

**MINUTES OF THE
LEGISLATIVE MANAGEMENT COMMITTEE**

October 22, 2002 – 3:00 p.m. – Room 303 State Capitol

Members Present:

Speaker Martin R. Stephens, Chair
President Al Mansell, Vice-Chair
Sen. Mike Dmitrich
Sen. Karen Hale
Sen. Peter C. Knudson
Sen. L. Steven Poulton
Sen. John L. Valentine
Rep. Patrice M. Arent
Rep. Ralph Becker
Rep. Jackie Biskupski
Rep. Greg J. Curtis
Rep. Brad King
Rep. David Ure

Members Absent:

Sen. Ron Allen
Sen. Gene Davis
Rep. Tom Hatch

Staff Present:

Mr. Michael E. Christensen, Director
Ms. M. Gay Taylor, General Counsel
Ms. Beverlee LeCheminant, Secretary

Note: A list of others present and a copy of materials can be found at <http://www.image.le.state.ut.us/imaging/history.asp> or by contacting the Office of Legislative Research and General Counsel.

1. Committee Business

Chair Stephens called the meeting to order at 4:00 p.m.

MOTION: Rep. Arent moved to approve the minutes of the September 17, 2002 meeting. The motion passed unanimously with Rep. King absent for the vote.

2. University of Utah Project Settlement Proposal

Ms. Taylor said that Section 63-38b-202, specifically, provides that before the executive branch can legally bind the state by executing a settlement agreement that will cost the state between \$500,000 and \$1,000,000, the agency is required to submit it to the governor and if he approves it, then it goes to Legislative Management Committee (LMC) who may recommend that the agency execute the financial settlement agreement, reject the financial settlement agreement, or recommend that the governor call a special session of the Legislature to either review and approve it or reject it. If the settlement agreement is for more than \$1,000,000, it must be submitted to the Legislature in an annual general session or a special session. The amount of the settlement agreement in question today being presented by the Division of Facilities Construction and Management (DFCM) is within the \$500,000 to \$1,000,000 range.

Mr. Joseph A. Jenkins, Director, DFCM, said that this issue involves a student housing project at the University of Utah which was about \$125,000,000. It involved four general contractors, numerous subcontractors, and many craftsman. The job was completed on time for the Olympics and it worked out well.

Mr. Jenkins indicated that in the middle of the project they identified a problem with an Americans with Disabilities Act (ADA) requirement because there were going to be athletes with disabilities living in the village during the Paralympics. As a result, some of the buildings had to be redone to meet ADA and Federal Housing Administration (FHA) requirements for disabled individuals. There are a couple of small claims that DFCM has been trying to get resolved because of this. These claims came about through Bud Bailey Construction, the general contractor on Phase II at the end of the project. DFCM knew that a claim was coming from Bud Bailey related to Clark Mechanical Contractors, but it didn't know the amount of the claim. Mr. Jenkins said that when he became director of DFCM in November of last year (2001), he received a letter from Mr. Clark, through Bud Bailey, indicating the amount of the claim, but not giving the documentation for the claim. DFCM then asked Bud Bailey to do all of the documentation on the claim so DFCM could evaluate it. They did this.

Mr. Jenkins said the process for resolving a claim is that once DFCM has a claim filed with the accompanying documentation, it tries to negotiate a settlement. If DFCM can negotiate a settlement, it saves time and dollars. He stated that they did this and believe they had a good negotiation process. Mr. Jenkins stated that there are three agencies involved in the claim before LMC today: DFCM, University of Utah, and DPIC, which is an insurance company that represents Design West, the project architect. The three agencies came to an agreement that each would pay one-third of the claim, for a total of \$1,000,000 settlement. However, the DPIC policy carried a \$50,000 deductible. DPIC's insured (Design West) was not in favor of the settlement, so DPIC agreed to absorb the deductible themselves, so it was a \$50,000 cost to them. In order to get to the \$1,000,000, DFCM and the University of Utah agreed to pay \$350,000 apiece. DFCM has analyzed this claim and has received a perspective from Rick James, project director, and Randall Funk, representing the University of Utah, who was on the project from the beginning. These men have gone over the claim and have made recommendations to DFCM. Their recommendation is that DFCM should come up with something that is fair and equitable, but also takes into consideration what might happen if it needs to impanel a professional mediator or a professional panel to hear the claim, or go to court. All three agencies agreed to come together with the \$350,000 from DFCM and the University of Utah, and \$300,000 from DPIC, and to make the offer through Bud Bailey to Clark Mechanical for \$1,000,000.

