

Senate Business and Transportation Committee Members:

I will not attend today's Senate Committee on Business and Transportation Hearing. Please include this email string and its attachment in the Legislative Record for Senate Bill 254.

I was not a member and am not a member of the Interim "Public Contracting Work Group", which I understand was appointed to consider adjustments of the Public Contracting Statute's treatment of what is referred to in Oregon as the "Construction Manager / General Contractor" ("CM/GC") procurement method. I was not aware of the initial meeting of that Interim Work Group, but did attend and observe, as an individual citizen, taxpayer and 32 year Oregon construction attorney, most, if not all of the later Interim Work Group sessions, as they considered what has emerged as Senate Bill 254.

I oppose Senate Bill 254, because it enhances the use of the CM/GC procurement method, which has dramatically eroded the baseline fixed price competitive bid requirements of ORS Chapter 279. Further, it appears that the SB 254 is "not ready for prime time". Six hours notice of a significant revision, over two months after the last Interim Work Group session, seems odd process to me.

The extended period for revision, and yesterday's print DJC's article (copy of web version attached), indicating that a "comprehensive rewrite" has occurred, seem at odds with earlier press reports on the status of the Bill since the Legislature convened.

The confusion that has occurred is natural, since what CM/GC means to any one person or entity depends on that person's or entity's interest and prior experience with the ephemeral, ever-morphing and inherently unstable CM/GC process. Three metaphors repeatedly came to mind, as I observed the Interim Work Group participants struggling to define current practice and what should be the practice in using CM/GC: (1) the Tower of Babel, (2) the Eleven Blind Men and the Elephant and (3) what one of my former law partners' referred to as "two monkeys trying to make love to a football". The problems and complaints are inherent in the process, and the interests of those who seek to maintain and advance it as the preferred method of the spending the Public Dollars, particularly on large projects.

Otto Von Bismarck's enjoinder, that one should not observe the making of sausage or laws, applies in spades, here. I suggest that appropriate Committee action is to table the Bill through another Interim, to allow Interim Work Group and other stakeholders to absorb and react to this comprehensive rewrite.

While I question whether the Bill meets the stated goal of producing transparency in the use of CM/GC, and whether it truly addresses the other significant concerns raised from the sub-tiers of the Industry about their treatment under CM/GC, these are not the primary reasons I oppose its enactment.

It is my considered opinion that Interim Work Group and this Committee began the inquiry at the wrong point. The threshold question should be whether use of CM/GC is in the best interest of the taxpayers, to an extent that justifies ignoring the baseline statutory principle of award based upon fixed price competitive bidding. While I have a lot of reasons for feeling that it is not, here are a few marshaled on short notice, for today's Hearing:

1. CM/GC deprives the taxpayers of the benefits of true competition based on a final design, under which qualified contractors bid and are awarded the Contract upon an one objective criterion, Price.
2. CM/GC erodes the design responsibility of the Architect or Engineer, by bringing the CM/GC Contractor into the design process with the practical power to enforce adjustments of the design.
3. A benefit argued for using CM/GC is that early involvement of persons with construction knowledge and experience will enhance the ultimate constructability of the Project and reduce issues which might result in claims. This does not explain why that has to be the Contractor that will ultimately price and construct the Project. The desired result can be accomplished by having the Architect or Engineer retain under its responsibility appropriately experienced employees or consultants, to assist in producing a final design, before bids are requested.
4. CM/GC almost always allows the Fox into the Chicken Coop. The initial CM/GC selection usually is based on the Agency's subjective assessment of qualifications of a limited pool of contractors, and on only partial or conceptual design. The selected CM/GC usually has a significant role in (and often practical control of) the ultimate design details and the final "guaranteed maximum price". The selected CM/GC enjoys immense leverage, under critical time constraints, where the opportunity to go to a different procurement method or contractor is impracticable.
5. CM/GC excludes from competition a lot of contractors capable of doing the work, particularly on intermediate-sized and smaller projects. This has a further detrimental effect on the emergence of small and mid-sized businesses as viable contractors over time, given the dominance of those who have been playing the CG/GC game for so many years. As such, CM/GC conflicts with policies and programs aimed at advancing small business and disadvantaged and minority-owned businesses.
6. Fixed price competitive bidding against a completed design allows objective competition and basis for award, and assures that the taxpayers get the lowest available price. It is not possible to determine that this is the case with CM/GC.

Further, during the course of attending these meetings, I heard a few troublesome anecdotes from subcontractors about CM/GC. If the Legislature really wants to clean up the use of CM/GC and see it limited to the most appropriate context, the Committee should open its public Hearings to complaints about the process. Again, I urge the Committee to hold off on the Bill this session, and task an enhanced Work Group to focus on the front-end issues about use of CM/CG, to see whether it should continue as the dominant public contract procurement process in the Industry.

