

**MINUTES
of the
TWENTY-EIGHTH MEETING
of the
PUBLIC SCHOOL CAPITAL OUTLAY OVERSIGHT TASK FORCE**

**October 7, 2010
Room 307, State Capitol
Santa Fe**

The twenty-eighth meeting of the Public School Capital Outlay Oversight Task Force (PSCOOTF) was called to order by Representative Rick Miera, co-chair, at 9:25 a.m. on Thursday, October 7, 2010, in Room 307 of the State Capitol, Santa Fe.

Present

Rep. Rick Miera, Co-Chair
Sen. Vernon D. Asbill
Rep. Keith J. Gardner
Ms. Cecilia J. Grimes
Sen. Timothy Z. Jennings
Mr. Richard La Pan for Sec.-Designate
 Dannette Burch
Rep. Larry A. Larrañaga
Rep. James Roger Madalena
Mr. Kilino Marquez
Rep. W. Ken Martinez
Mr. Antonio Ortiz for Sec.-Designate
 Dr. Susanna Murphy
Sen. Sander Rue

Absent

Sen. Cynthia Nava, Co-Chair
Dr. Lisa Grover
Mr. Leonard Haskie
Mr. Robbie Heyman
Sen. Lynda M. Lovejoy
Rep. Ben Lujan
Ms. Elizabeth Marrufo
Dr. John Mondragon
Mr. Mike Phipps
Rep. Henry Kiki Saavedra
Sen. John Arthur Smith
Mr. Ernesto Valdez

Staff

Sharon Ball, Senior Researcher, Legislative Council Service (LCS)
Tim Berry, Deputy Director, Public School Facilities Authority (PSFA)
Raúl E. Burciaga, Director, LCS
Martica Casias, Planning and Design Manager, PSFA
Pat McMurray, Senior Facilities Manager, PSFA
Leslie Porter, Research Assistant, LCS
Mark Williams, Communications and Strategic Planning Manager, PSFA

Guests

A copy of the guest list is in the meeting file.

Handouts

Copies of the handouts and written testimony are in the meeting file.

Thursday, October 7

**Construction Manager at Risk: New Las Cruces High School, Workforce Solutions
Department Wage Increase**

Tiffani Lucero, on-site project manager, Gerald Martin Ltd. (GML), explained that the new Las Cruces High School project is one of the first projects to be undertaken under the 2007 construction manager at risk (CMAR) statute that was enacted in 2007. She explained that the construction process was begun in August 2009, included seven separate phased work packages and was approached as a single job. Work packages numbers one through six were advertised for subcontractor interest in 2009, and work package number seven was in early 2010. She emphasized that it was not until work package number seven had begun that GML was informed that, according to the Workforce Solutions Department (WSD), the 2010 wage rate increases needed to be included in the package. She emphasized that GML had no knowledge of being out of compliance with laws and regulations. She mentioned that GML has met with the WSD to try to mediate the situation. Ms. Lucero believes that GML is currently in compliance with all laws and regulations and that GML should not be penalized for the new wage rates to which it did not have access at the time the project was initiated. She explained that enforcing the new wage rates on a project that began in 2009 will cost the school district an additional \$1.5 million.

Lar Thomas, general counsel, GML, informed the task force that in 2010, one class of wage rates increased 40 percent while other classes decreased. He added that there is no schedule for the WSD to issue decisions as is required in other jurisdictions.

Johnny Barton, vice president, general construction, GML, indicated that the wage changes are very difficult to implement. He said, for example, that workers may perform more than one job on a project site and, as a result, can be earning one amount in the morning and another amount in the afternoon. He also indicated that wage changes in the middle of a contract can create an environment of poor morale and bad productivity. He added that contract amounts are not adequate to accommodate mid-contract wage changes.

Mr. Berry explained the statutory requirements for current public school capital outlay CMAR procedure. At the beginning of the process, the PSFA, together with the school district, defines the scope of the work and then a request for proposals is issued. Proposals from general contractors are reviewed and scored. Then the most qualified contractor is chosen. This contractor is not necessarily the one with the lowest bid. Once the CMAR has been chosen, the contractor and the architect work together to stay within the budget developed by the owner of the project and the PSFA. He explained that the advantage to this system is that, when the general contractor is brought on early to work with the architect to discuss and determine the constructability of the project, the number of change orders is greatly reduced, which, in turn, reduces the overall cost of the project.

