

# **Equitable Contracting and Purchasing Commission**

*Meeting Minutes – November 19, 2015*

Meeting: November Meeting of ECPC

Date/ Time: November 19, 2015, 6:00 p.m. to 7:36 p.m.

Location: Portland Building, Auditorium

Acting Chair: Andrew McGough – Worksystems, Inc.

Secretary: Melissa Walton Hendricks, Staff – BIBS

In Attendance: Commissioners

- Marcela Alcantar, Alcantar & Associates
- Michael Burch, Pacific Northwest Regional Council of Carpenters
- Vicqui Guevara, Valley Growers Nursery & Landscape, Inc.
- Rosa Martinez, Professional Minority Group, Inc.
- Andrew McGough, Worksystems, Inc.
- Maurice Rahming, O’Neill Electric, Inc.
- Andrew Colas, COLAS Construction
- Tony Jones, Metropolitan Improvement Partnership

Excused: Commissioners

- Herbe Fricke, Oregon Native American Chamber

## **Welcome and Networking – 6:00 p.m.**

- Acting Chair McGough calls meeting to order, 6:00 p.m.
  - Welcomes commissioners and audience members
  - Invites everyone to network with one another for 10 minutes
    - Meeting called back to order at 6:08 p.m.
  - Introduces Commission members
  - Introduces Fred Mill, Chief Administrative Officer of the City

- Commissioner Fricke requested an excused absence in advance of the meeting

### **Discussion of Community Benefits Agreement (CBA) – 6:10 p.m.**

- Fred Miller, the City of Portland’s Chief Administrative Officer, leads discussion.
  - Mr. Miller mentioned several versions of the CBA that the City has used for different projects. The August 2012 model agreement, the agreement used on 2 Water Bureau Projects, Environmental Services, Commissioner Fritz’s projects – they all used different “community benefits agreements.”
    - We don’t have all of the data back from the Water Bureau projects yet, so I don’t have all of the information. But if we applied that version of the CBA to the Portland Building Project then we’d be setting aside 1% (\$1 million) + \$500k in administration costs. I don’t want to do that. That is 50% administration costs. Our goal is 5% administration costs.
      - My comment to the council was that I am all for the direction of the CBA. Let’s put in a 1% community benefit, and decide how to properly administer it. That is what we’re looking for – how do we administer this?
- Commissioner Rahming: I’m confused about you saying you don’t have all the data. The city has the complete data from the projects. Is the city not sharing or giving you access to that data? And also, yes, that’s true about the administration costs, but those Water Bureau projects came in below budget and ahead of schedule.
  - Mr. Miller: I talked to City staff in Procurement this week, and they told me that the data is not in. It is possible it has come in since then, but earlier this week it was not in.
    - Commissioner Rahming: I guess I’m just wondering what data they are waiting on? What information has the City supplied to you?
      - Mr. Miller: I am waiting on final reports from Procurement. I was told that data was supposed to be given to the City by November 13, and we have not received it yet.

- Tony – comm. Is charged with much greater than just PPB project? Why focus on this proj.?
  - We have bigger question about bureaus under your jurisdiction and #s are very bad. Want your consistent participation and procurement participation on how to make bigger changes
    - Fred – Christine and Ken are coming next month. That’s great, we want to discuss how to increase utilization
    - Andrew M – seems to be an enviro where things can get skewed. Would love to see info about all diff efforts for comm agreements. How do we improve? We’d love that
- Andrew C. – these 2 proj have a lot of \$. How does the city not have the data from 2012 projects Maurice was talking about? How do we not have this info in real time? Are we not tracking?
  - Fred – I was told Nov 13
    - Maurice – I have a summary sheet. This isn’t data I’m supplying. This is data the city is supplying to the group, that’s why I’m confused. What data does the city need from the community?
      - Fred – I think Christine is the one to ask that because I don’t know
- Michael – we reviewed data monthly – we worked on those, and that’s what Maurice is talking about. That data resides with the city, they’re obligated to track. There is a report that Purchasing requested, additional info like “what kinds of outreach are you doing?” but the #s of apprentice, journey people, etc. resides with the city. Hard data lies with the city (gender, ethnicity).
  - Fred – my sense is that they’re trying to do a broader report with more discussion.
- Andrew C. – that data is so critical that subKs wont get paid if they don’t turn in that data. The data is real time. We’re focusing on 2 projects, and they have been completed. We’re not focusing on methodology. We’re greenlighting new projects, without analyzing the data.
- Michael – if every job you bid on as a contractor it’s diff to know what the goals are. What we’re shooting for.
- Fred – I’m looking at the eval of those two (as is council) to see how well it worked. I need the report, and they said they’re waiting on more info. We need all that info available.

