

Montana Transportation Commission

**January 31, 2013 Meeting
Helena, Montana**

IN ATTENDANCE

Kevin Howlett, Transportation Commissioner, Chairman
Barb Skelton, Transportation Commissioner (Conference call)
Rick Griffith, Transportation Commissioner
Carol Lambert, Transportation Commissioner
Michael Tooley, Director MDT
Pat Wise, Deputy Director MDT
Dwane Kailey, MDT Engineering
Kevin Christensen, MDT Construction Engineer
Lynn Zanto, MDT
Tim Reardon, MDT
Dave Ohler, MDT
Val Wilson, MDT
Wendy Stewart, MDT
Suzi Price, MDT
Tim Tilton, MDT
Jim Walther, MDT
Kevin McLaury, FHWA
Bob Seliskar, FHWA
Lloyd Rue, FHWA
Frank Tabish, LHC
Cary Hagreberg, MCA
Tracy Cowdry, TCA Construction
Bab Warren, Schellinger Construction
Mark Cyr, Schellinger Construction
Russ Bog, Knife River Construction
Paul Sandry, Johnson Law Firm, Kalispell, MT
Jeremy Dahl, United Materials
Sue Platus, Highway Specialties

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OPENING – Commissioner Kevin Howlett

Commissioner Howlett called the meeting to order. After the pledge of allegiance, Commissioner Howlett offered the invocation.

Approval of Minutes

The minutes for the Commission Meetings of October 23, 2012, November 1, 2012, November 20, 2012, and January 15, 2013 were presented for approval.

Commissioner Griffith moved to approve the minutes for the Commission Meetings of October 23, 2012, November 1, 2012, November 20, 2012, and January 15, 2013. Commissioner Skelton seconded the motion. All Commissioners voted aye.

The motion passed unanimously.

Agenda Item 1: Rail/Highway Crossings RRXing FAS 522 – Huntly RRXing Whitlash Road – Chester

Lynn Zanto presented Rail/Highway Crossings, RRXing FAS 522, Huntly and RRXing Whitlash Road, Chester to the Commission. Rail/Highway Crossing –

Protective Devices projects are funded under the Highway Safety Improvement Program set-aside. Projects are selected by inventorying railroad crossings and identifying hazardous sites.

MDT is asking the Transportation Commission to approve two rail crossing projects. The first, located at Huntley on Secondary 522 at RP 0.478, will upgrade the circuitry for the gates at the existing signal system. The second project, located west of Chester on Secondary 409 at RP 0.013, will also upgrade the circuitry of the existing signal system (flashing lights) and will add gates. The total estimated cost of the Huntley project is approximately \$228,000. The total estimated cost of the Chester project is approximately \$305,000.

Summary: MDT is requesting Commission approval of two projects to upgrade the circuitry for rail/highway crossing signals. The first project is on Secondary 522 at Huntley, and the second is on Secondary 409, west of Chester. The Secondary 409 project also includes the addition of gates. The estimated costs are approximately \$228,000 for the Huntley project and \$305,000 for the Chester project. The proposed funding source is the Rail/Highway Crossing – Protective Devices Program. Staff recommends that the Commission approve the addition of these projects to the program.

Commissioner Lambert moved to approve the Rail/Highway Crossings, RRXing FAS 522 – Huntly and RRXing Whitlash Road - Chester. Commissioner Griffith seconded the motion. All Commissioners voted aye.

The motion passed unanimously.

Agenda Item 2: Slide Corrections, D1 Slope Stability

Lynn Zanto presented the Slide Corrections, D1 Slope Stability to the Commission. MDT’s Geotechnical Section has found eight locations in the Missoula District where unstable cut slopes or embankments are creating chronic maintenance problems or hazards to the travelling public. Without attention, these sites have the potential to encroach into the roadway resulting in serious damage to highway infrastructure. The specific locations are listed below.

The costs at each location will be funded according to highway system. Approximately \$824,000 will come from the Surface Transportation Program Primary (STPP), \$1,172,000 from the Surface Transportation Program Secondary (STPS), \$193,000 from the Surface Transportation Program for Other Routes (STPX), and \$605,000 from the National Highway System Program (NH). The total estimated cost for all locations is approximately \$2,794,000.

County	Signed Route/Location	Dept. Route	Beg. RP	Length	Funding Source
Lincoln	US-2, Yaak Hill	N-1	5.20	0.100	NH
Lincoln	MT-37 along east shore of Lake Koocanusa	P-33	18.30	0.100	STPP
Lake	MT-35 along east shore of Flathead Lake	P-52	18.30	0.100	STPP
Lincoln	MT-56, Bull Lake Road, south of Troy	P-56	27.90	0.102	STPP
Sanders	S-472, 2 km north of junction with MT-200	S-472	1.00	1.498	STPS
Lincoln	S-508, Yaak River Road	S-508	18.80	0.100	STPS
Lincoln	S-508, Yaak River Road	S-508	19.20	0.100	STPS
Missoula	Old Montana 200, frontage road near Bonner at junction with Marshall Canyon Road	X-32200	0.25	0.010	STPX

Staff recommends that the Commission approve the addition of this project to the program.

Commissioner Griffith moved to approve the Slide Corrections, D1 Slope Stability. Commissioner Lambert seconded the motion. All Commissioners voted aye.

The motion passed unanimously.

Agenda Item No. 3: Bridge Rehabilitation and Replacement
West Side Canal – 4M N Dillon
Blaine Spring Cr – 9M S Ennis
Clark Fork – 1M NW Trout Creek
Butte Creek – E of Rosebud

Lynn Zanto presented the Bridge Rehabilitation and Replacement projects to the Commission. MDT’s Bridge Bureau reviews bridge conditions statewide and provides recommendations for construction projects to be added to the Bridge Program. At this time, the Bridge Bureau recommends adding the following projects to the program:

West Side Canal – 4 M N Dillon: The West Side Canal Bridge is located four miles north of Dillon on Old Highway 91 (X-81001). The department plans to use accelerated construction techniques to replace this bridge. The total estimated cost for all phases of this project is approximately \$837,000.

Blaine Spring Creek – 8 M S Ennis: Replacing the Blaine Spring Creek Bridge, located on Secondary 249 (S-249) 8 miles south of Ennis, is a high priority for Madison County. They have a Treasure State Endowment Program (TSEP) grant and county funding totaling about \$1,000,000 that they are committing to this project. The bridge meets the Bridge Program objectives for replacement. The total estimated project cost is approximately \$1,996,000.

Clark Fork – 1 M NW Trout Creek: The deck of this bridge, which crosses the Clark Fork River 1 mile northwest of Trout Creek on Montana Highway 200 (P-6), is showing significant deterioration and is in need of rehabilitation work. The total estimated project cost is approximately \$5,600,000.

Butte Creek – E of Rosebud: MDT is planning to replace the timber deck of the bridge that crosses Butte Creek on Old Highway 10 (X-44303), east of Rosebud. Due to the thickness of the existing overlay (about 11 inches), it will be necessary to adjust grades in and out. All work will be within existing right-of-way. The total estimated cost for all phases is approximately \$682,000.

MDT is requesting Commission approval of the following bridge replacement and rehabilitation projects:

District	County	Feature Crossed	Approximate Location	Route	Estimated Cost	Scope
2	Beaverhead	West Side Canal	4 mi. N of Dillon	Old Hwy 91 (X-81001)	\$837,000	Bridge Replacement
2	Madison	Blaine Spring Creek	8 mi. S of Ennis	Secondary 249 (S-249)	\$1,996,000	Bridge Replacement
1	Sanders	Clark Fork River	1 mi. NW Trout Creek	Montana 200 (P-6)	\$5,600,000	Bridge Deck (Rehab)
4	Rosebud	Butte Creek	E of Rosebud	Old Hwy 10 (X-44303)	<u>\$682,000</u>	Bridge Deck (Rehab)
Total Estimated Cost					\$9,115,000	

The total estimated cost for all four projects is approximately \$9,115,000, which will come from the Surface Transportation (STP-BR) Bridge Program with the exception of county and TSEP funding totaling \$1 million for the Blaine Spring Creek project.

Staff recommends that the Commission approve the addition of these projects to the Bridge Program.

Commissioner Griffith asked about replacing the timber deck on Butte Creek and the life expectancy of that deck. Dwane Kailey said it was hard to say because it depends on maintenance and the use of the deck. Some of our decks are 50 years old.

Commissioner Griffith asked if the area had potential for significant growth and would the timber deck support emergency vehicles. Dwane Kailey said the bridge engineers go through a very thorough analysis and would not propose something that was not appropriate. We completed the study in that area and we are taking the increase in growth into consideration. Our bridge engineers are very thorough and would not recommend something that would not hold up.

Commissioner Howlett asked if the Clark Fork Bridge Rehab was part of the project by Mill Town. Lynn Zanto said it was north of Thompson Falls. We have an improvement project near Bonner that is on the Safety Project list.

Commissioner Lambert moved to approve the Bridge Rehabilitation and Replacement, West Side Canal – 4M N Dillon, Blaine Spring Cr – 8M S Ennis, Clark Fork – 1M NW Trout Creek, Butte Creek – E of Rosebud. Commissioner Lambert seconded the Motion. All Commissioners voted aye.

The motion passed unanimous.

