether they received the payment. They have the option to add public or private notes. Young Sang Song emphasized that WSDOT's check-in process is straightforward, discrete, and takes only about five minutes.

Chair Fernandes asked Jackie if these emails were automatically generated by B2G Now or if other owners were manually sending them. Jackie explained that the process is automated through B2G Now. Once the prime is paid, emails are sent. She mentioned that there is a slight delay in adding the prime to the system, and the settings give the prime a designated amount of time to report the amounts paid to the subs. Afterward, the subs have a specified timeframe to confirm, dispute, or reject the amounts. Jackie also stated that WSDOT can send a note to the contract compliance officer, WSDOT staff, or the contractor. It is recommended that the subcontractor first tries to resolve the issue with the prime, and if problems persist, WSDOT will assist in resolution.

Keith expressed his interest in the example of a Prompt Pay partial 40 percent system and found it intriguing. He believed it was a viable option despite the administrative burden and felt that the benefits for the recipients outweighed the challenges. Keith emphasized that while change can be challenging, Prompt Pay brings tremendous benefits to the recipients.

Co-Chair Irene Reyes mentioned a recent meeting at the Office of Minority and Women's Business Enterprises (OMWBE) where King County presented a similar program. She noted that King County pays certified women- or minority-owned companies within three days. Irene suggested inquiring about the OMWBE process.

Laura Preftes clarified that the OMWBE program applies to goods and services, not capital projects where there is a prime contractor responsible for paying the subcontractors. She explained that it's more straightforward when King County receives an invoice directly from an OMWBE-certified subconsultant but becomes more complex when the OMWBE-certified firm is subcontracting with a larger prime. Irene recommended that the committee learn more about what OMWBE is doing and explore how it can be applied to contracting and services.

Jackie noted that King County has different statutes requiring payment within 10 days, and she expressed a desire for a similar requirement in WSDOT. She advocated for the state to pay subcontractors faster than the 30 days specified in Prompt Payment. Jackie highlighted the potential for further delays when payments take 45 days, leading to a total of 75 days, which she considered too long.

Laura explained that King County includes a 10-day Prompt Pay clause in contracts, meaning that when King County pays a prime contractor, the prime is obligated to pay their subcontractors within 10 days. This process is tracked in B2G Now. Laura mentioned that they have implemented a direct payment system for project-specific contracts, where payments are uploaded directly from King County's finance department. This system eliminates the need for the prime contractor to report their own payments, making it easy to verify compliance with the 10-day payment requirement.

Chair Fernandes inquired if the 10-day requirement was negotiated with prime contractors. Laura clarified that it was not a negotiated term but rather a requirement set by King County. She also explained that King County collects data on the payment date from its financial system, and prime contractors are responsible for reporting sub-payments to ensure they meet the 10-day deadline.

Jackie explained that for WSDOT, such a requirement would need to be included in the standard template and enforcing it might require statutory backing. She mentioned that King County and Sound Transit have similar provisions in their codes.

Chip clarified the payment timeline, stating that there is a period for the client to respond with payment, followed by the application of Prompt Pay once payment is made to the general contractor (GC). Chair Fernandes concurred.

Chair Fernandes asked MRSC if the 10-day clause was present in contracts with other local governments. Aleanna Kondelis mentioned that her research was in the early stages but shared some observations. She

explained that in construction contracts, there are "pay when paid" clauses that typically have 10-day, 3-day, or 30-day payment windows. More progressive owners often pay every 30 days, regardless of when they are paid by the owner. Aleanna emphasized that there is a standard 30-day payment cycle in many construction contracts. She suggested that different contracts, such as those for goods and services, consulting, and construction, might have different requirements, making it challenging to move away from the 30-day payment cycle. Aleanna noted that "pay when paid" clauses have been a source of legal disputes, and there is a varying tolerance for risk when it comes to asking primes and prime consultants to break away from this traditional payment structure.

Young shared his experience with WSDOT contracts involving both the county and prime contractors. He explained that providing the same service as a consultant to the owner is faster and typically results in payment within 15 to 20 days. However, when working as a subconsultant under a prime contractor, payments can take significantly longer, with 60 to 90 days being the norm and the fastest payment turnaround being 60 days.

Jackie explained that WSDOT had considered negotiations but faced a challenge due to its standard boilerplate contract that had undergone multiple rounds of legal review. She mentioned that implementing Prompt Pay into the Community Workforce Agreement Construction Program took six to nine months of negotiation.

Chip highlighted two key issues regarding Prompt Pay. The first issue is the ability to track payments to ensure that all tiers are paid within the required timeframes. While committee members expressed concerns about adding 10 days to each tier, this approach allows for effective tracking and monitoring of non-compliance. The second issue relates to expediting the payment process. Chip noted that the B2G Now infrastructure exists to manage non-compliant contractors, but it is not universally mandated by all owners.