Rep. Biskupski asked if there is a process in place for change orders and what happened with that process. Mr. Jenkins said that it was probably impossible for all contractors to keep up to date on all of their claims and so they notified DFCM that there would probably be a claim coming, but not the total amount of the claim, so it took them a period of time to get the documentation together.

Sen. Valentine said that the fast-tracking process is apparently at risk for this kind of situation and yet it has been adopted as a matter of policy with a number of projects that appear on line. He stated that DFCM needs to be very diligent in making certain that specifications are done correctly. He indicated that he has discovered through the media that DFCM did not specify ADA compliance for the Paralympic Village and it is things like this that create problems later. DFCM needs to make certain that if it is going to do a design-build that it is diligent starting right at the top when it designates how the project is to be built.

Mr. Jenkins stated that design-build is not the problem. The problem was that DFCM decided to go into a

new type of selection process that had not been used before called "performance based selection process" and because it went through that process and because this was such a big project and needed to be done quickly, it created some problems.

Sen. Valentine said that DFCM did not designate ADA compliance on this project. Mr. Jenkins said that is correct and the reason that DPIC is in this as an insurance carrier representing Design West is because DFCM believes there were errors and omissions by the architectural firm in this project. There was some disagreement between DFCM and Design West as to whether they needed to adhere to ADA and FHA requirements for persons with disabilities. They did some research with it and DFCM's legal counsel advised them at that time in the process that DFCM did, in fact, have to meet ADA requirements. This caused DFCM to make a change in the process with some of its construction.

Speaker Stephens said he understands that there is another major claim on this same project from another company. Mr. Jenkins said there are three claims left on this project. One is from Nelson Trucking which is a claim about the same size as this one and DFCM has not been able to negotiate a settlement with that claim. It has nothing to do with the selection process, but it has to do with errors and omissions or plans that were not completed in time for the construction to go on. In the Nelson Trucking claim there is also a counter-claim by the state that it thinks that the contractor owes DFCM some money and DFCM has not been able to reach a negotiated settlement on it. About a week ago, DFCM agreed that it would take this one to a panel and try to resolve it that way.

Mr. Jenkins stated that DFCM also has a smaller claim by a firm called Winward Electric. The claim is around \$150,000 to \$200,000. The last claim is from the architect, Design West, against the state and the University of Utah and a counter-claim from DFCM against Design West. DFCM hopes to get this claim settled and the claim from Winward Electric negotiated also. DFCM will probably not be able to negotiate the Nelson Trucking claim.

Sen. Knudson asked that with regard to the time constraints, if the deadlines are not met, what would be the consequence. Mr. Jenkins said he doesn't really know, but Mr. Clark is trying to keep his business afloat and is trying not to have a bank loan foreclosed on him. DFCM said that it would try to move as quickly as it can because Clark Mechanical is a good contractor and deserves to stay in business. Sen. Knudson asked if Clark Mechanical threatened to withdraw its offer if the deadline of October 24, 2002 is not met. Mr. Jenkins said he didn't think that was a problem, though DFCM would try to meet that time frame.

Rep. Becker asked what the total cost of the project was. Mr. Jenkins said the total contract was \$125,000,000, the Bud Bailey part of it was about \$57,000,000, and the mechanical was around \$7,000,000. Rep. Becker asked how the settlement relates to the original claim in terms of the amount of those claims. Mr. Jenkins said the original amount given to him in November of last year was about \$2.2 million. As DFCM went through the process of having Mr. Bailey do their documentation, the amount came down to about \$1.6 million. In April of this year, DFCM went through a negotiated process on a change order and on the basis of the hard costs and technical issues, DFCM negotiated a settlement in April and paid them \$476,000. The issues that are before DFCM now are the soft costs, which include general office work and overhead, interest costs, attorney fees, etc.

Rep. Becker stated that the change orders for this project were very large and asked if there was a step-by-step approval for each change order. Mr. Jenkins said there was a step-by-step approval for each change order and those that DFCM could identify as part of the process, it took care of, but some were larger and more technical and took a little more time to do. He indicated that there were 600 or 700 change orders on the whole project.