In terms of the issues related to the new Las Cruces High School project, Mr. Berry stated that GML entered into the CMAR contract with the Las Cruces Public Schools in July 2009. Because of the time frame the district had established for the project, the district requested a wage determination for the entire project that would be accomplished through phased early work so that materials could be ordered and the infrastructure and footings could be started. He explained that as the project designs and specifications progressed to a level sufficient to request a guaranteed maximum price (GMP) from the CMAR, each early work package was accomplished through an amendment to the contract under terms previously agreed to in the contract negotiations. The CMAR is then responsible to solicit subcontractor proposals for all work that the CMAR will not perform itself.

Mr. Berry said that the CMAR and owner of the project must agree to the GMP prior to selecting subcontractors, and if the cost comes in higher than the originally agreed-upon amount, the contractor must absorb that additional cost. He noted that this practice allows project costs to remain stable. He noted also that vague language in current rules does not define the way in which prevailing wage laws are followed with a CMAR project.

In response to task force questions and comments, Mr. Berry briefly explained the way in which the State of Massachusetts deals with this issue. He said that under the current interpretation of Massachusetts law, the wage decision is in effect when the first early work amendment begins or the GMP agrees to stays that are in effect throughout the project.

Representative Miera asked representatives from the Attorney General's Office (AGO) and the WSD to respond to questions from the task force.

Melanie Carver, assistant attorney general, Civil Division, AGO, said that the parties in the dispute may proceed through the process in place to deal with the policy interpretation given by the WSD and that any member of the PSCOOTF can request an official opinion from the AGO on the policy issue at hand.

Clyde DeMersseman, general counsel, WSD, stated that if the Massachusetts interpretation of the law were to be applied, the PSCOOTF would be seeing different results. He added that the WSD will listen to the questions presented and will return with research on how this section of the law may be modified for future applications.

Francie Cordova, director for human rights, WSD, informed the task force that the WSD is not opposed to the methodology in question.

Mr. Berry said that the Massachusetts procedure is that the wage decision stays in effect throughout the project and that the existing Massachusetts law requires annual updates of the wages, unlike the requirement under New Mexico statutes. He added that Senate Bill 33 (SB 33), passed by the 2009 legislature, allows the WSD to set prevailing wage rates on public works projects by using collective bargaining agreements and allows fringe benefits to be included in the prevailing wage. He noted that implementation of this law is currently in litigation.

Representative Gardner and Ms. Cordova discussed SB 33 from the 2009 legislature. Ms. Cordova claimed that the issue is that current bid regulations do not have an explicit expiration date, and she questioned whether the current wages can be applied 20 years from now if a project is still running. Representative Gardner stated that SB 33 does not mention the CMAR process, but it must be applied as written. He opined that GML left the bid as based on the current rules and that the legislature altered the rules while the project was in process. Ms. Cordova responded that the project is not being treated any differently from other projects, and if Las Cruces had used traditional bid processes, this issue would not have surfaced.

Senator Jennings shared Representative Gardner's concern over changing the wage rates in the middle of the project.

In response to a task force question, Mr. Berry explained that the CMAR contract was approved by the PSFA on August 13, 2009 with a substantial completion date of November 23,

2011, which was subsequently extended to May 11, 2012 after the GMP amendment was executed.

Public School Capital Outlay Projects: Space Incentives

Ms. Casias explained that over the past year, the Public School Capital Outlay Council (PSCOC) has adopted revisions to the adequacy planning guide (APG). She said that the APG is the reference document for planning and designing new schools in New Mexico. She noted that the most significant change was that the APG became more performance-based than prescriptive, as it had been in the past.

She explained that this new flexible approach to designing a school presents school districts with an opportunity to tailor the interior spaces of facilities to their needs without worrying about whether they have exceeded an upper range limit on any individual space. Conversely, this new methodology creates a potential negative effect that needs to be remedied. She noted that school districts have a natural tendency to view the maximum overall size cap as a goal to strive for in terms of getting the most square footage allowed. She explained that the PSFA and its advisory group determined that districts need an incentive to work creatively with their consultants to develop the most efficient plan possible without sacrificing the essential needs of the educational program.