- Commissioner Rahming: I think what is confusing is that you're talking about data. The City collects the data during a project, and the City doesn't pay you until you give them that data. What the City was gathering was anecdotal evidence about additional factors. That is outside the CBA and the resolution. We can work to provide that, but I wouldn't call that data.
    - Mr. Miller: I can agree with that, but to evaluate the program they need that information. Forget the word "data." I am waiting on the report.
- Commissioner Jones: We have been here since August. The City is getting ready for new fiscal year. 95% of contracts go to white males. We know we have a problem, we don't need a lot more data. What I want to look at is proposals in the CBA. I'm not worried about 1% of the Portland Building Project – \$1 million is chump change. 22% of contractors are supposed to be M/W/ESB firms, 12% are supposed to be disadvantaged women contractors. On this project alone that is \$40 million in the hands of M/W/ESB firms. This is urgent. We want systemic change, not to focus on one project. I want to talk about overarching goals. --
  - Mr. Miller: Christine Moody has talked about goals for the Portland Building Project and they are ambitious. Also, the construction costs for the building are only \$95 million. \$195 million is the total cost of the project including relocating people during construction.
    - Commissioner Colas: Well we don't want to focus just on one big project. We want to discuss a citywide change
      - Mr. Miller: Ok, I understand, but that is sort of unrelated to the CBA.
        - Acting Chair McGough: To be fair to Fred, we're here to talk about CBA issue. But you can hear the passion – we want systemic changes. The numbers are terrible. How do we work with you to work with the commission to create real systemic solutions?
          - Mr. Miller: I believe that is exactly why the commission was created. I know you

reviewed the audit, and one of the suggestions was to separate ESB out of the M/W/ESB equation. We cannot do that per the city attorney's office. Also, one of the other suggestions in the Audit report is to move to a least cost model. We really don't agree with that. At the City we do "best value," not "lowest cost," and that actually allows us to do more M/W/ESB contracts.

- Commissioner Burch: You said that you wrote on Oct 8 and didn't get a response from the Commission. Part of our response was to go to City Council meeting with our recommendations. Now, if you're asking for help figuring out best practices for CBA, I am happy to review other plans.
- Commissioner Rahming: We asked the City to pause on the third resolution at City Council, and we felt ignored. Why not hold off on passing the resolution to allow the Commission time to give input?
- Commissioner Jones: I think going forward we need to get back to some of our overall charge. We can give input on a project, but we want to work on more of a city-wide policy. I don't want to get too side-tracked on this single project. From the auditor's report, my concern is that ESBs have not been subject to disparate treatment. There are numerous exceptions to open competition for city projects. We need to come up with some real recommendations by January because it is budget season.
  - Mr. Miller: January sounds like a good target as far as the budget goes. I have heard from the City Attorney's office that we cannot pull out ESBs from the M/W/ESB goals. We are going to follow their legal advice. I am happy to set aggressive goals on this project for M/W/ESB participation though.
    - Commissioner Jones: It's more than just this project, though. And I've spoken to the City Attorney and disagree with what they've said. For the Portland Building are you going to use CBA type goals? That's 22% M/W/ESB participation, and 12% MBE, DBE, WBE participation.
      - Mr Miller: I believe those are Procurement's goals.
        - Commissioner Colas: Procurement is just a flat 20%. And that applies to all M/W/ESB firms. And so it ends up being 19.5% of that is ESB, and we

call it equitable when in reality we are doing nothing for women and ethnic minorities.