Rep. Becker said that these seem like extraordinary changes in the project and asked if the state received some federal grants associated with it. Mr. Jenkins said that the state hasn't any money in this project, but that it comes from a \$50 million bond and from the Olympics. The total project was \$125,000,000 and DFCM's total claims that have not been resolved will be less than \$3,000,000.

Rep. Ure said that if the money is owed to Mr. Clark, he would like him to get paid. He asked Mr. Jenkins that if the \$476,000 that was paid in April for hard costs, then is the \$1.6 million that the LMC is debating about for soft costs. Mr. Jenkins stated that they are debating about the soft costs. Rep. Ure asked what amount DFCM came up with that is owed Mr. Clark on the soft costs. Mr. Jenkins said that as DFCM went through and evaluated that, it figured that there was probably around \$650,000 to \$700,000 worth of soft costs. As DFCM tries to make a negotiated settlement, it has to evaluate what the long-term costs are going to be or cost savings that should be paid now rather than what it would cost in the future. Without the benefit of having a panel, DFCM does not know exactly what those costs would be, but determined that it would cost them to hire a mediator or a panel, it would take three months or longer to go through the process which would cost them money, in addition to the people it would have working on the project, and, if it went to court, it would be considerably more than that. Rep. Ure asked if there is something in the rules that says it has to go to a panel of some kind. Mr. Jenkins said the rules require that when a claim is filed, that a general contractor has the right to appeal and a negotiated settlement could be done and that is what is being done in this case. If DFCM cannot agree on a negotiated settlement, then it goes to either a panel or a mediator and then to court. This is a negotiated settlement that DFCM feels is a good and legitimate claim.

Mr. Jenkins said the hard costs are the only thing DFCM is going after from DPIC.

Mr. Jenkins said that this whole discussion of settlement is under Rule 408 of the Utah Rules of Evidence so it cannot be used in a court of law.

Rep. Ure asked why Mr. Clark is coming to the state when he was a subcontractor under Mr. Bailey. Mr. Jenkins said that DFCM rules require that all general contractors that work for them be bonded, and all general contractors have financial responsibility for the project, including all of their subcontractors and most general contractors. Therefore, DFCM does not require its subcontractors to be bonded. Mr. Jenkins said that in this case, Bud Bailey did have a bond, but he does not think that Clark Mechanical had one. They were operating under Bud Bailey's bond. Bud Bailey, in a negotiated settlement to end this project, had a cost totaling about \$1.7 million and were willing to negotiate for about \$900,000 in order to finish out the project and they figure that they have given up \$800,000 of their share on the project and, therefore, are not participating.

Rep. Ure asked why Mr. Bailey is not requesting the same thing for his \$900,000. Mr. Jenkins said that was negotiated as a change order to be able to finish up the project and, therefore, his company is no

longer involved.

Rep. Curtis asked why Mr. Bailey would not request money for the other costs associated with this project. Mr. Jenkins said he wouldn't because the three agencies are coming up with the \$1,000,000 and that is for the soft costs and was negotiated that each of them had some responsibility and were willing to negotiate on this.

Rep. Curtis asked if there is some value in paying Clark Mechanical \$600,000 or \$100,000 and then have an arbitration panel on the remaining amount. Mr. Jenkins said if that were the case, DFCM would not be at this meeting because DPIC would not agree to pay the \$300,000 without all three parties making the offer. The agreement the three agencies have come up with now for the settlement is that they participate equally, that the soft costs go away, and that Mr. Clark and Bud Bailey must sign an agreement that they have no more claims against the state, University of Utah, or this project. Rep. Curtis asked if DPIC understands that the state may sue them for \$400,000. Mr. Jenkins said DPIC understands that and that he has a letter from them indicating that they are willing to come up with the \$300,000 and that they understand that the state will still come back to them for the \$476,000. LMC is looking at taking a vote on whether or not to appropriate \$1,000,000 on litigation that it has only had 30 minutes of discussion on. Mr. Jenkins said the reason they have a negotiated settlement is that all three parties are willing to come to the table now. If they did not have that, there would be no benefit for them to arbitrate the last \$300,000.

Sen. Dmitrich asked why this can't go through the regular appropriations process in January. Mr. Jenkins said the reason is because Clark Mechanical is up against a time deadline with its funding. If they don't receive the money soon, they will go out of business and Mr. Clark may lose his home and other assets. This is a firm that does a good job and DFCM would like to keep them in business. Sen. Dmitrich said he does not like to see LMC turn into an appropriations committee. He does not feel that this is the right way to go. This money is not to pay employees, it is to pay the business. He asked if this could go through Risk Management since there are insurance companies and bonds involved rather than have LMC appropriate \$1,000,000. Mr. Jenkins said Risk Management has been involved. Sen. Dmitrich asked whether any money has ever been appropriated out of LMC.