Agenda Item No. 4: Enhanced Projects on MDT Right of Way Pike Avenue Path – Columbus

Lynn Zanto presented the Enhancement Project on MDT Right of Way, Pike Avenue Path – Columbus to the Commission. The Transportation Commission approves Community Transportation Enhancement Program (CTEP) projects that are located on or adjacent to state-designated streets and roads. CTEP projects are funded with the enhancement set-aside of the Surface Transportation Program, which is allocated by population to Montana's local and tribal governments. Communities select projects to fund with their allocations and provide the required non-federal match. The program is based on an agreement between MDT and Montana local and tribal governments.

Stillwater County is requesting CTEP funding to design and build a hard-surfaced bicycle and pedestrian path in Columbus. The 8 to 10 foot wide path will extend approximately 3,275 feet along the north side of Pike Avenue (S-306) between Quarry Street and the Mountain View Cemetery. This location was identified as a desirable place for a trail during the development of the Columbus Area Trails Plan. The plan's public input process included a public hearing held before the City-County Planning Board on March 23, 2010.

The total estimated cost for all phases is approximately \$207,000. Including this project, Stillwater County will have obligated \$727,259 of the \$804,574 made available over the life of the CTEP program. MDT will perform a final review to ensure substantial compliance with project plans, specifications and estimates.

Summary: MDT is asking the Commission to approve a project to design and build a bicycle and pedestrian path in Columbus along Pike Avenue (S-306) between Quarry Street and the Mountain View Cemetery, a distance of about 3,275 feet. This is a CTEP project with a total estimated cost of approximately \$207,000. Staff recommends that the Commission approve the addition of this project to the program.

Commissioner Griffith moved to approve the Enhancement Project on MDT Right of Way, Pike Avenue Path – Columbus. Commissioner Lambert seconded the Motion. All Commissioners voted aye.

The motion passed unanimous.

Agenda Item 5: Highway Safety Improvement Program

Lynn Zanto presented the Highway Improvement Program to the Commission. MDT is asking the Commission to approve 45 safety projects to be funded through the Highway Safety Improvement Program (HSIP). The overall purpose of HSIP is to reduce traffic fatalities and serious injuries by implementing infrastructure-related safety improvements. Funding distribution is prioritized according to benefit/cost ratios at locations where feasible countermeasures to crash trends are identified.

The projects on the attached list meet the criteria set forth for HSIP-funded projects. These projects will be let for construction individually. The estimated total cost for all phases is approximately \$16,831,000. Combined, these projects will provide safety improvements for approximately 38.8 miles of federal-aid highways.

Summary: MDT is requesting Commission approval of 45 safety projects to be funded by the Highway Safety Improvement Program. Attachment A lists the project names, locations, scope, and cost. The total estimated cost for all 45 projects is approximately \$16,831,000. Staff recommends that the Commission approve the addition of these projects to the program.

Commissioner Griffith said he spoke with Dwane earlier about Skalkaho Road. It's been over a year now since we brought up the issue of Skalkaho Road where there was a fatality. We agreed to get some lighting in there. That is very important to get done and Dwane said it was scheduled in 2014. When we have a safety project it shouldn't take two or three years to get done. Is there any way to incorporate that into this? Dwane said the design has not been completed yet – we still have to design all the electrical and get that set up for the project. As we go through the TCP, in SHIP we typically don't program out five years but we do look at essentially two years of funding. The projects identified this year will actually be some backfill for 2014 but the majority of them are planned for 2015. When we did Skalkaho we were shooting for 2014 funding because we had already programmed and identified safety improvements for 2013. Commissioner Griffith said it comes down to an issue of priority where there has been a fatality and there's potential for harm. Don't we have any flexibility in there? Dwane said yes there is always flexibility but all these projects are identifying safety improvements through benefit cost ratio and every one of them is important to us. Commissioner Griffith said he was not suggesting they were not. Dwane said we are trying to deliver all the safety projects and trying to keep them in a methodical method to get them delivered in an appropriate timeframe. Commissioner Griffith asked if the opportunity presents itself would they give some serious thought to getting this project done. We made a commitment to Ravalli County to get this done. Dwane said he would do that.

Commissioner Lambert asked if County Commissioners propose these projects or does the department find them? How do they get on the list? Dwane said MDT looks at the entire system and identifies crash clusters. We also send a letter to each of the local governments and ask them to identify potential issues within their area. They notify us of locations and then it competes with all the other areas statewide. There is no priority – it's all based on a benefit cost issue. Commissioner Lambert asked if sometimes there is an emergency situation where you have to go in and take care of it and not put it on the schedule. Dwane Kailey said yes there are times we identify an immediate risk and we address that immediately. Typically in those situations we try and use state funds if possible to cut through the red tape.

Commissioner Lambert moved to approve the Highway Safety Improvement Program. Commissioner Griffith seconded the Motion. All Commissioners voted aye.

The motion passed unanimous.

**Agenda Item 6: Speed Zone
Brooks Street – Missoula**

Dwane Kailey presented the Speed Study for Brooks Street in Missoula to the Commission. The investigation was prompted by a Brooks Street Corridor Safety Audit. We identified an area and we've looked at it. We've reviewed the traveling speeds and the accident history. Based on that review we are recommending a proposal to extend the 35 mph speed zone. We recommend a 45 mph speed limit beginning at station 806, approximately 300 feet south of Buckhouse Bridge and continuing north approximately 3,100 feet and then transitioning to a 35 mph speed limit about 150 feet south of 39th Street and continuing north an approximate distance of 6,800 feet or 1.3 miles. The City has reviewed this and they support it.

Commissioner Griffith moved to approve the Speed Limit Recommendation for Brooks Street – Missoula. Commissioner Lambert seconded the Motion. All Commissioners voted aye.

The motion passed unanimous.

**Agenda Item 7: Speed Zone
MT16 – South of Sidney**

Dwane Kailey presented the Speed Study for MT16, South of Sidney, to the Commission. This was requested by Richland County and the City of Sidney. We've reviewed the traveling speed, the accident history, as well as the roadside culture. It is our recommendation to adopt a 55 mph speed limit beginning at milepost 49.75, 1,300 feet south of the intersection of MT23 and MT200 and continuing north an approximate distance of 0.85 miles. This has been presented to Richland County officials for their review and they concur.

Commissioner Howlett asked if the project was because of the significant truck traffic. Dwane said absolutely. We've got two in this Commission meeting and we plan to bring another one that actually addresses the entire length of MT16. We plan to bring the entire length of MT16 to you at the next Commission meeting as well. Commissioner Howlett asked how that would impact what they were being asked to do today. Dwane Kailey said it will tie into this recommendation but it will not adjust this recommendation.

Commissioner Lambert moved to approve the Speed Limit Recommendation for MT16 – South of Sidney. Commissioner Griffith seconded the Motion. All Commissioners voted aye.

The motion passed unanimous.

**Agenda Item 8: Speed Zone
MT16 – Sidney West**

Dwane Kailey presented the Speed Study for MT16 – Sidney West to the Commission. Dwane said this was prompted by local officials. We've reviewed the accident history, the travelling speeds, the roadside culture and based on our review we are recommending a 35 mph speed limit beginning at the intersection with North Central Avenue MT200 and continuing west an approximate distance of 5,100 feet. Email correspondence from the City of Sidney shows they concur with this recommendation.

Commissioner Lambert moved to approve the Speed Limit Recommendation for MT16 – Sidney West. Commissioner Griffith seconded the Motion. All Commissioners voted aye.

The motion passed unanimous.

**Agenda Item 9: Speed Zone
Secondary 354 – Polson South**

Dwane Kailey presented the Speed Study Secondary 354 – Polson South, also known as Back Road. You may recall that we actually presented this to the Commission at a previous Commission meeting. This roadway was recently rebuilt; it used to be a gravel road. The county asked us to look at it. We’ve reviewed the travelling speeds as well as the roadside culture. It is our recommendation to adopt a 65 mph speed limit beginning at MP 3.5 500 feet south of Suncrest Lane, continuing south to the intersection of Round Butte Road an approximate distance of 9.1 miles. We do have the Tribes and the local county official’s concurrence in that recommendation.

Commissioner Griffith moved to approve the Speed Limit Recommendation for Secondary 354 – Polson South. Commissioner Lambert seconded the Motion. All Commissioners voted aye.

The motion passed unanimous.

**Agenda Item 10: Speed Zone
East Railroad Street & Shannon Road (U6903)**

Dwane Kailey presented the Speed Study East Railroad Street & Shannon Road (U6903) in the City of Laurel to the Commission. The City requested we take a look at their 25 mph speed zone and look to an adjustment towards 35 mph. We have reviewed the area. Our original recommendation was to drop the 25 mph and go to a 35-45 mph zone, however, when discussing this with the local officials, they requested that we actually retain a short section of the 25 mph but because it is existing it is not included in our recommendation. Our recommendation at this point in time is to adopt a speed zone of 35 mph beginning 1,000 feet east of the intersection with US 213 & 310 and continuing an approximate distance of 0.5 miles, then transitioning to a 45 mph speed limit and continuing east to the intersection of East Main Street and Hwy 10, an approximate distance of 2.6 miles. We have presented this to the City of Laurel and they concur.

Commissioner Griffith asked if they were increasing some of the speed limit. Dwane said yes as requested by the City of Laurel. As you may recall by statute we cannot increase the speed without a specific request from the local government.

Commissioner Lambert asked if they were refurbishing a bridge in Livingston. I saw a sign that said “no traffic across the bridge.” Dwane said they were replacing the structure over the Yellowstone River in Livingston. We analyzed the cost of doing that. We could have built a detour bridge but based on the cost and in coordination with the City of Livingston, we felt it was best to go ahead and close the road, expedite the construction and get it done sooner and at a lower cost. The interchange on the east end of Livingston has signs advising that the road is closed.