SB 254 may actually address some of my concerns, in that makes it much complex for agencies to use the CM/GC method, and will requiring spending considerable sums aimed at compliance. Perhaps, fixed price competitive bidding, based on fully-defined plans and specifications, will reemerge as the dominant procurement method, in response to the intensely competitive market which has resulted from the Recession and public officials'

concerns with demonstrating compliance under the new "transparent" requirements of the Statute.

I observe in this process what Noam Chomsky calls the "Manufacture of Consent" and the "Illusion of Participation". I submit these comments for the Legislative Record, with little expectation of affecting enactment of SB 254, but as a lone voice crying in the Wilderness, seeking to establish that SB254 did not go through without complaint. I ask that Committee Staff notify me, at least a few days in advance of the Committee's next Hearing on SB 254, if there is any problem including this email string in the Record.

I appreciate the Committee's attention.

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From: Brennan Patrick H [<mailto:patrick.h.brennan@state.or.us>]

Sent: Tue 4/9/2013 9:08 AM

Subject: SB 254 amendments - resend (corrected links?)

NOTE: The links should now be correct -- sorry for any confusion/inconvenience.

I have provided links below for the two sets of amendments for Senate Bill 254, the product of the Public Construction Contracting Work Group. The two versions are as follows:

The -1 amendment is the larger, more comprehensive version that encompasses the amendments to the Underwood red-line draft versions that have been circulated during the past month and a half; the changes encompass both the specific amendments discussed during the January 28 work group meeting, as well as those discussed more in concept at that meeting and disseminated via e-mail during the past couple months. You can view that version HERE:

<https://olis.leg.state.or.us/liz/2013R1/Downloads/ProposedAmendment/1189>

The -2 amendment is smaller and encompasses only those specific seven changes that were agreed to and adopted by consent at the January 28th meeting (these changes are also included in the -1 amendment); you can view the -2 amendment HERE:

<https://olis.leg.state.or.us/liz/2013R1/Downloads/ProposedAmendment/1190>

We are, of course, scheduled for work session on Senate Bill 254 this afternoon at 3PM in Hearing Room B before the Senate Committee on Business and Transportation. Because we just received these amendments this morning, there will be no way for the committee to actually send the bill out today, as

our committee rules require analysis by Legislative Fiscal Office and Legislative Revenue Office to be completed prior to sending a bill out of committee – and LFO and LRO will not have time to perform that analysis on something this complex on such short notice. However, I expect that we will take up a discussion on the amendment(s) this afternoon in work session, so if you are interested in attending I highly encourage you to do so.

Do not hesitate to contact me if you have questions or comments.

Patrick Brennan, Administrator

[Senate Committee on Business and Transportation](#)

[Joint Committee on Interstate 5 Bridge Replacement Project](#)

Public contracting bill still on hold

POSTED: Friday, April 5, 2013 at 02:12 PM PT BY: Tom Henderson

The Senate Business and Transportation Committee delayed action on Oregon's public contracting law - again.

Senate Bill 254 would change how and when Oregon's public agencies could choose contractors for construction projects directly without going through a bidding process.

At first, it looked like smooth sailing for the construction manager-general contractor bill. A public hearing was held Feb. 25 with barely anyone offering testimony. It was then scheduled for a work session. Then it was rescheduled. Then it was rescheduled again. Then it was rescheduled again.

Committee members were supposed to take action on the bill on Thursday, but now they won't do so until 3 p.m. on Tuesday.

"We're still waiting on an amendment back," committee administrator Patrick Brennan said. "The amendment request we submitted is long and technical, and we have not received that amendment back yet. We don't think there is a reason to bring back the bill for a work session until we have an amendment before us that the committee can consider.

"I fully expect to have an amendment before us before (Tuesday). Hopefully, we can move forward with the bill at that point."

Most of the specifics of the bill were hammered out by a work group of various stakeholders before the Legislature even convened. State Sen. Lee Beyer, D-Springfield, who chairs the Business and Transportation Committee, organized the group in response to concerns raised about the public contracting law during the previous legislative session.

Brennan said the work group's last meeting was Jan. 28. At that meeting, he said, members decided the bill should accurately reflect language used by construction industry professionals.

"That turned into quite an undertaking," Brennan said. "It means a comprehensive rewrite of the bill."

Rewriting a bill in the middle of a legislative session is no lean feat, he said. Workers in the legislative counsel office have been "carpet bombed" by requests for amendments and rewrites, he added.

As written, Senate Bill 254 specifies the conditions under which a public agency could use an alternative contracting method. It requires the attorney general to adopt rules to specify the precise procedures for using CM-GC services.

It also states that public agencies must obtain construction services in accordance with the new model rules.

If the bill were to pass this session, it would go into effect July 1, 2014.

When the rewritten bill returns for a work session in Hearing Room B, Brennan said he suspects committee members will take a few comments before either sending it to another committee or to the full Senate floor for a vote.