

Whatcom County Deputy Executive Tyler Schroeder made a presentation to the Whatcom County Council during the September 13, 2016, Council Finance and Administrative Services Committee meeting. The presentation was about proposed contract Amendment 5.1 to the June 2012 contract for the preparation of the EIS for the Gateway Pacific Terminal and Custer Spur Modifications Projects.

Schroeder's presentation starts at 57.50 minutes in the audio recording of the September 13, 2016, Council Finance and Administrative Services Committee meeting. The committee is comprised of Committee Chair Rud Browne, Council member Ken Mann, and Council member Satpal Sidhu. Although, for this particular September 13th committee meeting, all seven Council members were present.

The transcribed excerpt below starts at the tail end of Schroeder's presentation to the committee, and leads into the discussion/question and answer between Schroeder and County Executive Jack Louws, and the Council. I transcribed most, but not all, of that question and answer discussion.

Tyler Schroeder: So, you see this contract amendment is really to kind of close up some loose ends that CH2M Hill has. Complete and close-out the contract. And, it's separate to the permit decision, I'm that the county is aware of and has been working I'm, on the other side as it relates to the permits that the county has from Pacific International Terminals. So the last point, and there's a couple questions and I apologize, um, this is, no county money will be expended with these contracts. Remember it's \$51,000, there is an escrow account which is the next contract that will be deposited from Pacific International Terminals and that's what will be expended for CH2M Hill. But, as we talked about in the past, Council does have authority for professional services contracts. They are pass-through in nature.

Committee Chair Rud Browne: We don't have a motion on the floor, but as the two motions are related I'm going to allow discussion on this before we put it on 'em on the floor. Starting with Committee member Mr. Mann.

Ken Mann: Thank you Mr. Chair. Um, Tyler, so, thinking about the overall format of this arrangement where, um, PIT is putting in the money and CH2M Hill gets paid and we're just sort of a middle man, right, I totally understand the, the logical need to wanna have ramp-down, whatever else you call it, tying up loose ends, you know I certainly have been a part of many big projects where at any given time you got a lot of unfinished business that it would be nice to, in case

you ever want to pick it up again, you know, you, you want to have it sort of cleaned up. What, I guess I don't really remember or understand well enough, the arrangement that we have where we're this middle man with the escrow account. We were doing that to create a firewall so that CH2M Hill, we thought, wouldn't be unduly influenced by wanting to give favorable results to PIT. Um, couldn't they, if we deny this contract, couldn't PIT just go to them afterwards and say "okay fine, well the County wanted to make a statement and would you guys mind taking \$51,000 directly from us and performing this ramp-down?" Is there any reason that they couldn't do it that way?

Tyler Schroeder: Outside of the reason why we set up the escrow account, and we've done that for four years in the firewall, if the County Council decided not to move forward with this contract, then yes, I believe that the company and CH2M Hill would have any and every legal ability to contract then to finish this work out.

Ken Mann: Okay, so, that's right, I figured, and interestingly that makes me think either way, we could do it either way, you know, or CH2M Hill and PIT could do it either way, either through us, or not. But, we've obviously received a lot of questions and concerns about how this creates a zombie permit, and that we're somehow enabling an unfair advantage for, for PIT to, I don't know, circumvent public process down the road, um, and I don't actually understand that point. So, I guess I want to ask you to explain their point but um, does it in your mind, does it do that, and is there any, what is the legal permitting advantage or sequence that is enabled by keeping this contract going?

Tyler Schroeder: You know, I, I, don't want to speak to the permitting right now, but what I will speak to is the public availability of information. And, so, there has been a number of technical reports that have been done, whether it be rail analysis statewide, or coal dust analysis statewide, and all of that information right now, is, is kind of in a, in a state in which it is very hard to determine what's available and what's not. And so the public process, in my opinion, continues if this contract is signed because that really allows the County to have the information that, that is available, that we've already been receiving public disclosure requests for. I've had trouble answering where exactly that information is, and how it's available, because this work hasn't been done to date.

Ken Mann: So, and this'll be my last one, the eleven reports that have been completed, we have those?