Commissioner Griffith moved to approve the Speed Limit Recommendation for East Railroad Street & Shannon Road (U6903). Commissioner Lambert seconded the Motion. All Commissioners voted aye.

The motion passed unanimous.

Agenda Item 11: Speed Zone Rocky Point Road – X24003

Dwane Kailey presented the Speed Study Rocky Point Road – X24003 in Lake County to the Commission. We were requested to take a look at the speeds on this route. Our original recommendation, based on traveling speeds, accident history, and roadside culture, was for 50 mph transitioning to 60 mph. In discussion with both Lake County and Confederated Salish and Kootenai Tribes, they actually requested a 45-55 mph. We discussed that with the District. Based on additional review we are recommending a speed zone of 45 mph beginning at the intersection with US 93 continuing north to MP 2, an approximate distance of two miles, then transitioning to a 55 mph speed limit beginning at MP 2 then continuing north to MPH 4.6, an approximate distance of 2.6 miles. That is concurred and supported by both Lake County and the Confederated Salish and Kootenai Tribes.

Commissioner Griffith moved to approve the Speed Limit Recommendation for Rocky Point Road – X24003. Commissioner Lambert seconded the Motion. All Commissioners voted aye.

The motion passed unanimous.

Agenda Item 12: Letting Lists

Duane Kailey presented the Letting Lists for January 17th through June 13th to the Commission for their approval. These are built off the TCP Meeting we held in late October last year.

Commissioner Lambert moved to approve the Letting Lists. Commissioner Griffith seconded the Motion. All Commissioners voted aye.

The motion passed unanimous.

Agenda Item 13: Design Build Teton Rest Area

Kevin Christensen presented the Design Build, Teton Rest Area to the Commission. The Teton Rest Area is the next rest area in our Rest Area Prioritization Program. This is our first design build rehab. We went through the process like we normally do with a Request for Proposal. We received two responsive proposals. Unfortunately the low bid came in over our guidelines. Our guidelines for design build are 25%. When we got the price proposals, we went back and looked at our estimate. Initially we had submitted our initial estimate to Fiscal Programming and that was during the development of the RFP which is the scope of work for this project. During that time a number of things changed because this was a rehab project and we weren't 100% sure what the scope of the project was going to entail. Unfortunately some changes were made along the way that didn't get reflected back to the original engineer's estimate. For instance, one of the bigger items was the picnic structures. There were four of them and initially those were going to stay in place. During the RFP development we looked at them and they were in a state of disrepair and the decision was made to replace those. That is about \$60,000 that wasn't added back into the estimate. The original plan for the building called for new vestibules at each building and again as the RFP was in development, it was decided to remove those. The original estimate was low. In the Grey Cliff Rest Area project we change ordered in a couple of vestibules so we had a pretty good idea of what the cost would be. So we subtracted that cost out of the building portion of the estimate but we didn't take into account that the estimate wasn't high enough to begin with so the remaining amount of money wasn't enough to basically gut the building, new plumbing fixtures, ADA compliant, new electrical – there wasn't enough money left.

Unfortunately we were a little bit disorganized during the development of the RFP but when we went back and looked at it, we believed we received a competitive bid. So it is staff recommendation for the Commission to award the project.

Commissioner Howlett asked if “competitive” meant they now had to get prices. Kevin Christensen said the bid price is lump sum. So there weren’t specific items in Talcott’s bid price proposal that we could look at. All we could do is look at our own estimate. What we discovered was there were a number of scope changes in the RFP development phase that weren’t reflected back on our estimate. So by looking at that, we believe that Talcott/Hessler’s bid is a competitive bid. Essentially it is the same as design bid build, we go back and look at our estimate to see if there’s anything that we missed, and indeed in this case there were a number of things we missed. I attribute part of it to simple oversight and part is that this is our first design build rehab whereas with a complete reconstruction of a rest area, the development of the RFP is more straight-forward.

Commissioner Howlett asked Tim is he concurred that we were on solid legal ground. Tim Reardon said he believed so. We’ve looked at this.

Commissioner Griffith moved to accept the staff recommendation to award the Design Build Teton Rest Area: (1) Recommend all two Firms are considered responsive and receive the stipend payment; and (2) Award the Contract to the Talcott/Hessler DB team, with the highest Adjusted Score, considered the Best Value for MDT, in the amount of \$615,900. Commissioner Lambert seconded the Motion. All Commissioners voted aye.

The motion passed unanimous.

Agenda Item 14: Certificates of Completion August, September, October & November 2012

Dwane Kailey presented the Change Orders for the months of August, September, October and November, 2012.

Commissioner Griffith said he was approached about an issue of final payments. Isn’t a Certificate of Completion a warrant that determines the allowability of final payment? Dwane Kailey said the Certificate of Completion is the final step in closing out the project. Commissioner Griffith asked about the timeframe for issuing final payment to a Contractor. Dwane said it can vary a fair amount depending on ... Commissioner Griffith asked if it could be up to three years. Dwane said potentially if there is a legal challenge, i.e., a claim on some projects, yes it can delay final payment up to three years. Do you have a specific project? Commissioner Griffith said there is one coming. This individual was aware I was a Commissioner and he was probing my level of knowledge which I’m not familiar with final payments. It seems to me that a Certificate of Completion says it’s all done, it’s met spec. I think the issue is that a general contractor had paid a subcontractor and something wasn’t right after the final inspection and the sub was out of business and the general was left holding the bag for a substantial amount of money. So it’s not the final payment? Does it mean that everything has been inspected and it’s a done deal? Where would a legal challenge come in that would delay a payment? Dwane said a legal challenge should come in during the project – they have two weeks from when an issue arises to file a claim.

Unidentified – I’m familiar with the project you’re talking about. It was a large project. Typically our goal is to have the project close out in 180 days. Sometimes that’s difficult because we need to get a significant amount of paperwork, labor certificates, materials search, etc. Our ability to do that is actually dependent on the

contractor, the contractor's suppliers, and so forth. In this case, the project was completed but before we did the final inspection, there were some problems with the concrete intersections and that occurred later in the year. We negotiated with the contractor because there were some things that had to be removed and replaced and some that could just be fixed but it was a little too late in the year to undertake that work. So by the time we negotiated a Change Order, many months had gone by. The work was actually delayed which delayed the whole process to final the project and do the final inspection again, our people checking the final, sending in the result, the district having it rechecked and then going through the Certificate of Completion. You're correct, in this case, during the checking of the final documentation there were some errors found. Normally we find errors in the contractor's favor but on occasion we find errors where we've overpaid. That was the case here. Unfortunately a significant amount of time transpired and that's how we ended up with that situation.

Commissioner Griffith asked if this was a one-case occurrence. Kevin said he couldn't say it was a one-case occurrence – it was infrequent but it happens on larger projects. We had a number of large projects on the 93 Corridor. With more complicated projects sometimes it takes a lot more time to get the project finalized out. I wouldn't say it's a frequent occurrence but it does happen on occasion.

Commissioner Griffith said one thing that was interesting was the discussion of a number of possible bills that would mandate payment within 180 days. I think it's a little bit dangerous to get Legislators making executive or management decisions. I hope we can find a way to look a little deeper into this and make it a little smoother because three years seems unreasonable. Kevin said he agreed that it made the department look bad. We could have done better in that case. It's not a case of prompt payment but rather we discovered we'd overpaid and that's where the difficulties come in.

Commissioner Griffith moved to approve the Certificates of Completion for the months of August, September, October and November, 2012. Commissioner Lambert seconded the Motion. All Commissioners voted aye.

The motion passed unanimous.

Public Comment

There was no public comment made.

Agenda Item 15: Change Orders August, September, October and November, 2012

Dwane Kailey presented the Change Orders for August, September, October and November, 2012 for Commission approval.

Commissioner Griffith moved to approve the Change Orders for the months of August, September, October and November, 2012. Commissioner Lambert seconded the Motion. All Commissioners voted aye.

The motion passed unanimous.

Agenda Item 16: Liquidated Damages (See attached Agenda item)

Dwane Kailey presented the Liquidated Damages to the Commission. We have several of them today.

1. Superior Structures. The number of days is 19. The amount is \$63,745.00. The contractor is not disputing the liquidated damages.
2. North Colstrip North. The number of days is 16. The amount is \$46,224.00. The contractor is not disputing the liquidated damages.
3. Prior Creek One Mile South – Huntly. We anticipate Inman Supply, the Contractor, at 10:00 so I'll defer until then.
4. Bear Creek Road South. The number of days is 15. The amount is \$50,325.00. The contractor is not disputing the liquidated damages.
5. Bow Crossing North and South. The number of days is 1. The amount is \$2,220.00. The contractor is not disputing the liquidated damages.
6. Junction MT 40 South. The number of days is 7. The amount is \$15,540.00. The contractor is not disputing the liquidated damages.
7. Baker South. The number of days is 44. The amount is \$147,620.00. The contractor is not disputing the liquidated damages.
8. Smoke Route in Black Eagle. The number of days is 1. The amount is \$2,889.00. The contractor is not disputing the liquidated damages.
9. Chinook East and West. The number of days is 27. The amount is \$72,873.00. The contractor is not disputing the liquidated damages.
10. East of Nashua East. The number of days is 35. The amount is \$101,115.00. The contractor is not disputing the liquidated damages.
11. Maria Pass East. The number of days is 8. The amount is \$15,128.00. The contractor is not disputing the liquidated damages.
12. North of Augusta - Choteau. The number of days is 5. The amount is \$14,445.00. The contractor is not disputing the liquidated damages.
13. 40 km South of Ekalaka. The number of days is 17. The amount is \$84,626.00. The contractor is not disputing the liquidated damages.

