

PORT OF SEATTLE
MEMORANDUM

COMMISSION AGENDA

Item No.	<u>6a</u>
Date of Meeting	<u>November 3, 2009</u>

DATE: October 28, 2009

TO: Tay Yoshitani, Chief Executive Officer

FROM: Tom Barnard, Research and Policy Analyst
Ralph Graves, Managing Director, Capital Development

SUBJECT: Second Reading and Final Passage of Resolution No. 3628 amending Resolution No. 3605 – Master Policy Directive (Delegation of Authority)

ACTION REQUESTED: Second Reading and Final Passage of Resolution No. 3628, amending Resolution No. 3605.

BACKGROUND

The proposed amendments outlined in this memo reflect the Port's ongoing efforts to increase our efficiency and effectiveness as an organization. They build on the significant changes in construction contracting policy and procedures required by Resolution No. 3605, which was adopted by the Commission on August 26, 2008, in response to recommendations made by the State Auditor's Office. This resolution has improved the transparency and accountability of the Commission authorization process for major works contracting. New procedures were added that clarified when and how Port staff gain the Commission's approval on major Port construction projects. The resolution also strengthened the Commission's relationship with the Chief Executive Officer (CEO) by clarifying his authority and the relationship between the Commission and the CEO.

The new policy passed last summer eliminated the previous practice of "project-wide authorizations," which allowed only one review of major construction projects and put in its place a three-step authorization process. Projects costing more than \$200,000 currently require separate Port Commission approval for (i) a review of project feasibility and authorization to complete design, (ii) the authorization of construction and approval to advertise, and (iii) an authorization to award the contract. This provides the Commission the opportunity to consider projects more thoroughly and openly with higher quality information. In some cases, this has led the Commission to request changes to and even halt a project. The increased transparency and accountability resulting from the adoption of Resolution No. 3605 was well illustrated by the

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financial and construction review of the suspension and re-start of the Rental Car Facility. The new multi-stage review process has also produced more informative memos and presentations for the Commission.

Since the passage of the Resolution in 2008, Commission and staff members have completed a number of activities centered on implementing the resolution successfully. In addition to the many departmental briefings that were given initially to familiarize staff with the new requirements, an inter-departmental committee was formed comprised of division representatives who were most familiar with the resolution. This committee responded to more than forty requests for clarification on the meaning or implementation of individual sections of the resolution, dispensed advice and guidance on the correct procedures to follow, and grappled with Resolution No. 3605 issues as they arose. A Frequently Asked Questions (FAQ) page was also developed and posted to the Port's intranet site to respond to questions that the committee received more than once.

Resolution No. 3605 included a provision that it must be reviewed "in twelve (12) to eighteen (18) months after it enters into force...." This review allows the Commission an opportunity to evaluate the effect of the resolution on Port operations, including increased transparency, accountability and oversight, and to make any changes to the resolution that the Commission had not anticipated when adopting it in 2008. An initial briefing on possible changes was presented to the Commission on April 21, 2009, and the Commission was briefed on the proposed changes recommended in this memo on September 1, 2009. On September 17, 2009, the Commission held the First Reading of the Resolution in open session with all changes that were planned up to that point. Since that time, two additional steps were taken:

- Public comment was solicited from September 17 to October 26 by posting the proposed Resolution on the Port's web site, and it was also sent individually with requests for comments to a number of Port's stakeholders and observers. These included the Century Agenda panelists, the original 3181 Citizens Advisory Panel, the Municipal League, the League of Women Voters, the Associated General Contractors, the members of the Competitiveness Panel (held in February 2009), and many of our tenants and customers in the Airport, Seaport and Real Estate Divisions. We received specific comments from one of our original consultants on Resolution No. 3605, Shan Mullin, who felt the proposed changes were welcome and appropriate, and looked forward to future reviews. The Association of General Contractors (AGC) also were appreciative of the proposed rise in authorization levels. Although some responded to thank us for sending it, no other significant substantive changes were comment was received.

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- Commissioners were consulted individually to give their views on the proposed changes. In some cases, the proposed changes have been altered to reflect positions that appear to have gained possible consensus among Commissioners. These issues will be discussed fully in open session.

This memo, the proposed resolution and accompanying PowerPoint presentation is the last step in that review process. The recommendations include raising almost all authorization levels required for Commission approval from \$200,000 to \$300,000; correcting language in Section 1 related to “Authorized Budget Limits” that was a holdover from Resolution No. 3181 (the predecessor of Resolution No. 3605); adding a new Section 1.7. that requires the Commission to review and approve any RCW or legislative change before it is implemented by Port staff; adding a section on the CEO’s authorization for competitive waivers; re-writing Section 7.1., Personal Services; adding a Critical Works provision to Section 7.3., Goods and Purchased Services; adding language that allows but does not mandate the CEO to retain counsel for Port officers and employees without Commission approval except for fraud or criminal behavior; adding language where the wording is unclear in various sections of the resolution to indicate the Commission’s intent; and improving procedures used when the Commission authorizes capital projects.