Ms. Casias said that, in response to this concern, the PSFA and its advisory group are recommending a space reduction incentive to create benefits for school districts that are efficient with space in designing a new school or additions funded on a matching basis through the PSCOC. In practice, she explained, the district would work to reduce the total gross square footage (GSF) of its project below the maximum allowed in the APG, and using a standard formula, a percentage of the construction cost of the difference between the maximum space allowed and the amount of space actually proposed by the district would be given by the PSCOC to the district for use in funding other capital needs other than building new spaces.

John Petronis, president, Architectural Research Consultants, applauded the idea of space incentives and said that he believes it would be a significant change in the way in which the PSFA works. He mentioned discussions among members of the PSFA advisory committee regarding the standards establishing an upper limit on what the PSCOC would fund. He elaborated on the extensive research done by both the PSFA and the advisory committee. He said that the committee concluded that the GSF per student within New Mexico was lacking in secondary schools at upper-size levels of 550 to 600 students. He stated that the GSF per student should be more flexible and encourage efficiency.

Joe Muhlberger, principal, Van Gilbert Architects, Albuquerque, echoed the sentiments of Mr. Petronis regarding flexibility and the authority to analyze methods for better use of facilities to be more beneficial to the students. He mentioned that this adjustment will initially require a great deal of effort with the design professional and the owner to understand each school's curriculum as well as the learning and teaching processes. He applauded the PSFA and its efforts and stated that this plan will save the state money and provide better facilities for students and teachers.

Gary Yabumoto, principal, ASA Architects, Las Cruces, expressed his support for the incentive program. He pointed out that curriculum delivery methods have changed at the high

school level and that the same square footage cannot be built to address and facilitate the new approaches utilizing small communities and team teaching. He added that incentives for building "green" should also exist because green systems will save more in the long run.

Robert Gorrell, director, PSFA, noted that the initial cost of a building is 20 percent of its operating cost over 30 years and that the PSFA does spend extra money on schools if there are reflected savings within that time frame. He added that the money saved by reducing square footage cannot be used for additional square footage, such as the construction of a new theater, but it can go to educational equipment, such as turning an existing piece of square footage into a theater.

PSFA Audit Reports on State Sources of Funding

Jeff Eaton, chief financial officer, PSFA, indicated that he would discuss recent reported issues around the use of state share contributions for two projects within the Albuquerque Public Schools (APS), specifically the Volcano Vista High School and Atrisco Heritage Academy projects. Summarizing the current issue under discussion, Mr. Eaton stated that APS has contracted with an auditing firm, Meyners+Company, LLC, to audit and reconcile the district's capital funds. As part of this reconciliation, some concerns exist over the appropriate use of state funding on the projects, as reported in local newspaper articles that have included, according to Mr. Eaton, some inaccuracies.

Regarding the Volcano Vista project, Mr. Eaton provided the task force with a table illustrating the amount of funding from the state and the district and the way in which those dollars were expended to date, as well as the projected balances. He noted that APS applied for and received a PSCOC standards-based award on September 21, 2004 for a new high school to relieve overcrowding at Cibola High School. Total approved project cost to adequacy at the time of the award was approximately \$60.8 million, with state participation of 46 percent and district participation of 54 percent. Offsets for direct legislative appropriations to the district applied to this project totaled approximately \$4.7 million, resulting in an adjusted participation rate for the state and the district of 38.3 percent and 61.7 percent, respectively.

He explained that APS submitted an application for high priority project grant assistance for a local match advance on April 20, 2006 because of limited availability of local funds and the need to proceed in a timely manner. After staff review of the district's application, the PSCOC approved a revised total project cost to adequacy (because of construction inflation costs) of approximately \$89.8 million. Some of the additional costs that were determined to be for parts of the project that were above adequacy (such as a performing arts center, auxiliary gym, additional playfields and other facilities) totaled approximately \$28.4 million and would be funded at 100 percent by the district. Referring task force members to Table 2 in the handout, Mr. Eaton explained that on May 3, 2006, the PSCOC approved additional state funding to adequacy of \$13.3 million. To bridge the gap between the district's limited availability of local matching funds, the PSCOC approved an advance of the district share for project costs to adequacy totaling \$35 million. He pointed out that the advance was repaid when the district assumed the state share on various other PSCOC-approved projects on July 25, 2008.