The Commission needs to do nothing on this agenda item unless you wish to waive some days. Commissioner Howlett said they would take up Prior Creek at 10:00 as scheduled. The Commission will do nothing for those that are not disputed.

Discussion on Prior Creek

Dwane Kailey explained the Liquidated Damages on Prior Creek One Mile South – Huntly. The number of days assessed were 78 days. The total amount was \$173,160.00. To give you a run-down of the issues that are disputed – essentially TCA is contesting three issues. We assessed a total of 80 days on the project; however, as I read earlier, we're down to 78 because MDT is looking at waiving two days. The three issues are: (1) the project was let July 14th with an award date of July 14 and a Notice to Proceed date of July 22. It was an emergency project. You may recall that with the flooding the bridge was significantly damaged and the only way to repair it was to actually replace it. So we expedited the design, award and construction on this project. As mentioned earlier, TCA is contesting three issues relative to Liquidated Damages.

First and foremost to help expedite construction on this project, MDT actually pre-ordered the beams for the bridge. The delivery of those beams was MDT's responsibility. Those beams were delivered late and hence MDT has agreed to waive two days relative to that issue.

The second issue is in regards to pier removal. On the pier removal issues, in September TCA submitted a blasting plan to remove the pier. MDT reviewed that request and conditionally approved it with some comments on October 4th. The condition was approval from Fish, Wildlife and Parks; they have to approve the blasting plan as well. Subsequently we received a letter from Fish, Wildlife and Park on October 11th denying the request for the blasting plan. On October 12th TCA was in communication with the department and had decided to not proceed with blasting and then went forward with jack-hammering. TCA is saying that by denial of the plan and our delay in reviewing and approving it, they are due some additional time.

The third issue is the water depth on the project. This project's plans showed a water elevation on the plans. Due to the flooding and there is actually a downstream check dam to maintain a certain elevation for an irrigation ditch that goes out to the Warden-Huntly area. That check dam was actually in place prior to the bidding and award of the contract. We believe that the water elevation was visible during the bidding and subsequent construction. It was not excessive and therefore we're not recommending any waiving of days relative to the water depth issue. With that I would ask TCA to speak to the issue.

TCA – Tracy Cowdry

Thank you for letting me speak to you. TCA does not contest the blasting, what we're contesting is that the bridge was designed on June 6th after the flood. The bid date was July 14th. We went down and looked at the job. The water elevation on the bridge plan shows an elevation of 3,011, the actual elevation was 3,022. Now, normally a foot or two is understandable but 11 feet is three feet higher than those lights; you can imagine the difference. Not only is it 11 feet higher but when you start building the bridge out and putting in the rip-rap it gets wider and as you go up the slope so you get farther and farther from the work. We had pointed this out many times to the inspectors on the job. In my 30 years of doing bridges for you guys, we've never had a problem with the verbal statements. They said they knew there should be a change in conditions but it was an emergency job so we just kept going trying to get it done. I learned a lesson on that. The next job we made sure we got everything in writing. I would like to show you what I'm talking about (referring to graphic). This shows the actual elevation of the water and you can see that it makes everything much more difficult – the bridge removal, the installation of rip-rap. We're contesting part of the liquidated damages and the excess in costs and we think we're being very fair. We're asking that the 19.5 chargeable days be added to the contract time; an additional \$11,322.02 paid for all the extra work because of the high water.

Dwane Kailey said that, as well as the documentation, supporting letters are all included in the packet. Commissioner Howlett asked if the position of the department is that it wasn't necessary. Dwane said the contractor had the opportunity to review the site; the water elevation was not significantly different from the time it was bid to the time they actually did the construction. We believe they had every opportunity to anticipate the water height they experienced during construction. Commissioner Howlett asked about Ordinary High Water (OHW). Dwane said that refers to about a two-year flow. Commissioner Howlett said if it was ordinary high water, it wouldn't have washed the bridge out. Dwane said that was correct.

Tracy Cowdry said they wrote that on the plans after the flood. They went down and checked it and somebody got an elevation off somewhere. We did go look at the job

before we bid it but I don't know if there are any contractors that have actually hired a surveyor to go out and survey the job before they bid it. We've never done that and we've been doing bridges for 30 years. There was a screw up on the plans. We also requested the design from the Bridge Bureau to see what they designed the new bridge for and that request was denied. Commissioner Howlett asked if he was given verbal approval. Tracy Cowdry said we need to get a change of conditions and MDT agreed that it was definitely off – we've got 11 feet more water than what's shown on the plans. We've been doing bridges for 30 years with you guys and we've had verbal agreements and never had any trouble before.

Commissioner Howlett asked what he had to support his conclusion. Did the project manager tell you that? Tracy Cowdry said Rich Hutton and Gary Gotshell were the two inspectors on the job and we talked about it every day we were involved with the high water. They said they understood there was a change in conditions. My screw-up was that I should have stopped the job and gotten a change order right then but I knew it was an emergency job and we were trying to get it done because winter was coming on. I learned my lesson on that one and it won't happen again.

Commissioner Howlett asked what the change of conditions did to make the days late. Dwane said the project was a total of 80 days late, however, we're waiving two. They are requesting that we waive 19.5 days relative to this water elevation issue. Tracy Cowdry said the bridge removal took so much extra time. If you look at the picture, if the water height would have been at this height here, we could have gone right out with a jack-hammer and got rid of that pier but the water height was here (referring to graphic) and it took a lot more work because we're reaching another 40 feet. It is a lot different working in seven feet of water versus 18 feet of water.

Commissioner Griffith asked Dwane about the communication between him and the project manager. Dwane said we have questioned the staff on the project and they do not recall giving any kind of approval. We've also gone back to the daily work reports, which are the diaries of the project, and found no evidence or documentation of committing to waiving any time on the project. Commissioner Griffith asked if the contractor received a copy of the daily diaries during the project. Dwane said they do not. Tracy Cowdry said they requested those and were told that they were either lost or destroyed. So we never got them but we requested them. Commissioner Griffith said it seems that since this was an emergency project and obviously we weren't at the ordinary high water mark or we wouldn't be having the discussion for a new bridge. There were factors there that were extraordinary – not just the depth of the water but the turbidity of it and the extra precautions one has to take to work in those conditions. It's not ordinary work. Whether it warrants 78 days, I don't know.

Commissioner Howlett asked if they were talking about 78 days or 19 days. Dwane Kailey said if you look in your packet on the 2nd page you'll find a letter from TCA. The third paragraph discusses the high water issue and it refers to a request for 10.5 days. The 19-day issue comes in because he is tying in the pier removal relative to the blasting plan and they are requesting nine days for that. Commissioner Howlett said we started out at 80 and you gave two, now we're talking about 10 additional days and nine more additional days, so we're talking roughly 60 days now or zero days? Dwane said we started out at 80 and MDT waived two of those days, so we're working down from the total of 78 days. Tracy Cowdry said he was requested 19.5 days because of the high water. Commissioner Howlett asked if that was 19.5 paid. Tracy Cowdry said we're asking that 19.5 days of liquidated damages either be repaid to us or given back. Commissioner Howlett asked if it had already been taken. Tracy Cowdry said yes.

Commissioner Howlett asked about the other 60 days. Tracy Cowdry said the job took longer than we thought it was going to and we knew that when we bid it. Commissioner Howlett asked if they were contesting the other 60 days. Tracy Cowdry said no they were not. Commissioner Howlett asked if the other 60 days

were because the job took longer or was the job not staffed right. Tracy Cowdry said the job took longer because it was an unrealistic time period but we knew that when we bid it. We are not contesting the extra 60 days we're only contesting 19.5 days because of the extra 11 feet of water. That's the extra time it took us for the pier removal and digging out all the dirt for the rip-rap construction. Commissioner Howlett asked the dollar figure. Tracy Cowdry said it was \$1,881 per day for a total of \$38,000. We are also requesting an additional \$11,000 because it took a lot more time and labor because of all the high water. I was very fair on that \$11,000. Commissioner Howlett said it would be fair to give you a waiver on those days. Commissioner Lambert said giving him the waiver on the days would be fair.

Commissioner Griffith said he was not totally on board with giving a waiver on the days. I'm not overly convinced that we've done everything we could. I'm trying to see what difference the high water made. From the department's perspective, do you think the high water difference was a factor in the completion time? Dwane said he believed the contractor had a reasonable opportunity to expect the high water prior to bidding the project; I think they had the opportunity to bid it appropriately. The one thing I would add, according to their letter they are asking for nine days for pier removal due to the blasting plan. Again the department was very strong in that position; we reviewed their blasting plan accordingly and timely. I believe the denial by Fish, Wildlife and Parks was appropriate. It was the contractor's decision to divert from the blasting plan to using a jack hammer. So I don't believe the nine days should be considered.