ISSUES UNDER REVIEW

Adding new language describing a review period

Although the Commission assigned an original review period of 12 to 18 months after passage of the Resolution, no subsequent review was assigned. The Commission is proposing new language mandating another review “within two years or sooner if legislative changes in contracting practices or related matters require Commission review.”

Replacing and clarifying the term “Authorized Budget Limits”

The term is used throughout the current Resolution No. 3605 as an additional means of limiting the spending authority of the CEO and is usually combined with the \$200,000 limit, as in “are less than or equal to Two Hundred Thousand Dollars (\$200,000) and are within **Authorized Budget Limits.**” This provision presents problems, as unlike other governmental bodies, the Port works with an accrual budget, which is continually adjusted throughout the year to achieve budget targets.

To solve this problem, Port staff proposes the insertion of a new Section 1.5 that provides:

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- General authority for the CEO to exercise his authority “in a manner consistent with the Port’s annual operating budget, annually approved capital budget and annually approved Capital Improvement Plan.” It also grants the CEO specific authority to reallocate amounts and incur variances from the Annual Operating Budget.
- A request for the CEO to report to the Commission not less than quarterly on actual results versus budgeted amounts for both revenues and expenses and, if necessary, more frequently if there is “a material, negative variance from the Annual Operating Budget, Annually Approved Capital Budget or Annually Approved Capital Improvement Plan.”
- Finally, when seeking project approval, the CEO would indicate whether a project is within the Annually Approved Capital Budget and Annually Approved Capital Improvement Plan and, if not, how it is expected to be funded.
- We would then generally delete the phrase “and are within Authorized Budget Limits” throughout the current document.

Raising most authorization levels for Commission approval to \$300,000

Resolution No. 3605 authorized the CEO to approve all contracts up to \$200,000 without Commission approval. This amount was a carry-over from Resolution No. 3181, which was passed in 1994. Port staff proposes granting the CEO authority to approve all contracts up to \$300,000, which adjusts for the rate of inflation since 1994 and makes the CEO’s authority consistent across-the-board to facilitate contract administration. Based on the experience of the past year, there are relatively few projects or contracts that fall between \$200,000 to \$300,000, so this is not seen as a significant change.

An additional issue is that Resolution No. 3605 allows the CEO, without prior Commission authorization, to approve small works construction contracts up to the monetary limit set by RCW 53.08.120. This was done to keep our limits on contracting approvals no higher than those mandated by the Legislature. In 2009, the Washington State Legislature passed HB 1196, as an amendment to RCW 53.08.120., which raised the dollar amount for what could be considered small works contracts from \$200,000 to \$300,000. Port staff has interpreted this change to allow the CEO to approve contracts up to \$300,000, resulting in the advertisement of four additional contracts valued between \$200,000 and \$300,000 since the legislation went into effect on July 26, 2009.

In Section 1.7., Roles and Responsibilities of the CEO, an additional sentence will be added: “Any changes in the policies and procedures of this Resolution brought about by changes in Legislation or RCWs will be reviewed and approved by the Port Commission prior to implementation by Port staff.”

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Notification procedures for change orders on contracts over \$300,000.

We are proposing a new way of improving the notification process on change orders. Currently, the Commission receives notices of every change orders once a project is 10% over the original contract amount. Although this results in many notifications, it does not always provide a clear analysis of why the project is undergoing cost increases or what Port staff is doing to rein them in.

The new language provides a notification process at certain percentage points, (10%, 25%, 50%, 75%, 100%, and every 50% increment after that.) But even more importantly, the notifications will provide an analysis of why the project is undergoing cost increases, and what staff is doing in an attempt to control them.

Adding new language on approving Competition Waivers

Port staff proposes adding a new section 6.4., which authorizes the CEO to approve competition waivers.

The proposed language defines the circumstances under which these waivers would be used, including (1) when there is only one source for the service or product, or (2) when the only source for the service or product is proprietary in nature, or (3) when there is only one source for the service or product that is compatible with existing Port infrastructure, or required for inter-operability, or (4) when the waiver is necessary to authorize work with a contractor or service provider who has exclusive knowledge that was provided during a prior phase of the contract or project.

These instances happen infrequently, and Port staff estimates that there would be an average of ten of these waivers per year. In addition, the authority to approve funds for the project is still retained by the Commission for any project over \$300,000.

Port staff recommends that the often detailed technical nature of these actions argues for delegating this authority to the CEO. The current procedure is for the Director of the Capital Development Division to approve these actions after concurring recommendation from the Legal Department and the Capital Procurement Office (CPO). In addition, notification of all such waivers shall be provided to the Commission prior to the proposed starting date of the contract or purchase, and will include the exact justification for the waiver.

Examples of our application of this provision would include:

- Hiring a consultant to provide design support during construction of a design the firm executed for the same project under an earlier contract.

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- Procuring support for a proprietary system (such as using the Bombardier Company for the airport satellite terminal shuttles).
- Specifying a make and model to preserve interoperability when expanding an existing system, such as surveillance cameras or fire alarms.
- Using a specific designer and producer of software already installed at the Port when it was necessary to maintain, expand or upgrade a system using that same software.