- Commissioner Rahming: I am not afraid of aggressive goals, but what do you consider aggressive goals? And are you looking at meeting or exceeding those goals?
  - Mr. Miller: I need to spend more time to give specifics on our goals. I can't just say I agree to aspirational goals unilaterally. I don't know what we're looking at because we haven't designed the contracts yet. We don't have any contracts yet.
    - Commissioner Rahming: I would rather hear "we're not going to do anything." Then for everyone to waste our time. I am nervous hearing "we have an aggressive goal, but we don't know what the goal is yet."
      - Mr. Miller: That is not right – this project is still 2 years away. There is a long time to go, and we are goal-setting right now. What I wanted to say is that we've committed to \$1 million on this issue, but we are looking for a way to go forward.
        - Commissioner Rahming: Ok, but we know what trades are needed to renew a building. We need dry wallers. We need plumbers. There are things that we already know because of the type of project that it is.
          - Mr. Miller: You will need to talk to procurement next month. I wasn't invited to speak on that, and I haven't come close to seeing those numbers yet. So far I haven't seen any recommendations for contracting numbers.
- Commissioner Alcantar: One of the things for me, after attending the City Council meeting, is that this issue is not new. Where there is a will there is a

way. I don't think there is a will at the City, or there would have been a way already. We need the City to be willing to implement the commission's recommendations. We went to the City Council for the first time, and we were blown off. Our recommendations were not listened to. It makes me feel like we're just wasting our time. We have the data. The data has been there forever. How do you want to interpret the data? If you don't implement a way to make it happen we're wasting our time.

- Commissioner Colas: Our conduit to the city is usually Bryant, but it's no different that we're talking to you. You're the conduit today. I recommend that we as a body come with recommendations for your office, and then go to City Council. And I'd hope that you'd come and sit with us at City Council. I want to go to City Council with your support so we can get things done. That's what I hope is done by January.
- Commissioner Jones: Forgive me, I wasn't at the last meeting, but this resolution was brought to us. We wasted our time working on this thing for the last 2 months instead of focusing on city-wide recommendations.
  - Mr. Miller: It's fine with me if you don't want to be involved. I just thought it was inappropriate to go forward without asking for input from this commission.
    - \*multiple commissioners objected that they did want to be involved\*
    - Acting Chair McGough: I think you heard from one Commissioner who doesn't want to work on this. The Commission as a whole is interested, but we do want to look at systemic issues, too.
- Commissioner Alcantar: Recommendations were proposed, to accept certain audit report recommendations.
  - Acting Chair McGough: It did sort of feel like there was some dismissal of the commission members watching it on TV, but I wasn't there. We need to take you at your word, Fred, and we want to do that. We want to get to that place where we're in agreement and go to Council together. I just want to reiterate my colleague's sense of urgency. We are interested in doing anything we can to help expedite the process. What would be most effective way for us to interface with your team?
    - Mr. Miller: It would be great if you came to us with recommendations. Even by the meeting next month when

Christine Moody and Ken Rust will be here. It would be great to have some proposals at that time, but we have a bit of time if that is not long enough for the Commission.

- Commissioner Rahming: Well, we did have recommendations at the City Council meeting and they were ignored. Maybe we should put them in writing.

### **Call for Public Comments to Address Mr. Miller – 6:50 p.m.**

- James Posey: Fred you've been around for a long time. There's a 1996 disparity study, and you talked about an absence of data. You're responsible here, the buck stops with you. I'm embarrassed that you went to city council without knowing the ins and outs of this project. You're a public servant and you come here talking about an absence of data on the CBA. I'm not a CBA fan, but the real deal is you want to minimize the whole discussion to \$1 million. And you're talking about an absence of data when Christine isn't here. Why isn't she here? I know you. I know that you know how important the data is. You could spell out every dime about data on brick and mortar.
- Matt Malmshaimer – Mr. Miller, you said you are in the process of evaluating two models of CBA? Can you describe that process?
  - Mr. Miller: I don't know what the study looks like yet, Procurement puts it together. We committed to Council to look at that report, talk to the community, and come back to Council to say why \$1 million. I haven't seen the report yet, that's my concern.
    - Mr. Malmshaimer: Will you commit to continue interacting with the public and this commission on this? I'm not sure where \$1 million came from. No one is, it seemed unilateral.
      - Mr. Miller: Not exactly, I'm hearing that they don't necessarily want to participate.
        - Commissioner Burch: That was one commissioner, we do want to participate.
          - Mr. Miller: It's a question of developing the right balance. The Water Bureau Projects were 1%, it didn't come out of nowhere. My commitment was to do at least that, that's where the \$1 million came from.
    - Acting Chair McGough: We just want to be part of the evaluative process of those CBAs.