Commissioner Howlett said they were aware of the trigger issues for Fish, Wildlife and Parks – when you start blasting these streams you've got all kinds of problems. Tracy Cowdry said MDT thought they had it and we went through a bunch of stuff to do that. When we knew it was going to be denied, we just dropped it. I'm not contesting that. It's when we had to go in and jack-hammer out the pier, the extra 11 feet of water made it a lot harder to get to the pier because it was under 18 feet of water instead of seven and now we're way back on the banks. I'm not contesting the blasting plan; MDT tried to help us with that. They tried to help us on the whole job because they wanted to get it done too. I don't have any problem with the help they gave us. You try things that don't work and you move on. I'm saying that because of the 11 feet of extra water, there was a lot more work and time involved. I'm sure they did some surveying on it and should have known at that time that the water height should have been 30/22 because they designed the bridge after the flood. Commissioner Howlett asked if the water height was shown through the plans as OHW – was that a factor to the contractor. Dwane said I believe that this is the one main location where that water height is shown. Do I believe that the contractor may have used that in the design of their construction activities? It's very likely. I believe what actually transpired is when the flooding took place, not only did it impact our bridge but it also went downstream (he handed out a picture). On the left hand side is the bridge in question and you can see where the stream is restricted and there's a check dam in there. You can also see the irrigation ditch that goes through there. What happened during the flooding was the water got to the point where it actually cut around and into the irrigation ditch and actually jumped out of it and into the river and cut that check dam out. I believe what happened during our design process is that check dam which is owned and operated by the Army Corp of Engineers, was not in place. It was installed in June prior to the bidding of the project so I think the contractor had a reasonable opportunity to expect a higher water elevation than shown on the plans. Commissioner Howlett said it was installed in June – had it ever been through a high water incident? Dwane could not answer that question. Tracy Cowdry said there were only 4-5 weeks from the time they designed the bridge to bid letting. As you all know in Montana the water continues to go down in July and August. Somehow it rises 11 feet than shown in the plans – somebody just screwed up when they designed it and put the wrong elevation on it. That's our contention.

Commissioner Griffith asked if the plans were drawn up quickly because it was an emergency situation. Dwane said yes. I believe the flooding happened and the bridge was damaged towards the end of May. So between the end of May and the middle of June is when we ordered the beams, finished completion of the plans, and bid this project. Commissioner Griffith asked if it was based on the topography of the river prior to the flood. Dwane said he could not answer that. Tracy Cowdry said they had to go out and survey to design the bridge. Commissioner Howlett said he was not trying to find any fault; he was just trying to be reasonable. My concern is by awarding liquidated damages does it imply a precedent for awarding additional funds. Tim Reardon said it is an assessment more than an award. The contractor has been charged. He admitted he overran the project roughly 80 days. He's asking that 19.5 days be excused by virtue of the water issue and the additional work required – nine days for the blasting and 10.5 days for the remainder. The question is – is that sufficient reason for the Commission to be motivated to waive that portion. If you do nothing, it stands. If you waive a portion of it then he is going to be paid for those 20 days and the assessment will be for the balance which is 60 days. Commissioner Howlett asked if they had the authority to say that if they waive the damages that there is no other recourse on the project. Tim Reardon said no. You have specific provisions to waive liquidated damaged and that's it. There are separate issues for any claim that might be filed for a change order that should have or could have been given. You don't have the authority to do that. You have the contractor that says he wants the 19.5 days and then there is a disputed \$11,000 payment they think they are entitled to. That's separate from the liquidated damage issue. You can deal with the liquidated damages today. If he wants to have a change order argument with the department, that's different and outside of the scope of liquidated damages.

Commissioner Howlett said there is a reasonable expectation of the plans representing the work that has to be done and there may have been some confusion about the elevation. While I don't think 19.5 days is the right number, I would say maybe nine days would be fair. Tim Reardon said liquidated damages are not punitive therefore the cost for the department to be out there and provide oversight for the project. This isn't saying there was any wrong doing; it was just for the cost to continue the project past when it was supposed to be done.

Commissioner Howlett said we have a little bit of a divided Commission. I'm ok with the 19.5 days and being assessed 60 days. These were extraordinary times and the water was 11 feet higher than normal high water. There were a lot of things that happened but we were in an almost crisis situation of needing to get it done. There could have been oversight in terms of what is exactly there right now, but at the same point in time I'm appreciative they went out and got the work done. They're willing to accept 60 days of liquidated damages. I think it's a fair position to waive 19.5 days. Commissioner Griffith is agreeable to half of that. Commissioner Lambert said she believed they have a reasonable expectation that the plans they were given would be right. I also think it sounds reasonable to me that the water level was a problem. I believe we should give them the 19.5 days.

Commissioner Lambert moved to waive 19.5 days of liquidated damages for TCA – Tracy Cowdry. Commissioner Griffith seconded the Motion. Commissioners Lambert, Skelton, Howlett voted aye; Commissioner Griffith voted nay. All other Liquidated Damages stand.

The motion passed three to one; Commissioner Griffith in opposition.

**Agenda Item 17: Amended Access Control Resolution
M1027(3), 0674-003-000, Hill Top Road
Extension – Billings**

Dwane Kailey presented the Amended Control Resolution for Hill Top Road Extension – Billings. This is on the Bench Blvd. Project. The Resolution did not allow access to Hill Top Road for a business when we adopted it. We would like to amend that to allow access for a business on Hill Top Road at Station 11+08.

Commissioner Howlett asked if it was multiple businesses or is it an industrial park. Dwane said there are two businesses in there. Commissioner Howlett asked if it was open to the public because we granted them access. Dwane said it is a public access to these businesses. Commissioner Griffith asked what the question was. Dwane said it was to amend the resolution to accommodate access for this point. Commissioner Griffith asked if it was already in existence. Dwane said yes.

Commissioner Lambert moved to approve the Amended Access Control Resolution M1027(3), 0674-003-000, Hill Top Road Extension – Billings. Commissioner Griffith seconded the Motion. All Commissioners voted aye.

The motion passed unanimous.

Agenda Item 18: New Limited Access Control Resolution STPS-STPU 225-1(1)0, 2km N of Great Falls North

Dwane Kailey presented the New Limited Amended Control Resolution for 2km North of Great Falls North. This is a new Limited Access Control Resolution on a road locally known as Bootlegger Trail. It is on Urban Route 5213 and Secondary 225 in Cascade County. We actually have a project in development right now that covers 11.489 miles of this roadway; however, the Access Control Resolution is only covering the urban area which is approximately 6,000 feet. An Access Control Resolution is a proactive measure by MDT to limit access and improve safety on this route. This is presented for your review and approval.

Commissioner Howlett asked if it was for 11 miles. Dwane said the main project is covering 11 miles. Commissioner Howlett asked if we would be controlling access for 11 miles by adopting this Resolution. Dwane said the Access Control Resolution only covered the first 6,000 feet of the 11-mile project and that is what this Resolution articulates. Commissioner Howlett asked if out of the entire 11-mile project this is the only portion that has limited access – is that because we are out of the city limits. Dwane said yes it turns rural at this point and it is outside the urban limits.

Commissioner Lambert moved to approve the New Amended Access Control Resolution STPS-STPU 225-1(1)0, 2km N of Great Falls – North. Commissioner Griffith seconded the Motion. All Commissioners voted aye.

The motion passed unanimous.

Commission Discussion

Pat Wise, Deputy Director

Commissioner Howlett welcomed her and Director Tooley to the Department. Pat Wise thanked the Commission and said they were getting acclimated to the department. MDT has a tremendous staff and resources. We have a wonderful constituency in Montana and the Commission is a key piece of that. It is a pretty well-oiled machine here. By the time we get aerial photographs taken so we can finish that pile of paperwork to get a product done, I think your staff is consistent in your policies, and allow reasonable local and community conversation about how that process is put into place. So I'm excited to see that. We can always make things more effective and more efficient. We have a couple of items pieces on the agenda

where we are going to continue to try and do that. We want to be able to make decisions based on the best information we can that reflect both our public and our private partner's interests in making this process run. I'm glad to be here. Commissioner Howlett welcomed her. Some of us have been around a long time. This is the third Governor I will have served under. Welcome aboard. I find this to be a challenging opportunity in life – challenging in the sense you get to do something state wide. We work hard and the department works hard to provide the very best safety we can. When we say something we mean it and when we commit, we're committed. It's been a real pleasure to serve with the number of different Commissioners over the years as well as the different Federal Highway Administrators we've had over the years.

DBE Discussion

Commissioner Griffith said we are going to have a discussion about DBE. This is going to be an interesting discussion. My request is to keep it civil and try to find common ground. I know there is some disagreement between what might be acceptable between different agencies. I also know that we are bound by accepting federal resources that we have some obligation and duty to adhere to that in policy and principal. So I'm going to be the ears listening and in the end we will try to find some reasonable and accommodating position that we all can live with – the contractors, the department, and the feds.