Staff will draft formal procedures implementing the competition waiver process, and present them to the Commission for review.

Adding new language to Section 7.1., Personal Services

Three additional subsections were added to this section. The first adds an opening statement that commits the Port “to promote full and open competition, transparency in its procurement practices, opportunities for small businesses, and compliance with all required statutory regulations.”

The second subsection adds language covering amendments to service agreements. It provides the CEO with the same level of authority (\$300,000) to execute service agreements as CEO has for other contracts. Any amendment over \$300,000 would require Commission approval. It also adds a provision that any amendment to personal service contracts, whose value, singly or cumulatively, exceeds fifty percent of the original contract, must be provided to the Commission prior to the proposed starting date of services under the amendments.

The third adds language that commits the Port to “develop an appropriate training program for Port staff with respect to efficient and effective contract management. Port employees responsible for executing or managing personal services contracts shall complete the Port’s training program. The training program will be based on RCW 53.19.080, Port policy and public sector contracting best practices.” This provision is intended to meet the demands of that legislation passed in the 2008 Washington State Legislative Session that mandated such training be established by the end of 2009.

Increasing the level of purchased goods requiring Commission approval from \$200,000 to \$300,000 and removing the conditional timing requirements

This proposed change in Section 7.3.3. would authorize the CEO to procure “Goods and Purchased Services” up to \$300,000, as long as, where appropriate, such acquisitions would be approved as part of normal monthly expenses. It removes the different requirements that were based on the length of the contract, which was an unhelpful distinction. This provision reflects the necessity at times to make major bulk purchases of materials for the day-to-day operation of the Port. The CEO currently has the authority to execute multi-year contracts up to \$200,000 without obtaining Commission approval. Current language for one-year purchases or contracts

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does not require Commission approval based on any specific amount, but only states it should be included in the Capital or Operating Budgets. Because the process for Commission approval will no longer depend on the length of the contract, this will provide consistency and visibility to the process of approval for purchasing goods and services. Commission approval for these contracts will be based on the size of the purchase, as it should be, regardless of the term of the contract. A likely result of this change is that more authorization requests would come before the Commission, thereby providing greater oversight, visibility and transparency to these transactions. We estimate that 25-30 additional requests will come before the Commission for approval if the limit is set at \$300,000.

Adding new language to Section 7.3., Goods and Purchased Services to address a possible “Critical Work” situation

Port staff proposes adding a provision for “Critical Work” identical to the use of that term in Section 4.2.3.7., and delegate the authority to the CEO to commit up to \$500,000 for “circumstances not constituting a legally defined emergency but otherwise requiring immediate action to avoid significant adverse consequences.” This exception provides the Port with a vital tool to deal with a critical need when Port staff is unable to obtain approval from the Commission in a timely manner for the usual approval process. Section 7.3. would then be consistent with Sections 4 and 5. These sections, which cover public work projects and non-public work projects respectively, also have a “Critical Work” procedure in place for construction work.

Adding new language in Section 8, Utilization of Port Crews, that allows the CEO to authorize maintenance work up to \$300,000

Port staff proposes this new provision be inserted into Section 8, covering the Utilization of Port Crews. The issue of maintenance work was not addressed at all in Resolution No. 3605. The proposed change provides the CEO with the authority to approve “heavy” maintenance work funded from the operating budget, involving major necessary repair and replacement to Port facilities, whether performed by Port crews or by contract, up to \$300,000. This section is quite specific and would exclude public work or non-public work projects funded from the budget, or any work that physically expands a facility or provides new capability. This work would also not fall under the very narrow Washington state statutory definition of minor maintenance. Work of this type over \$300,000 would still require Commission approval, while the delegation of authority to the CEO below that level would assist in the efficient performance of programmed repairs.

Adding new language to Section 9.2, Legal Services

Port staff proposes an insertion of language in Section 9.2., Legal Services, that allows (but does not mandate) the CEO to retain counsel for Port officers and employees without Commission

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approval in all but matters alleging fraud or criminal behavior. The Commission, CEO and other managers and employees are routinely named in actions against the Port simply because of their position as officers and employees of the Port. This measure would allow the Port the right to retain counsel, subject to the limitations of RCW 53.08.208. The statutory reference limits the Port's ability to pay defense costs for employees who are found to have acted in bad faith or outside the scope of their authority.

LANGUAGE CHANGES FOR CLARITY

- Port staff proposes re-wording Section 5, Non-public Work Projects to remove repetitive language already contained in Section 4 on public work projects, and leaving intact language in Section 5 that clarifies how the Commission authorization process is different than Section 4.
- Cleaning up language in sections on:
 - Section 4.2.3.3: Project Changes
 - Section 4.2.3.8.: Change Orders and Section 4.4., Small Works Change Orders.
 - Section 20.2.: "Best Bid" definition
 - Section 7.7.4.: Audit and Accounting Services
 - Section 16: Affirmative Action (now called Equal Employment Opportunity)