- Mr. Miller: Yes, there are about 8 groups that are interested in CBAs that we are trying to interact with.
  - Acting Chair McGough: When Christine and Ken are here next month I'm hoping the report is done.

### **Alternative Contracting 7:05**

- Lisa Gramp, Deputy City Attorney, leads discussion.
  - When can the city engage in alternative contracting is the primary topic of this discussion.
  - Oregon state law requires sealed competitive bidding for public contracts.
    - We have asked for disaggregated data from that.
    - The City can engage in alternative contracting (i.e. non-sealed competitive bidding) in a few ways
      - Design build (i.e. Portland Building Project), CM/GC (i.e. Parks projects)
      - However, the City cannot have a blanket policy of when it will use alternative contracting. For example, switching to alternative contracting for every project in excess of a certain dollar amount. The attributes for the project are what make alternative contracting appropriate.
      - To use Alternative Contracting we have to make two threshold findings:
        - Substantial likelihood of cost savings
        - Not substantially lacking competition
      - Alternative contracting approach
        - Prime contractor development program was developed along these lines – maybe the commission can look at how to utilize that and cut across.
- Commissioner Alcantar – What is the city's code on ESB in the MWESB?
  - Ms. Gramp: I do want to clarify about the advice that comes from the City Attorney's office on including ESBs – it's just that, it's advice. It's the public body that decides what kind of risk it wants to take, we don't make the decision, City Council does.



federal race and gender neutral program. They felt like the risk was there, but using DBE satisfied it. Is the City willing to go with just a DBE program, and remove ESBs?

- Ms. Gramp: That's not a legal issue, that's a policy question. I would say that M/W/ESB are state certifications, and I'm not sure what the hurdles are to be certified federally.
  - Commissioner Rahming: Well, we're the only state using ESBs. Other states use DBE or other neutral programs.
- Commissioner Jones: Does state law require sealed competitive bidding? Is there any flexibility with that? Does it have to be lowest price? Can't there be other criteria? Whether it's qualifications or diversity or whatever?
  - Ms. Gramp: I'd want to know more about how that plays out. I'd guess under OR law they wouldn't be subject if they are real estate. There are certain exemptions.
    - Commissioner Jones: I'm just trying to be creative.
      - Ms. Gramp: Under the state statute real estate transactions are not subject at all. The Housing Bureau can do direct negotiations.
- Acting Chair McGough: It's not necessarily a number threshold, but would there legal ramifications if we had more CM/GC with an equity focus? For small projects?
  - Ms. Gramp: That's why I mentioned Prime Contractor Development Program. I think there has been some effort to cleave off some work specifically for program participants. It's hard to justify alternative contracting for routine work for the City. You've got to make the finding that it's not diminishing competition. It can't be city policy that projects that cost a certain dollar amount are automatically alternative contracting. It's supposed to be limited to projects that are set up for that.
    - Commissioner Rahming: Again, I'd like the Prime Contractor Program to be DBE based. I'm concerned about diversity within the program.
- Commissioner Alcantar: You said that there are some things that you don't go low bid on. I understand professional services and qualification-based exceptions. But, qualifications-based in terms of professional services, for a small business to be qualified the limit is \$50,000. We need to look at raising that limit to at least \$100,000 to make sense for a professional to at

least be in business. A lot of my competitors have been small business ESBs with three times the resources. Professional services gets overlooked.

**General Public Comment 7:29 p.m.**

- Mr. Posey – Lisa, you're not an inanimate object. Your inferences in the attorney's office set city policy. You know no one has been sued about this in a long time. You know the risk factors. Fred was deferring to you. The Prime Contractor development program is a joke – many of those people have been prime contractors for 20 years. We defer to insane policies.
  - Commissioner Jones: I have heard feedback from City Council saying that they look to the legal advice from the City Attorney's office to make their decisions. So it does feel a bit like the chicken or the egg here. We should look to the City Attorney's office's legal opinions, too. How can we get things done?
- Commissioner Burch: I just want to do a small acknowledgment before we end the meeting. During the City Council meeting today there was a resolution to award 8 contractors for Equity Best Practices in Contracting. One of them was O'Neill Electric – congratulations to Commissioner Rahming.

**Commission Adjourned at 7:36 p.m.**