Dwane Kailey said the true agenda item is actually the recommendation from the department on the project 2003 Safety Improvements South of Whitefish. I'll lead with information and then we may have additional comments from the department. The bid letting was held December 13, 2012. This project was let with a 9% DBE goal. The apparent low bidder did not obtain any DBE participation, did not make good faith efforts and was being non-responsible. The second lowest bidder obtained less than 1% DBE participation and did not make good faith efforts and was also being non-responsible. The third lowest bidder obtained the DBE goal and MDT was initially recommending the work to the third lowest bidder as the lowest responsible/responsible bidder. The two unsuccessful bidders sought administrative reconsideration as provided by MDT's DBE Program. Prior to a decision by the Administrative Review Committee, MDT reviewed the specific specifications and concluded that the specifications did not provide sufficient guidance and clarity to contractors regarding what constitutes a "good faith effort" particularly when DBE bids are higher than non DBE bids. Consequently MDT has amended its good faith specifications to provide more guidance to the contracting community. On Friday, January 25, 2013, one of the unsuccessful bidders filed a complaint in District Court seeking an Injunction prohibiting MDT from awarding this contract and seeking a Declaratory Judgment awarding it the contract. It is staff's opinion that due to a lack of clarity in the previous good faith specifications, the fairest way to proceed is to reject all bids and to re-let this project under the amended good faith specifications. Additionally, because of the on-going litigation in which the plaintiffs seek to stop the award of this project, counsel has advised that it will likely take a year before the case can be tried and another year thereafter for any appeals to be complete. Consequently proceeding with the award of this project at this time may result in a delay of up to two years for this project. That would unnecessarily delay the safety project. You've got the bid tabs for your review if you want to look at those.

Commissioner Howlett asked if his recommendation is that we reject all the bids and re-bid it under the revised description of the good faith effort. Dwane said that is correct. Commissioner Howlett said he understands there is some level of ambiguity between the feds interpretation of what we've described as a proposed good faith effort and what might be acceptable to them. Is that correct? Kevin McLaury said yes. Commissioner Howlett said they were left in a dilemma. They will tell us what's okay or not okay after we've implemented something. I don't think that's an acceptable way to bring some clarity to contractors or to this department. First of all

I'm in agreement that we should reject all those bids. I think we need to find a way to have the principals, i.e., the legal staff of MDT and the legal staff of Federal Highways, sit down and come to some agreement on what's acceptable on the DBE because it's federal regulation and that it be done out here so that they understand the demographics of Montana and what we're dealing with here in Montana. I don't think anyone is trying to duck around DBE but certainly it's got to be confusing to contractors; it's confusing to the department and until we have some clarity and agencies in agreement we're just ripe for the picking. I don't like being in that position. It's a difficult position to be in as a Commission awarding things that are subject to some kind of legal review because of its ambiguity. So I'm going to defer to Mr. Reardon. The first order of business would be to reject the bids. Then you can tell me what to do.

Tim Reardon said if you recall on the last conference call in January you extended the time to award. The specifications say you have to award the contract within 45 days of the opening. The 45th day expired last week, so because we knew there was an issue out there the Commission extended that time. The motion from Commissioner Griffith was for an additional 45 days and the Commission accepted that. The 45-day window will be toward the end of February, to be within your specifications to make a decision whether to award the contract. Today you have several options – (1) award the contract. It is a recommendation from the department to not do that but you retain the authority to make that call. (2) You can reject all bids. You have done that in the past for a variety of reasons. (3) You can do nothing. According to Mr. Ohler and we have not been involved in this to the level that he has, but we have a hearing scheduled in the District Court of Lewis and Clark County next Tuesday for a hearing on a request from Schellinger Construction for the issuance of a Temporary Restraining Order. My understanding is that it is an order to direct the Commission to not award the project. There is also a subpart to the Complaint for a declaratory ruling to award the project to Schellinger Construction. Eventually you sort of segway right back into the central issue that brought us to where we are – the department's interpretation and application of what constitutes a good faith effort by contractors and bidders to satisfy the DBE goals to meet a federal requirement. As a result of a long study that the department had to conduct to establish a state-wide goal and on a project-by-project basis MDT tries to find projects where they can accomplish the statewide goal. So the department's recommendation is to not award.

Tim Reardon went on to say that this is a difficult decision. This is a safety project. While safety projects are not necessarily out of the ordinary, any time you postpone a safety project there is some concern about doing that. We're in court and I think while not named at this point I suspect the Transportation Commission should consider itself a defendant in that litigation. If the Temporary Restraining Order is issued next Tuesday, you couldn't award this project until we got a full-blown hearing of some kind to decide whether it will be a permanent injunction or whether the court might order you to award the contract to Schellinger Construction. It's not an easy situation for the department or the Commission to be in. It's not an easy place for contractors to be in. If you'll recall just three months ago we went through this same exercise with a controversy over DBE. I think everybody has tried since that time to make this program work more effectively. Obviously the contractors believe in this and several of them believe they did and now a decision has been made by the Civil Rights Bureau that at least one and possibly two of the low bidders did not. The third bidder is nearly \$300,000 higher in price. So the balancing act before the Commission is not an easy one. That's where we are. The Construction Bureau tried to find a reasonable process to provide some guidance to everybody. It's difficult. I can tell you with some assurance that most state's we've talked to are struggling with this same issue. Today the question in front of you is what to do with South of Whitefish. That really is your decision to make today.

Commissioner Griffith said while I'm in agreement with your recommendation of what to do with this contract, before we vote, I'd like to hear from the contractors.

We're not defending this in court; this is the action before the Commission. It's not a threat of lawsuit that's causing us to defend this action; it's just whether we should award to not award this project. The contractors have come a long way and I'd like to hear from them. Commissioner Howlett agreed. Commissioner Lambert asked Mr. Reardon if he said the Commission could reject all the bids. Tim Reardon said he intended to say that it is within your authority to reject all bids. The department has made that recommendation to you. That's what's pending in front of you today. Commissioner Lambert asked if they did something could it be changed by the court. Tim Reardon said the Commission has the authority to reject that recommendation or not. Commissioner Howlett asked if they accepted the recommendation today, then we have a different stature when we appear in court because we have rejected the bids. Tim Reardon said the department at this point would likely be in that position, yes.

Paul Sandry, Johnson Law Firm, Kalispell MT representing Schellinger Construction

I'm with the Johnson Law Firm in Kalispell. I'm here today on behalf of Schellinger Construction. These two folks are from Schellinger – Bob Warren and Mark Cyr. First of all I want to address the lawsuit. Schellinger filed the lawsuit. It wasn't filed last Friday in preparation of trying to leverage anybody here today. I think Mr. Reardon and Mr. Ohler will tell you that if Schellinger doesn't file that lawsuit before an award is made, there is a laches argument and Schellinger would have no remedy. So I'm assuring you that I don't stand before you saying that we have all this leverage because we filed a lawsuit; there was a reason to file it because there was a statute of limitation. He asked the Commission if they had an opportunity to review his letter. They answered yes.

In 2012 Schellinger bid a highway job in Libby, Montana. They didn't get the job. They didn't get the job because there was a determination made by MDT that they didn't meet the good faith effort criteria. You didn't hear from Schellinger in response to that. The reason is because they didn't meet it, and they acknowledged that they didn't meet it on some level. So Schellinger revamped the way they bid these jobs with DBE goals. Schellinger was doing some of the simple things that are contained in both the former and the current criteria, i.e., advertisement, soliciting, DBE's on the state's list, following up with phone calls, contacting the DBE's and analyzing their bids. They do all that now because of the Libby experience. They did that with this job.

There is some institutional history with MDT. In the recent history there have been some things that Schellinger and other contractors have picked up from this process. One of those things has to do with a job that Riverside Construction was awarded in the Vaughn Sun River area. Riverside did not meet the DBE goal in that project and in the bidding but they were determined to have made a good faith effort. They accepted one subcontractor that was a DBE that was 6% over the closest non-DBE. They did not pick up any other DBE's in that project and some of the DBE's on that project had percentages 19% above the lower non-DBE. Those contractors know that. So in fashioning their business decisions they take that into account.

On the Whitefish job, Schellinger solicited 26% of the work as DBE solicited. There was plenty of opportunity for participation. If Schellinger would have accepted the bids of all those DBE's, 26% of that project would have been DBE. They would have exceeded, far and above, the 9% goal for this project but they didn't use any of them. The reason is because the DBE's weren't competitive. Schellinger takes a look, as do all the other contractors, at questions and answers that go to the department about DBE and good faith effort. Prior to the Whitefish job they let, there is a blurb contained within my first letter I sent to you folks on page three. MDT was asked if a DBE bid is a certain percentage over the non-DBE bids, is that considered unreasonable. The question really is if the DBE bid is over the non-DBE bid do I have to take the DBE because they are higher. The answer is MDT has not

determined a percentage – that is up to the individual prime contractor as to what they feel is reasonable based on current business processes. With the Riverside experience in mind with the question and answers, with the printed materials MDT put out prior to this job, they knew they didn't have to accept non-competitive DBEs. They didn't; those were the rules. The DBE's that submitted to Schellinger were between 20% and 75% over the lowest non-DBE that Schellinger went in on this job with.

What's reasonable and what's unreasonable? On the one hand the department has told these contractors that they should use their business judgment. On the other hand the department, in disqualifying a bidder, is saying I know that's what we told you and we told you to use your business making processes, but we didn't like what you did so we're going to substitute our decision making for yours in determining that you shouldn't have done what you did. That's not fair!

Nothing has changed in terms of this "reasonableness". I think we would all agree that what was reasonable in December of 2012 should be reasonable in January of 2013. Nothing has changed. What has changed is MDT's written GFE criteria. The old criteria didn't mention any percentages, but the new criteria do mention percentages. That's contained in the first letter I sent to you on page four. Subcontract bids less than 10% the acceptable percentage over low bid is 15% and so forth – it's a sliding scale. Everyone here would have to acknowledge that if we compare and contrast Schellinger's DBE bids to this table, Schellinger is within the acceptable percentage limit in rejecting all of the DBE's that it rejected – it just is. Everybody acknowledged that. The difference is the department is saying those rules don't apply back in December; they are new rules we made now. But they are still based on the same concept of reasonableness. Surely the department thought that if a bid was between \$10,000 and \$50,000 you could reject a DBE if they were 10% over the lowest non-DBE. That's reasonable. Schillinger did that. If it is reasonable today, then it should have been reasonable when this job was bid.