Ms. Taylor indicated that a few years ago there was an agreement out of the Department of Human Services that resulted in a settlement where the state was legally obligated to pay money over a period of time and the Legislature had never been involved in any of that discussion, so this statute was instituted. The statute requires agencies, before they enter into a final settlement agreement and there are dollar figures involved, if its \$100,000 to \$500,000 the governor can do it without the Legislature seeing it; if it is between \$500,000 and \$1,000,000, it comes to LMC after the governor has approved it; if it is anything over \$1,000,000, it has to go to the Legislature. That is why the executive branch was required to come to LMC before they could finalize this agreement.

Speaker Stephens stated that LMC is not actually appropriating the money; it is authorizing the payment. DFCM is taking \$350,000 out of its budget and the University of Utah is taking \$350,000 out of its budget. Sen. Dmitrich asked if the facility went through the Capitol Facilities Board. Mr. Jenkins indicated that it did. Sen. Dmitrich said that LMC is setting a precedent here. Mr. Jenkins said this is handled through DFCM because it is in the building business and it handles many claims. Most of the claims are small and do not change the cost of the project and DFCM has money in its project reserves to be able to handle

this type of a situation.

Rep. Biskupski asked if committee members could see a copy of the letter of intent from the insurance company. Mr. Jenkins distributed copies of the letter to the committee members. She said that in the letter it says that the \$1,000,000 check is written to Bud Bailey Construction and Clark Mechanical and wondered if Bud Bailey is getting some of this money. Mr. Jenkins said that Bud Bailey is not receiving any of this money, but it is the general contractor and, by law, DFCM has to deal with the general contractor rather than the subcontractor.

MOTION: Sen. Valentine moved to approve the University of Utah Project Settlement.

Rep. Ure said this is a tough situation and Mr. Clark is owed this money. He is in the potential throes of bankruptcy, but 90% of the members of this committee have known about this settlement for less than two hours and, even though everyone is trying to tell them what they perceive the facts are, he indicated that he is having a hard time making a decision about this settlement at this time. He stated that he would feel more comfortable if LMC waited until the next meeting to make a decision on this issue. He said he knows this will put Mr. Clark in a tough situation, but wonders why Mr. Clark cannot go to the bank knowing full well he is going to get some money and give LMC a chance to think about it for 30 days. He stated that he feels this would be the best solution for the state.

Rep. Curtis said if the state is paying out \$700,000, DPIC is paying \$300,000, and from the best estimate there is \$700,000, why can't LMC vote on giving Mr. Clark the \$700,000 and then say that DPIC didn't settle and it is still on the hook. Mr. Jenkins said this could be done and what would happen is at that point they would either have to go through a mediation process or they would have to go to court in order to get DPIC to resolve its \$300,000, and that Clark Mechanical would have another \$1,000,000 in claims that he has not yet given up. By being able to reach this settlement, Clark's claim goes away completely.

Mr. Alan Bachman, Office of the Attorney General, said this is a difficult matter because we are discussing a potential settlement in a public setting and are discussing things that could be in litigation so they are doing it under Rule 408. Mr. John Young, who is here for Clark Mechanical, has agreed that the discussions here would not be used in court under Rule 408. Mr. Bachman said that the project was completed a couple of years ago and they have been in the process of trying to resolve this issue which has brought Clark Mechanical to the point where he is just about on the verge of going under and if he doesn't get some immediate money, he is claiming that the damages would probably also include costs that he would incur from losing his business. DFCM tried to get him to go for a figure closer to \$700,000 or \$800,000, but it has not worked. If DFCM went with \$700,000, Clark Mechanical would want to keep its claim which would maybe be another \$1,000,000 or more because Clark Mechanical is also claiming that it has \$600,000 more in hard costs that it hasn't had time to document yet. DFCM was fortunate that it had a good contractor and it shouldn't be punished because it chose the path of trying to get the job done and making sure that the state got a good project first while going through all the aspects of its claim after the project was complete. And that is why, even at this point, it would be claiming there are parts it is still documenting.

Sen. Dmitrich said he is sold on doing this, but he doesn't like the process.