Tyler Schroeder: I, I knew I was gonna get that question and, and I have some that were submitted by email that don't include all the comments that all the agencies have responded and I don't have all of them because we also used a SharePoint site, so the SharePoint site was on CH, and so yes, I've reviewed them, provided input, but I don't actually have that hard copy because it's through the SharePoint.

Ken Mann: So, part of the ramp-down then would be providing a very clear repository for all eleven completed reports, all the comments, the 13 not completed yet reports whether or not they complete them...

Tyler Schroeder: That is the benefit I see the County gets out of this contract.

Jack Louws: If I may in, in, in probably rougher terms than what's described is, is if the Council doesn't approve this from a public disclosure end of it, we're entitled to the information as of August 31, 2016. The contract separately on it is, is that work will only be available to be distributed to us by voluntary, uh, uh, through voluntary fashion. We aren't contracting for it so it's not ours at that point and time. So, the benefit that I see is, is that the community, uh, Pacific International, those opposed, Whatcom County Government, that, that information is for the most part, although it has to be run through legal is, is public information for our, for our benefit.

Rud Browne: So just, I want to just for clarity, and I think you just described it well but I just want to make it really clear that by paraphrasing what you just said. If we approve this contract then we have the right to the information that's produced from that, and that information will be in a form that will be readily accessible by the public. If we don't approve this contract we don't have the right to that information and any existing information that there is going to be in a form that it's currently in which is difficult to access by the public.

Tyler Schroeder or Jack Louws [I cannot distinguish which one responded]: Correct

--A little later in discussion --

Todd Donovan: But this, so, you've been saying "complete" in terms of what were being asked to vote on, but on page 138 it says the purpose of this is to provide preparation for the EIS. And that looks like current language. Is that, then it mentions the specific amount so I'm assuming that this is a current proposal to provide preparation for the EIS, but that's not what going on in exhibit A. It's just hard to...[inaudible word].

Tyler Schroeder: And, I guess, Council member Donovan, that's what I was trying to articulate early on, is that I wanted to be clear that this is contract completion. And, and, and, as it was being developed, since April 'til today, as well as some of the verbiage that was used in the old and past contract amendments you could read some of those sections, but this is contract completion.

Todd Donovan: Contract completion, not EIS.

Tyler Schroeder: Correct.

Todd Donovan: But then the agreement is to provide preparation of the EIS to comply with NEPA and SEPA.

Tyler Schroeder: And as you'll see that is probably the same language that was used in the last amendment.

Todd Donovan: But it doesn't seem to make sense. It's not going to be preparing the EIS.

Tyler Schroeder: It's going to be archiving the work that was being prepared to accomplish the EIS.

Carl Weimer: On the next page where it talks about the schedule it says "work will be delivered within eight weeks." So if everything's gonna be delivered to us within eight weeks why do we need six months?

Tyler Schroeder: Well, you know there's a number of different, uh, notice to proceed, the escrow account has to have money into it before I give notice to proceed to CH2M Hill. So my understanding is that will take a couple of weeks. The work will be developed and the indication is here it'll take eight weeks. If they actually accomplish it within eight weeks then good on them, but there will also be other contracts uh, payments and, and deliverables that will have to happen to clean the permit up, clean that, that work up, so we gave them a hundred and eighty days to complete that. Once the work's complete, once the invoice has been issued, and the payment has been accomplished, then for all practical purposes this contract will be complete even if that's done within the 180 days.

Carl Weimer: Okay. It talks about the schedule you know, and it talks about this archive but it doesn't specify who's gonna hold the archive. If CH2M Hill is

holding the archive then I would assume that those reports still aren't available to the public. So who is gonna hold the archive and where is that specified?

Tyler Schroeder: We're going to continue to work with CH2M Hill in that regard, it's become very clear, to me, that the work needs to be delivered to the County because of these public disclosure requests that we've gotten locally but we've also got some fairly substantial ones statewide from attorneys from Seattle recently and that information needs to be available so that the County can accomplish any obligation or, or, or, requirements for releasing public disclosure. If you turn to page 186 in the packet, Council member Weimer, um, you'll see under section 31.1, it's Ownership of Items Produced, and in there it says that um, that's not the right section.