Commissioner Howlett said we are talking about what was in place a year ago versus now and what was in place a year ago was the use of your business judgment and acumen versus some prescribed prescriptive formula today and those are apples and oranges. Paul Sandry said right but my point is that this table is held up to represent reasonableness. Commissioner Howlett said that's the orange and business judgment is the apple. We are saying going forward this is what the department is recommending – this is the apple that everybody understands is an apple. Paul Sandry said he understood that. My only point is that if it is reasonable today then 30 days ago the same thing should have been reasonable. Commissioner Howlett said except this hasn't even been adopted by the Commission yet. Paul Sandry said it has been put out to the contractors. It is the department making determinations as to what is reasonable and what is not reasonable. So this very department is the one who determined that Schillinger didn't meet the good faith effort because it was unreasonable. Commissioner Howlett said they didn't have this formula in place when this bid went out. This is post bid. So I don't see and I'm not following your explanation that what wasn't in place should have been in place. Paul Sandry said what's in place represents that which is reasonable. Commissioner Howlett said yes but it wasn't in place a year ago so what's your point. Paul Sandry said my point is that the same standard should have been reasonable 30 days ago. Commissioner Howlett said he didn't disagree but we're not in a position to do post decisions. The laws change and rules change with time and you don't go back and say that is what it was then. You have a new rule in place so what we did then wasn't appropriate. I'm just having a difficult time following your train of thought. I don't think anyone would disagree that what's being proposed is reasonable; and no one would disagree that what was in place in terms of your business judgment was highly subjective. Paul Sandry said he agreed with that. The only point is that there has been a determination that Schillinger was unreasonable and that it didn't exercise ... Commissioner Howlett said it was based on the standard that was in place not the

one that is being proposed today. Paul Sandry said yes and there is no difference between the prior standard and the new one. Commissioner Howlett said they are not the same – one is to use your business judgment and one is a prescriptive percentage. Paul Sandry said I understand where you're coming from but I think you understand what I'm saying. If you don't then I'll say it one more time. Commissioner Howlett said you don't need to.

Paul Sandry asked what happens when a contractor such as Schellinger doesn't agree with a determination by this department that it didn't exercise its good faith effort. It gets an administrative review and it gets an administrative review before a DBE Review Panel. We timely requested that review; it was held in Helena and these folks attended the review and heard nothing. The criteria, both the old and the new, say that Schellinger has got to be provided with specific written findings as to why they didn't meet this good faith effort and we've received nothing. There hasn't even been a finding made on the administrative review process that Schellinger went through. I think Mr. Reardon is absolutely correct. You've got several options here. We think the only fair and legal one is to award the project to Schellinger as the low responsible bidder. The statute mandates that happen. There hasn't been a finding made by the department after the administrative review process that Schellinger did not exercise good faith. There's been nothing after the Administrative Hearing. That's all I have unless anybody has any questions.

Commissioner Lambert asked who decides the percentage of DBE's. Dwane Kailey said the department through the bid review sets that; they work with Civil Rights and Construction to identify the available, the work items that potential DBE's could work on, and then the group sets that percentage. Commissioner Howlett asked if it was based on federal law. Dwane Kailey said sort of, actually the department has a statewide goal of 5.83%. That is what we're shooting for across the board across the year. When we look at project specific agreements, we are looking at what work activities are available for a DBE to work on and what is that percentage relevant to that project. Commissioner Lambert asked if that was why some contracts have DBE recommendations and some don't. On some projects do you recognize there are no DBE tasks? Dwane Kailey said that was correct. Commissioner Howlett said we have a statewide goal of 5.83% which is about half of what it used to be. Wendy Stewart said that was correct; the 9% goal was approximately six or seven years ago. Commissioner Howlett asked why we don't apply DBE prescription to every project if it is a statewide goal. Kevin Christensen said we have to be sensitive to the fact that there's a fixed group of DBE contractors out there and when we're letting projects we might have a group of projects in one letting that has a lot of similar work and if we prescribe a DBE goal on all of those projects, we run the risk of forcing non DBE contractors out of the process. For instance, we might have a group of projects where the only opportunity for DBE's to participate would be traffic control and guardrail and those are limited opportunities. So if we prescribe a goal on all of those jobs, the non DBE contractors that perform that work, there's the potential they can't bid on those jobs and if they do they won't be selected because there's a narrow window for DBE participation on the projects.

Commissioner Howlett said DBE by its definition, women and minorities, the goal is to give them an opportunity to compete; that's the goal. Why would we go create a situation where we create a barrier for them to compete? Dwane said you hit it on the head – the goal here is to give them an opportunity to compete. What Kevin is trying to explain is that is exactly what we're trying to do – give them opportunities to be a little more competitive on these specific projects. They have the opportunity to compete on every project. Just because we don't set a goal on a project doesn't mean we aren't encouraging our prime contractors to work with DBE's. Commissioner Howlett said if you don't have a stated goal in the project, you're not going to have the kinds of contacts and follow-ups that would be required. Commissioner Griffith said on our bid opening on Tuesday we had two projects that had 0% goal and they both had 6.8% DBE. So there was some DBE participation which goes to apply to

our total goal. I've been in this process for 30 years so I understand it from day one. Day one there was a mandatory goal that sort of made everybody comply and it brought a lot of bad bidding practices. The feds switched where it's still the same idea for a goal but it's easier to acclaim and it's not a prescriptive to the contractors. So the contractors have an opportunity to meet it and if they meet it without us setting a goal, then we're all better off and we don't have to set goals. In other words, if they maintain an ability to keep DBE's going without setting a goal, it makes it better on both parties. It's when we don't hit that threshold that we have problems. That's where we're at now. I'm just wondering if there are other contractors that want to speak today.

Commissioner Lambert said we have a 5% goal all the time but sometimes we state it and sometimes we don't, but it's always there. Is that what you're saying? Commissioner Griffith said it goes to the state's efficiency to meet the federal requirements to hit that. It's better for those projects to create a situation where we don't have to mandate it later. Dwane Kailey said we have a statewide goal where at the end of the year when we tally all the work that we put out to bid which actually includes our CTEP and consulting projects as well, we are shooting for 5.83%. Then in the last few years we've done what Commissioner Griffith said – we did not have project specific goals. We worked with the primes to allow them to bid and we were hoping for participation that would get us close to that 5.8%. We were significantly lower and we ended up at .7%. In working with Federal Highways it was agreed that we needed to step it up because we weren't achieving that 5.83%. That's when we instituted this project specific goal where we come in with projects like this where we set the 9%. For this one project you must attempt and/or have a good faith effort to get that 9% goal. That's where the project specific versus the statewide comes in. Commissioner Howlett said following Commissioner Griffith's statement, we had a goal that was there but wasn't prescribed in the bids. We never met it and we were at .7%. Dwane said that was correct. Commissioner Howlett said contractors should be aware that in every project this is the goal. If you have a prescription that allows for flexibility if you don't have the applicants or if they are not available or whatever the situation may be that you can't employ them as subs, I think that is what the contractors are looking for – some clarity, some consistency in what the requirements are. Right now it is so subjective and when Whitefish South was let it was subjective; I don't think anybody would argue with that. What you've proposed going forward is reasonable. We just have to get our friends at the Feds to agree with us. That's why we want to get the two lawyers together because you'll have two different opinions but somewhere there is room in the middle. Throw in the contractor's lawyer and we'll have three opinions.

Commissioner Howlett said we need to take action on what is in front of us today – what are we going to do with this bid and then we need to go forward and look at how we find common ground in this DBE thing. We can't continue to be threatened with lawsuits; I'll have to move over here and rent an apartment just to appear in court and I don't want to do that. I think this Commission needs to deal with the issue in front of us today based on the recommendation of the department and the advice of counsel and then we'll move to go forward.

Kevin McLaury – Federal Highway Commission

Kevin McLaury said the DBE program has been around 30 years. The basic tenants of that program have not changed. The change that we've seen is previously there was a hard and fast goal that every project needed to have. There was a case from the 9th Circuit that changed that view that now puts the department in a situation because we're in the 9th Circuit where the decision came from that we had to do a disparity study. During that time we were not allowed to use project specific goals. The law was still there, the goal was still there but the numbers of DBE utilization went from nearly 9% down to .7%. Contractor's destiny was in their own hands and they've proven they are not using the DBE's when the project goals are not there. That's a

fact. So when we did come to the point where we said we needed to have stated goals in the projects so that we're able to meet the goal for the state, that's when some of these issues started to arise. Now to address your comment that there was no coordination, we worked with the department. The comments we gave to them on this specific change to the good faith effort, we brought our headquarters folks in because we knew this was going to be an issue. We advised them that this did not adhere to the law. They put it out on their website. The DBE Program itself must be approved by Federal Highway Administration. The DBE Program and good faith effort was developed cooperatively between Montana Department of Transportation, Federal Highway Administration, and presented to the MCA in July 2012. That's when the good faith effort process moved forward because that's when we started to utilize project specific goals. We approved that change as part of the DBE program. Now we don't approve small changes to the program but anything significant needs to be approved. This change is significant! This change has not been requested by the Federal Highway Administration to approve. I can say that if the department moves forward and awards a contract with the given table which is expressly prohibited because it's objective. It puts hard numbers. The law is very clear, this process must be subjective whether we like it or not, that's the law. It has to be subjective. If I'm faced with the decision that you've awarded a contract based on these hard numbers, there's a high probability we will not concur in the award. Commissioner Howlett said I'm acutely aware of that. Kevin McLaury said I want to make sure you are fully aware of it. Commissioner Howlett said that's why we need to get your lawyers and our lawyers together and figure out what will work because we don't need to be agency adversaries; we need to look at this as a partnership going forward and it has been. So I don't think we'll award any contracts under this new formula when we run the risk of not having the federal money. If we're going to accept their money we're going to have to play by their rules but the rules should allow flexibility for states to deal with the demographics of this state. In this state we've got minorities; we've got women businesses. Is 5.6% reasonable? I guess we'll have to figure that out. Again I hear you Kevin; I hear you. Is there anybody else who wants to speak to this issue?