Turning to Table 3 in the handout, Mr. Eaton explained that in 2004, APS applied for and received a PSCOC standards-based grant award for a new high school to relieve overcrowding at West Mesa High School. Total approved project cost to adequacy was approximately \$85.4

million, with state participation of 47 percent and district participation of 53 percent. Offsets for direct legislative appropriations to the district applied to this project totaled approximately \$14.5 million, adjusting participation for the state and the district to 30.1 percent and 69.9 percent, respectively.

Mr. Eaton explained that APS also applied for a local match advance because of limited availability of local funds. As with the Volcano Vista project, the PSCOC awarded a revised project cost of \$90 million to adequacy. The advance was repaid through the district's assumption of the state share on various projects approved and awarded on July 25, 2008.

In response to a task force question, Mr. Gorrell responded that, at this time, the PSCOC has been able to deal with this and other situations with its current legislative authority, and he does not anticipate that the council will be asking for statutory amendments.

Representative Miera acknowledged a letter from APS notifying the task force about being unable to attend the meeting.

Representative Larrañaga, Representative Miera and Mr. Gorrell engaged in a conversation regarding charter schools. Mr. Gorrell noted that student population is currently in decline statewide; as a result, districts have unused space that might be available for charter schools. Representative Miera said that these facilities should be used as much as possible, and successful charter schools should be replicated. In response to additional questions and comments, Ms. Ball noted that parents can choose whether or not they would like their children to attend a charter school, and a charter school may not choose its students but must, in response to federal requirements for grants, admit students on a first-come, first-served basis or, in the case of wait lists, by lottery.

Representative Larrañaga asked how accounting for the repayment of the advance money is reconciled. Mr. Gorrell stated that this reconciliation is currently being developed. Carrie Menapace, policy analyst, APS, stated that APS uses open-end contracts, which results in better value for the money spent as well as more consistency. She added that APS, because of its size and diversity, can be a bit more difficult to track than other districts.

Report from PSCOOTF Work Group Studying Performance-Based Procurement for Public School Capital Outlay Projects

Mark Bennett, facilitator, read the five recommendations for PSCOOTF by the PSCOOTF work group studying performance-based procurement for public school capital outlay projects:

1. Legislative Aspect: The PSCOOTF work group recommends increasing the subcontractor bonding statutory threshold amount from \$150,000 to \$250,000. A foreseen challenge with this is the lack of a simple solution to track results of the bonding process over time.
2. Rule Change to the New Mexico Administrative Code:
 - First, the PSCOOTF work group recommends changing the requirement language for companies to be in-state entities. This arose due to out-of-state companies claiming that they are in-state companies in order to be able to obtain jobs.

- Second, the PSCOOTF work group recommends replacing the term "final cost scores" to "final scores". There is also the desire to delete the term "cost as a limitation". The current scoring that applies to the resident preference fraction applies only to the cost part of the bid. The cost part of the bid is a modest fraction of total scoring.
3. Process Change: The PSCOOTF work group recommends that the PSFA develop a standardized template with detailed instructions for performance-based contracting work. There must be public confidence in the administration of the process.
 4. The PSCOOTF work group recommends that a web-based training module be developed for contractors and subcontractors. This training will be aimed at smaller communities and will give smaller contractors the confidence needed to go after big jobs.
 5. The PSCOOTF work group recommends that the web-based training be a requirement to serve in communities.

Ms. Ball clarified that the first recommendation applies to PSCOOTF action in terms of a change in statute. She added that the second recommendation is a change to a General Services Department rule, which needs to be addressed through a letter on behalf of the PSCOOTF. The remainder of the recommendations can be dealt with by Mr. Gorrell at the PSFA. She noted that while these recommendations were endorsed unanimously by the work group members earlier in the day, a number of members representing unions and union contractors were not present for a discussion of recommendations.

Members of the task force discussed with work group members several topics related to concerns about what may sometimes seem to be misperceptions on the part of the construction industry and the state regarding implementation of the Procurement Code.

Representative Miera noted the letter written to the General Services Department for a rule change and expressed his concern about getting a timely response because of the administration change.

Adjournment

There being no further business before the task force, the meeting of the PSCOOTF adjourned at 2:00 p.m.