Chair Fernandes shared some positive news, mentioning Executive Order 22-01, which mandates that all state agencies and higher education institutions implement a program called Access Equity (B2GNow). Under this program, all subcontractors are required to be added to B2GNow to track payments. She noted that this initiative could provide valuable data and insights. Chair Fernandes mentioned that while a contractor may be considered a bad actor at WSDOT, they may not have the same reputation elsewhere. Access Equity will allow for a broader assessment of contractual terms' impact on behavior.

Chair Fernandes added that there had been no complaints about Prompt Pay from WSDOT's pilot program, and she requested feedback from other owners.

Olivia provided insights into Washington State University's (WSU) experience with progressive design-build projects. She explained that they typically start with a problem statement and let design-build teams propose solutions. Olivia described a pilot project at WSU where the problem was the delayed payment of lower-tier subcontractors. The solution, proposed by contractors, was to identify small and woman- or minority-owned businesses and invite them to participate in a program. WSU evaluates when these firms perform work and their cash flow. At the beginning of each month, the prime contractor provides a projection of payments to subcontractors, and WSU has a quick pay line in the scheduled values to facilitate early payment. Olivia emphasized that this approach aims to ensure cash readiness for primes to pay subcontractors when bills are received.

Olivia highlighted two key takeaways: the first is that the effectiveness of these solutions depends on each contractor's accounting system. Large and medium-sized contractors might handle this process differently. The second takeaway is that the focus should be on supporting firms in need of help, rather than worrying about who gets paid when. WSU has added requirements related to access to opportunity, capital, and training in their RFP for design-build projects to identify and support small businesses. Olivia mentioned that part of access to capital includes asking firms to explain how they ensure their subcontractors are paid promptly.

Keith commended Olivia and her team for their innovative approach and emphasized the significance of the trust established in early payment for work that is not yet completed. He noted the challenges associated with Prompt Pay procedures and how WSU's approach creates an environment where early payment to general contractors for unfinished work is possible, leading to a shift in the payment process. Keith recognized the risks involved in early payment procedures, which the committee had discussed in previous meetings.

Olivia acknowledged that the risk involved is why the program at WSU is a pilot. She explained that it currently works because the participating contractors and design-build firms have good intentions, and WSU hasn't encountered firms with less favorable intentions. Olivia emphasized the importance of considering safety nets to avoid potential issues and urged public owners, particularly in situations not governed by low-bid requirements, to have contractors find solutions rather than adopting a one-size-fits-all approach. She noted that this approach raises awareness about the prompt payment issue and cautioned against attempting to replicate the pilot program.

Jackie shared WSDOT's workaround, which involves placing funding in an escrow account rather than making upfront payments. The funds are accessible to both parties, providing an alternative solution. Shelly Henderson expressed her appreciation for Olivia's example and explained that she had been exploring ways to pay contractors in advance. She discussed her experience with a school district where checks are issued every two weeks, making it challenging to accommodate additional payments within a billing cycle. Shelly suggested that, in theory, when using an alternative procurement method, establishing a good relationship with the contractor could allow for a line item or pot of money to serve as a backup in the next pay application. This approach would provide transparency in how the funds were used and avoid the need for an extra pay application for every small minority business payment.

Keith commended Shelly's example and emphasized the potential value of milestone billing over monthly billing. He noted that for small businesses, the timing of when work is performed can significantly impact cash flow. Keith appreciated the simplicity of Shelly's solution, as it doesn't require extensive changes to policies and procedures. He suggested that such examples could be considered in the legislative report to empower teams to adopt more frequent payment processes.

Olivia endorsed the idea of an escrow account and suggested that the committee keep it in mind. She shared a contractor's experience on a design-build project that involved extensive outreach to bidders but faced challenges due to the complexities of public bidding. Olivia emphasized that private owners have more flexibility to provide initial financing to firms for purchasing materials and paying before the work is done. However, she pointed out that public owners face more restrictions because payments must align with work completed. Olivia recognized the need for some form of legislative cover to address these financing barriers for small businesses venturing into public works projects.

Young Sang Song shared a personal story about working under a scheduling contract with an agency as a prime contractor. Due to billing cycles, he had experienced delays of two to three months in receiving payment. Frustrated with the situation, Young informed the prime contractor that he would not schedule further work until the invoices were caught up. He noted that when a disadvantaged business enterprise (DBE) reaches a similar point, they may stop working, but this often results in the prime contractor finding another contractor to complete the work. Young emphasized the real challenges that DBE/MBE's face in such situations.