Rud Browne: 31.1

Todd Donovan: Whether we approve this or not they still have to provide all of this information on the work that's been...

Carl Weimer: So they will be part of the deliverables 'cause even in the deliverables section of Exhibit A it talks about reports that are still under development will be delivered. It doesn't talk about the eleven ones that have already been reviewed. So will those be part of the deliverables to it, you don't already have 'em?

Tyler Schroeder: Yes.

Carl Weimer: And, is there some way we can put in here 'cause there's all these PDR, work in progress work product so people can't get a look at them. Will everything, the eleven and the thirteen be available to the public?

Tyler Schroeder: So to that specific question there's been a lot of discussion in regards to public disclosure and the ability and the deliberative draft process associated with it, and I've been working with Ecology and the Attorney General's office to be clear in regards to deliberative draft and how that's appropriate to be used or not. I don't believe that there is any work in the technical reports that are deliberative in nature. That's meaning that the County or Ecology have provided opinions or deliberative discussion in regards to crafting an opinion. This is more just factual work and technical work associated with it. So my understanding as of today is that this information would be available once it gets to that point. I quantify that because I'm currently having those discussions with Ecology, the AG's office, as it relates to the Memorandum of Understanding that are in place to use those appropriately. But

I'm doing everything I can to allow for this information to be publicly released once we have it in our possession. And I believe that that's what will happen at the end of the day.

Carl Weimer: Can we put a clause in here that says that?

Jack Louws: If I may, on 31.1, and my understanding is, the way I read it, looking at page 186, 31.1, and this goes with the contract extensions, and I'll read the whole thing through.

Louws then reads clause number 31.1 (in entirety), on page 186 in the September 13, 2016 County Council Agenda. He does not realize he is reading clause number 31.1 from a completely different contract (a Watershed Management Plan contract with Geneva Consulting), and not clause 31.1 from the EIS preparation contract Amendment 5.1.

**Clause 31.1 from the EIS preparation contract is displayed at the end of this transcription.*

Jack Louws: Now I believe that we have the ability to ask for the documents, and if we don't get them, and we want to do that, I think that we have a legal recourse to get there. That's what it's there for. I believe that were covered through the amendments, the amendment doesn't change that particular language at any point through and we're going under the assumption that we do, we own it. It's one of the reasons that I feel that it's appropriate for us to uh, ramp this down. In, you know in discussions with Tyler, um, you know PIT did request a suspension in the contract and I says no, there's no way that we're gonna take a suspension of a contract, this big of a contract, and keep all those consultants online through a possible federal appeal. You either need to finish it, or complete it and start over at sometime. I believe completing it's probably the right decision based on everything it's the one they decided to, and, but I do believe we have the right to the information, therefore, um, I think moving forward with it is the correct action.

Carl Weimer: Just a quick follow up. That ownership of the items produced that you were reading from, is not even in these contracts. It's a watershed management contract. Is it in...

Tyler Schroeder: It's page 144 in the packet.

Carl Weimer: 144, okay.

Tyler Schroeder: Oddly enough, it's 31.1 of the contract.

Carl Weimer: Makes sense.

Tyler Schroeder: No, I, I, I, I gotcha. And, and so just to be a little bit [inaudible], this contract helps that process. So, so we could either, uh, well, I don't believe we should not approve this contract, but if we don't give, if Council decides not to approve this contract, then there is no guarantee on where the information is. What monies may have to be expended from the Council, or what legal process the County has to go through to get this information because of the status [inaudible].

Rud Browne: I just want to say I agree with your interpretation of 31.1 on both documents.

Ken Mann: So, on page 152, there's deliverables language and, would that be a, um, a reasonable place to insert or clarify some of these intentions that we have, that we expect the contractor to honor cause you know the deliverables here, are pretty thin, just like basically an index. And a summary of outstanding issues. It doesn't say we're getting all the completed reports.

Rud Browne: Respectfully though, I think page 144 does say that. 144, section 31.1.

