

PORT OF SEATTLE
MEMORANDUM

COMMISSION AGENDA

Item No. 6c
Date of Meeting September 17, 2009

DATE: September 9, 2009

TO: Tay Yoshitani, Chief Executive Officer

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

SUBJECT: First Reading of Resolution No. 3628 amending Resolution No. 3605.

ACTION REQUESTED: First Reading 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 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 procedures 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 now 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 financial and construction review of the suspension and re-start of the Rental Car Facility. The

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new multi-stage review process has also produced more informative memos and presentations for the Commission.

Since the passage of the Resolution, 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.

This memo and the accompanying PowerPoint presentation is the third step in that review process. The recommendations include raising certain authorization levels from \$200,000 to \$300,000 or \$500,000; 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 language where the wording is unclear in various sections to indicate the Commission's intent; and improving procedures used when the Commission authorizes capital projects. There are no proposals for new procedures or additional limitations on the Chief Executive Officer's authority.

ISSUES UNDER REVIEW

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

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past year, there are relatively few projects or contracts that fall in the \$200,000 to \$300,000 range so this is not seen as a significant change. Having a consistent level of \$300,000 for all contracts would bring this type of contract authorization into line with others.

An additional issue is that Resolution No. 3605 allowed 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 four additional contracts between \$200,000 and \$300,000 to be advertised since the legislation went into effect on July 26, 2009. No contracts have been awarded.

In Section 4.3, which covers Small Works contracts, an additional sentence will be added: “The Commission shall review and approve any changes in authorization procedures affecting Small Works contracting brought about by the amending of RCWs by the Washington State Legislature.”

Increasing the level of purchased goods requiring Commission approval from \$200,000 to \$500,000 and removing the conditional timing requirements.

This proposed change would authorize the CEO to procure “Goods and Purchased Services” up to \$500,000, so 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. For example, the December 2008 snowstorm required the procurement of a large quantity of de-icing fluid for the Airport’s runways, and the bulk purchase needed to be made quickly. 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 does not require Commission approval based on any specific amount, but only states it should be included in the Capital or Operating Budget. 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 27 additional requests will come before the Commission for approval if the limit is set at \$200,000 and 10 additional requests if the limit is set at \$500,000.

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Authorizing maintenance work up to \$500,000.

Port staff proposes this new provision be inserted into Section 8, covering 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 \$500,000. This section is quite specific and would exclude public works 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 \$500,000 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.

Replacing and clarifying the term “Authorized Budget Limits.”

The term is used 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:

- 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.

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Adding language for Section 7.3 Goods & 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 delegating 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 get to 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 on approving competition waivers

Port staff proposes adding a new section 6.4, which says, “The Chief Executive Officer (CEO) is authorized to approve competition waivers consistent with applicable laws.”

Port staff recommends that the often detailed technical nature and the lack of advanced warning of these actions argues for the delegation of this authority to the CEO. We recognize the obligation for the CEO to use such authority sparingly, taking care to adhere to the letter and intent of the law and to document such decisions thoroughly. Our current procedure is that the Director of the Capital Development Division approves these actions after concurring recommendation from the Legal Department and the Capital Procurement Office (CPO). Depending on the specific action taken, these may require public and/or Commission notification, according to Washington State law and Port policy.

Various State laws (e.g. RCWs 39.04.280 and 53.19.20) authorize agencies to waive competition requirements or to specify brand-name products under defined circumstances.

Examples of our application of this provision would include:

- Hiring a consultant to provide design support during construction of a design the firm executed under an earlier contract.
- 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 consistency when expanding an existing system, such as surveillance cameras or fire alarms.

Staff will draft formal procedures implementing the competition waiver process.

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Retention of legal counsel

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 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 them the right to individual counsel. 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.

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. Staff proposes adding language mandating review "within three years or sooner if legislative changes in contracting practices or related matters require Commission review."

LANGUAGE CHANGES FOR CLARITY

- Port staff proposes re-wording Section 5 on 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 process for Commission authorization is different for the two types of projects.
- Cleaning up language in sections on:
 - Change Orders and Small Works Change Orders.
 - "Best Bid" definition
 - Project Changes
 - Personal Services
 - Audit and Accounting Services
 - Affirmative Action

NEXT STEPS

- Posting the resolution with the proposed changes to the Port's external website for a 30-day comment period.
- Incorporating Commission feedback on the proposed changes to Resolution No. 3605.

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- Receiving executive and Port staff feedback on proposed changes to Resolution No. 3605.
- Making final edits to amended Resolution No. 3605.
- Returning to the Commission in October for Second Reading and Final Passage.