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Rep. Arent said she understands his lack of comfort and one of the things the Legislature may need to look at during the next session is to amend this process so more information is given to them in advance of their decision.

Sen. Valentine said that from the information he has heard, he is convinced that the settlement is a good one and is done in accordance with the provisions of the statute

The motion passed unanimously.

3. Placement of Ethics Initiative to Legislative Web Page

Rep. Ralph Becker said he requested that LMC discuss the policy of what appears and what does not appear on the legislative web page. This issue came up because he and some other legislators noticed that there was an initiative of legislators on the Legislature's web page that wasn't customary to what he is used to seeing on the web page. This raised the question about what is appropriate use for the web page and what types of things should and shouldn't be on it and in what form. He indicated that the proposal that is before the committee members has been developed by staff as a starting point for discussion about having a policy for use of the Legislature's web page.

Rep. Becker said that this issue does not have anything to do with the APPLE initiative. He said he thinks that the APPLE Initiative is a good initiative and if the state can receive the benefits that are proposed in it, it will be a great benefit for the state and the education system. There are initiatives coming forth all the time and it was suggested in response to the questions that were raised that any legislator can put initiatives on the Legislature's web page. The mission of the Office of Legislative Research and General Counsel suggests that its purpose is to provide objective, accurate, concise, and timely information that facilitates informed decision making and effective policy development by the legislative branch. That is what the web page has always been about, but it seems to take on a different flavor when it is a forum for proposals by individual legislators. Rep. Becker indicated that LMC needs some initial discussion or some action about whether or not the web site should be a form for proposals by legislators, or whether that should be handled as part of the actions by the Legislature whether it is committee action, floor action, bills that are passed, and actions taken. He suggested that one idea would be to have links from proposals which would contain information about the proposal.

Sen. Mansell said that the APPLE Initiative is not an initiative before the Legislature, but is an initiative that LMC said it would support and would like it to go forward in promoting it to other states that need to support it in order for it to work. LMC is not promoting it for themselves or trying to pass a bill and if it were doing any of those things, he would agree with what Rep. Becker is saying.

Rep. Becker said that the APPLE Initiative appeared on the Legislature's web page before there was any consideration by the Legislature. Sen. Mansell said that was remedied by bringing it before LMC and making sure that it was something that was of benefit to the state and it was an initiative that the entire LMC supported.

MOTION: Rep. Becker moved that the Proposed Policy Regarding Information to the Legislature's Web Page dated October 22 be added to the policies of the LMC.

SUBSTITUTE MOTION: Sen. Valentine moved that LMC reserve this issue for its November meeting.

Rep. Becker indicated that he would support the Substitute Motion, but suggested that staff look at different ways of presenting the information that comes forward so the front page of the web site does not get cluttered with too many things and is a good accessible web site.

Rep. King suggested the possibility of saying that things can only be posted on the front page of the web site by unanimous vote of LMC.

Speaker Stephens said that no party has a majority in LMC so you wouldn't be able to put anything on the web site without some cross party votes if it required LMC approval. Sen. Mansell suggested using a 2/3 vote.

The motion passed unanimously.

4. Other Business

Speaker Stephens said that during the Executive Appropriations Committee (EAC) meeting held prior to this meeting regarding the issues surrounding the state CIO and Division of Information Technology, EAC referred an item to Legislative Management Committee to request the Office of the Legislative Auditor General to conduct an additional audit and to go into more detail on six items: 1) conflict of interest; 2) software purchases; 3) gag orders; 4) additional legislation; 5) violations of DHRM rules; 6) and the hiring of an ombudsman.

MOTION: Rep. Arent moved that LMC ask the Legislative Auditor to do an audit on Information Technology regarding these issues and any others that they run into. The motion passed unanimously.

Mr. Christensen discussed a memorandum from the chairs of the Natural Resources Appropriations and Interim Committees requesting reimbursement for a combined meeting which was held on Friday, October 11, 2002. He indicated that this item will be put on the agenda for the next meeting.

Sen. Valentine noted that LMC had a request that was an intent language regarding an audit of the School of the Deaf and Blind, which has gotten lost somewhere in the shuffle, specifically as to the treatment of the School of the Deaf and Blind. Mr. Christensen said that staff would find out what has happened to this request and report back at the next meeting.

5. Adjournment

MOTION: Rep. Biskupski moved to adjourn. The motion passed unanimously.

Speaker Stephens adjourned the meeting at 5:15 p.m.