Ken Mann: Well, I know, but, 31.1 is very, very nice language that gives us a lot of ownership, um, of these things, but it gives us the writings but...

Todd Donovan: I read that as saying, particularly given the previous page, there's gonna be a list of work they still need to do. They're gonna identify outstanding issues and then the deliverables, a summary of outstanding technical issues.

Ken Mann: Because this, this, yeah, 31.1 is referring to this contract right, not the prior work done as other contracts, is it?

Tyler Schroeder: Yeah, 31.1 is in every contract that we signed with CH2M Hill on this project.

Ken Mann: So, why haven't they provided the writings, programs, data, etc., for the eleven things that they've completed thus far?

Tyler Schroeder: Because at this point there is some additional work that needs to be done to get them understanding where they're at, and, and, and, and what level of, whether it's in SharePoint or not, to provide it.

Ken Mann: I'd feel better if it said that in the deliverables, but I mean I can see how we could, if we, I mean, has there been any indication from these guys that they don't want to provide any of that information? We could be worrying about writing a perfect contract to avoid something that's not even anyone's intentions.

Tyler Schroeder: And, and I continue and are in close communications with CH2M Hill in regards to the deliverables and the need for public disclosure and information that the County clearly owns.

Ken Mann: So, we could put it in there then.

Tyler Schroeder: My only, my only thought on putting it in here and it's another situation with Council's involvement on contracts, is I have to go back through and reiterate to everybody, and get new signature pages associated with the contract that's been done. And, to me, it's already clear what 31.1 that the County owns the information and that this is going to be indexed and [inaudible] ready for the information to be delivered. So I believe it's been taken care of. I will let Council make a decision on how they want to take care of it.

--A little later in discussion --

Jack Louws: If I may add one thing to it is, this is where the six months and the close-out of the contract becomes very important. We're going to have \$51,000 of supposedly CH2M Hill's money in the bank, and this is the leverage that we, we have, and we want to use it appropriately and professionally as is [inaudible] that you say, 'okay the work is done. One of the items is, is 3.1 [31.1] is that we need that, you know, to deliver us a full copy of everything and that's a checklist that you get into the contract, we do that with contractors everyday. We get the checklist, we get the information and then we go through and it takes, you know, three, four weeks to, to, get the \$51,000 dispersed through the finance end of it, uh, I will commit to you is, before we release the \$51,000 to CH2M is, we'll put the request in so the full body of information, and then we'll have it at that point. I mean that's the way the contract works, uh, it's there, and uh, it's stated, it's not stated in the Scope of Work, but it's stated in the, uh, in the preambles to it and it is a, uh, it is a legal obligation from them to provide that for us and if they don't those are the things that we need to watch and what takes time in closing the contract out is to make sure that we have that. So, Deputy Executive is right as is that there's been a lot of time spent on this. I would encourage the Council not to add language on that ends up being redundant to what we already have

in the contract and allow us to move forward with it, although um, this one's yours to do with as you choose.

Carl Weimer: Mr. Schroeder, I have a question that might take you somewhere you might not want to go, but, there seems to be a lot of misunderstanding that on the part of the public that if we voted against this contract we would somehow be retiring the pending permit. And I was wondering if you can talk about the difference between those and if there's any way in the County Code to retire a permit?

Tyler Schroeder: So, through this whole process there's been a separation between the County permit application, the environmental impact statement, and the contracts to accomplish that work. And so this contract is to accomplish the level of detail as you can see from the list of technical reports that are being developed, is pretty darn thorough of an environmental study and analysis. Uh, as we complete this contract there is a separate conversation going on, that I've already started, with the company in regards to the permit application. I've been working with the, the, the, the company to indicate to them that the County, also for their due diligence, has to ensure that the permit decision is made in a timely [inaudible]. As you review the County code, you will see, and I would recommend that Council maybe look at this into the future, um, that there is no specific expiration language in the County code as it relates to larger projects. Where there is no language that just allows a permit, if there is no activity, to expire in the future. And, so as I've articulated to other people that have asked the question, there is specific language in the major development permit code section that requires projects to be consistent with other state, federal laws as it relates to the proposal. So more than likely, in the next, uh, near future the County will be sending correspondence to the applicant to indicate to them that there is a due diligence, yes they have a due process, but the permit itself has to come to some type of completion. Now there are a number of different avenues that can take and I just want to be clear with Council, but the Administration is developing correspondence to send to the company in the next couple of weeks to start that process. But there is not specific language that expires the permit or specific language that says due to other agency decisions the local permit process is, is stopped or halted. And so the County has to take steps to accomplish that.