Laura mentioned that her office receives calls from small contractors who report not getting paid, often accumulating arrears of \$90,000 or \$100,000. These small firms, however, don't want Laura's office to reveal that they've made the call, as they fear it could damage their relationship with the prime contractor. Laura explained that investigations often reveal reasons for non-payment, such as contractors not billing monthly, following improper procedures, or falling behind on payments.

Jackie expressed WSDOT's desire for legislative changes to support their prompt payment program. She emphasized the importance of having a legal framework in place rather than relying on workarounds to avoid potential issues.

Chair Fernandes noted the various best practices that could work for different-sized entities, such as contract negotiation, owner-initiated problem identification, and prime contractors taking the lead in solving problems. She suggested that shortening the invoice cycle for partial payments, while not a comprehensive solution for all tiers, could provide relief for the initial tiers.

Keith raised the possibility of recommending a shorter time frame for payment, suggesting that the current 10-day requirement may be too long. He proposed a five-day requirement and inquired about the background of the 10-day duration.

Jackie clarified that the 10-day requirement isn't applicable to WSDOT, as its regulations specify a 30-day timeframe. She explained that the major issue in WSDOT construction contracts is the "within paid" provision, which leads to a longer payment process. Jackie supported changing the language to "10 days from the receipt of a successful invoice" and expressed WSDOT's willingness to support such a change, even though the industry might oppose it. She further elaborated that, typically, it takes 45 days for WSDOT to pay the prime, and then an extra 10 days on top of that.

Keith clarified that he was specifically referring to the extra 10 days added after the general contractor (GC) has been paid when it's time to pass money downstream to subcontractors (subs). He emphasized that changing the 10-day period to 5 days would significantly reduce the time for subs to receive payment and create a sense of urgency for GCs to release the payments more promptly.

Jackie pointed out that reducing the 10 days to zero may not be as effective when there are many tiers of subcontractors involved. She suggested that the committee consider a change where, upon receiving an invoice, the firm has 10 days to pay the invoicing firm, creating a shorter payment cycle. Chair Fernandes summarized the committee's two suggestions: First, subs should be paid within 10 days after a successfully submitted invoice, and second, primes should pay their subs within 5 days when the prime receives payment.

Olivia expressed her preference for allowing owners the flexibility to implement creative solutions, especially for projects that fall under RCW 39.10, without imposing specific deadlines through legislation. She suggested incentivizing firms to come up with innovative payment methods.

Chair Fernandes agreed to continue discussing best practices and explore options for faster payments, such as including provisions in requests for proposals (RFPs) and requests for qualifications (RFQs) that require written statements outlining their Prompt Pay plans for subs.

She proposed delving deeper into legislation, highlighting what's currently in statutes that lead to faster payment cycles and if there are any statutory solutions in place. She also encouraged discussing how owners, primes, and DB/DBE entities interpret legislation and determine its practical application. Additionally, she mentioned having another potential legislative solution in the works that she will share later.

Next Meeting Agenda (10/18)

Chair Fernandes announced that the next meeting's agenda will focus on B2G Now, exploring it from various perspectives to understand the challenges and benefits it presents. The intention is to assess whether B2G Now can be integrated into best practices. Charles will lead this discussion, and members who are already using the B2G Now system should come prepared to share their experiences, highlighting what works effectively and identifying any obstacles.

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She also proposed including discussions about Prompt Pay in the agenda, especially how it relates to other committees. Additionally, the meeting will involve voting on the best practices for BE/DBI entities in current legislation. The committee will also delve into the recommendations for legislative changes that will be presented to the Capital Projects Advisory Review Board (CPARB).

Committee Membership

Chair Fernandes discussed several key points for the next committee meeting, including incorporating the BE/DBI committee's best practices into all CPARB best practices based on feedback from the last CPARB meeting. The meeting will also focus on Prompt Pay, developing best practices in this area, and reviewing Prompt Pay legislation. She asked members from the JOC Evaluation Committee and the GC/CM Committee for insights on how Prompt Pay fits into their work.

Chair Fernandes emphasized the importance of voting membership, noting that the committee will potentially vote on BE/DBI best practices within current legislation during the next meeting. She asked for input on potential additions and removals from the committee, particularly regarding Minority Business Development Agency (MBDA) representation. Members provided suggestions for additional representatives, including those from the surety and general contractor fields, and considered whether MBDA involvement posed a conflict.

Chair Fernandes requested committee members to send their thoughts on potential additions or removals to the committee by Friday, October 13th, and she would compile a list and send it out.

Committee Feedback

Action items:

1. Committee members to send their thoughts on committee membership to Chair Fernandes by Friday, October 13th.

The meeting was adjourned at 2:59 p.m.

References\Resources:

[BE/DBI Legislative Report June 2023](#)