Rud Browne: Or, or that the County could unilaterally terminate it.

Tyler Schroeder: Correct.

Todd Donovan: Follow up on that. So, on that kind of a correspondence you mentioned a clause about major development permit code that requires things be consistent with state, federal rules and stuff. Would that then precipitate mentioning the Army Corps' decision, or DNR's decision, as now putting the permit potentially in conflict with that section of our major development code?

Tyler Schroeder: Those are potentials, and yes, those have been thought about from the Administration.

Todd Donovan: And then my, you know I, this is a question, maybe bigger picture thing, how is it that we are voting on this, and would we under the terms that when we were updating the purchasing policy stuff I remember there was a clause about pass through contracts that was there and then it went away, or it was away and it came back, but, um, if the, would this be something that would, this, would the new purchasing policy would we not?

Tyler Schroeder: The Council, with the new purchasing policy would still have authority and have authority over this because it's professional services greater than \$40,000.

Todd Donovan: Right. My last comment, and I don't like micromanaging contracts, um, but on page 138 the thing that was signed on August 31st, 2016, does say the general purpose of this is to prepare the EIS. It doesn't say to close-out the work on the existing contract. And that seems like that's already a done deal, but that doesn't, that language does not seem to describe what is in the discussion we're having or in attachment A.

Tyler Schroeder: Understood. The language does then at the bottom of there refer to the, the attachment A. Um, the last paragraph, the maximum consideration in the amendment for the scope of work and budget is \$51,085. But I understand your points as well, Councilor.

Todd Donovan: And, as long as it's constrained in that exhibit, I just, the way that some people might read that is, I think this is where some of the concern is that this is extending the life of the project, uh, but I think the bigger picture is that we want to deal with the vesting of these permits, that's either changing county code or using existing code to communicate with the applicant that...

Tyler Schroeder: And, the Administration is going to be taking those steps.

Jack Louws: If I may add on that is, I would again uh say that, uh, we're in close consultation with the legal department as it relates to this, um, there's probably

a very high likelihood is that this decision would go to the Hearing Examiner which is under your authority as the Council so you need to, um, somewhat allow this process to do, so that you don't, so that we don't, we don't cloud it, um moving forward. Uh, it's still, um, a unilateral decision that, uh, probably, probably is going to involve the Hearing Examiner, uh, confirming, uh, of such so, um...

Todd Donovan: Which brings up the issue of our appearance of fairness issues that we've been struggling with. So, now we're being asked to vote on...

Jack Louws: Well, by your, by your, by your design and your, uh, your purchasing policy that you put together is, is, that I'm sorry for the bind but that's, uh, um, that's the way is so you're, you're putting yourself in the position that you do and the Council has, over the last few years, acted on the contract as it relates to the EI, uh, the work product of the EIS, you weren't commenting on, on, uh, or making comments on, your interpretation of it is, is you're allowing for the work. In this particular instance is, is what you're saying is, is we're going to allow \$51,000 to allow this contract to be complete because I've made it very clear through Tyler and through everybody is, is this is it, we aren't going to, we aren't going to sit through years of holding this contract in, uh, uh, as an active contract, uh, based on what they may or may not do. We either need to finish it or close it. This closes it.

--Right after that, Council member Ken Mann moved to approve--

***Clause 31.1 from the EIS preparation contract reads:**

31.1 Ownership of Items Produced:

All writings, programs, data, public records or other materials prepared by the Consultant and/or its consultants or subcontractors, in connection with performance of this Agreement, shall be the sole and absolute property of the County. Reuse, alteration, or change by the County or by others, acting through or on behalf of the County, of any such item produced shall be without liability or legal exposure to Consultant.