Frank Tabish – LHC

We're the other company that went through the Administrative Review Process. I share Paul's frustration. We never did receive a determination whether we made a good faith effort. We have history here as well that goes back to the Libby project. I've addressed the Commission in the past. Is there a possibility of receiving a ruling? We really don't know what our position is. Like Schellinger we had a determination - Wendy issued some guidance and spoke about recruitment efforts, good faith negotiations, and we threw out a hard number of 10% the last go around. That didn't work. So we reinvented our effort according to the guidance we got on the Libby project. It was determined per an Administrative Review that we didn't make a good faith effort. We disagree with that. Not only did we quantify our effort objectively, bids were tabled, we also talked about ordering and presented our case in subjective terms. We ask the Commission for a ruling – do we have a good faith effort on the table or don't we?

Commissioner Howlett said he thought the reason these rulings didn't come forward was because the department is recommending the Commission throw out all bids. I think it would be a waste of time and effort to make a ruling on something that we're planning on doing anyway because the documents you had to use to bid were probably not the best regarding good faith effort. Frank Tabish said we've all been on record suggesting revisions. Commissioner Howlett said I don't think the Commission wants the department to go forward and make a ruling on a contract that we may not choose to award today. Is that a fair assessment? Dwane Kailey said that was correct. Frank Tabish said moving forward we're looking at our past effort and the rules that were in place when it was bid and we're trying to refine our process

and we're looking for guidance from the Administrative Review. If it's possible to get that, we'd love to have that information. Thank you for your time.

Bob Warren – Schellinger Construction

Unfortunately we've been involved in three of these projects. In Libby we were low bidder. It was the first job let with goals; we were kind of caught late in the process and we didn't do a good faith effort. The contract fell to the third place bidder and it cost the taxpayers about \$300,000. Like Paul said, we learned from that. Following the guidance and all of the good faith effort brochures, the Q&A's, we've tried to do a good job. We take ads out in the plans exchanges, for every job we bid we solicit DBE quotes on every item of work that we're going to do. We've bugged the DBE's on MDT's site incessantly to the point where they say, "quit calling me, I'm in Mississippi and I'm not bidding traffic control in Montana." We call them in two weeks and request a bid because that's what we have to do. We document that. We call them the day before the bid and ask if they are going to quote it. By midnight we look at everything and it's all the same color to us – if a quote comes in from a DBE or non-DBE sub, unless we have a reason because we used them five years and they weren't capable, we use every sub as they come in and our history shows that. We looked back four or five years and we've used somewhere between 2% and 3% DBE's on all the work we've done and we've done some high profile jobs and we take a ton of pride in what we do. At no point do we discriminate. It's a competitive world; if we're one penny higher than the next bidder, we don't get the work. In hind sight we can say it's only \$2,000 and we should have used the 30% higher DBE but we don't have the luxury of looking back. We turn in a bid that night and we live with that number. Just like Tracy Cowdry earlier, they ate 60 days in liquidated damages because they stood by their number the day they turned it in. We take a ton of pride in the way we do business.

We try to get the DBE's to split portions out to get some participation. In our business judgment, we didn't come by the numbers lightly, we talked about it – 20% is the lowest DBE percentage we had. We didn't just say we weren't using them because it a small dollar amount, we don't come by that number lightly. In our way of thinking 20%, even though it's only \$2,000, is a big deal. If you go to a project manager and say it's a small change order but we're going to mark it up \$2,000 because it's only \$2,000 – it might be 500%. So the reasonableness test we passed amongst ourselves; we make sure it passes a reasonableness test. Just look at 20% in your own daily life, you're not going to spend an extra 20% on certain things you might but is it reasonable. That's the question here. Our decision on what was reasonable the day we turned this bid in as compared to the department's decision of reasonable, looking back at the numbers it is not apples and oranges. With these new guidelines, our policy ... we've been led down this path three times. We lost Libby because we didn't do good faith. On the second job we were second and you guys determined that Riverside did do good faith. They turned down some DBE's that were only 19% high and you guys agreed that they passed the reasonable test. We're talking with DBEs between 20% and 75% too high and for some reason 19% was reasonable last month but now 20% is unreasonable. So we have a hard time because it's a moving target. We bid this in good faith and we've explained our position and documented everything and we feel very strongly that we were low bid and submitted in good faith and in the spirit of the DBE Program. We go out of our way and it's amazing what time and money we spend to solicit and make sure we let these DBE's participate. They have to turn a number in to us that works and we can't tell them what to bid. We're not going to call a DBE and say you've got to cut \$85,000 to be below a non DBE. So we don't feel that's right. Yes we did everything short of that to get them in so we're not in here again.

Commissioner Howlett said there are two dilemmas – you guys stand to lose a project because you didn't put a DBE in the project and that's a decision you have to weigh. But also, if we don't meet what the Feds think our good faith effort should

be, we lose federal funding. So we've got to make sure, from an economic standpoint, that we don't lose federal funding. But it's also a moral issue. We ought to take care of ... it isn't demographics that DBE protects, it's our local people. You can't look at it as an "us versus them" thing; it's our locals. Being from that industry, it doesn't matter whether you are an operator or a subcontractor it's hard to break into the business. We're just trying to give people a start. That's a moral objective more so from the Commission than from Federal Highways. We're just trying to give local people a start so they can compete. I know it's hard for you guys because it's a gamble but it's a big gamble for us too because it's not \$10 million on a project, it's \$400 million of a program. That's what our weight is.

Bob Warren said we know the importance of the federal funding; we realize that and we totally understand and respect that. We do everything we can to keep these DBE subs employed. We've bid jobs with no goals and had 16% to 18%. It isn't so much that the Primes are the problem; I think some of the DBE subs need to be more competitive. That's an important part of this too.

Commissioner Howlett said we had a discussion in Billings and I asked Cary what the Contractor's Association was doing to promote or advertise. I want to reflect on that conversation because I think the Feds can play a role in this as well. We've got to do a better job working with Tribal Colleges, women's groups, and other people to get these people to understand something about business, and understand what they can do to participate. I'm a member of the Salish Kootenai Tribe and I take significant pride in that. I look at projects close to Reservations and you have a Reservation with 60% unemployment and you can't get a DBE? I know there are a lot of things that go into that but at the same point in time that might be the only job that is available around there. So what are we doing to create that kind of an atmosphere? One thing that happened in the past year is we've eliminated some training programs for truck driving and construction programs at two of our major tribal colleges. So it's working in reverse from what we ought to be doing. It isn't MDT that cut the program; it was cut back in D.C. At the same point in time we've got these mandates for the DBE Program but we don't have minority businesses out here. As an example, if we bid this project and we have the capability to do it, how are we going to pay for a motel while we're clear across the state? Do they understand that per diem might be paid? Probably not! So they chose not to go or chose not to even bid it. I've talked to people about it. I, again, want to try and pull the principals together and have a good understanding of what it takes including on-going education for DBE's, participation of the contractors, and obviously the state and the feds. This isn't something we can just turn the key and get a whole new program. We're talking about basically reinventing it for Montana under the principles that are there. I think we can get there but until then we can't adopt these new rules and send them out because in all likelihood we're not going to have federal concurrence. The project won't go. So we're back to what we have in place and at least coming out of here with some understanding that the statewide goal is 5%. I don't know what else we can do at this point. I don't know.

Kevin McLaury – Federal Highway Administration

Kevin McLaury said he would echo those comments. We stand ready to be of assistance wherever we can be. To be honest with you I'm a little disappointed that these non-approved goals or this revision to the good faith effort was presented out to the public without concurrence from us; be that as it may, there out there. I want to make sure that everyone knows that we stand ready to work with whomever to try and make this program a success because ultimately reaching the goal that we've established for the state of Montana is the sole purpose – that's what we're shooting for. I want to address the contractors, I've heard a couple of times today that this cost the taxpayers of Montana X dollars, let me tell you the DBE Program is not an addition to any program, it's the cost of doing business. I ask you, are you allowed to use foreign steel on a federal aid project? No. Could you get foreign steel cheaper as

the same quality made in America? There's a high probability you can. Do we allow it? No. It's the same way with Davis Bacon. Can you pay your workers something different when you're not on federal job? Yes you can and some do. You have a federal contract you have to pay Davis Bacon. So my point is I'm real disappointed that people are trying to use the DBE Program to say, "It's costing the taxpayers of Montana X dollars." That's not the case. The case is DBE is a part of the program, there is a cost of the program, so let's just all accept that and then as we look at this it's a case-by-case analysis, that's the way the law it is written. Its subjective case-by-case so the argument that last month it was 19% and this month 20% doesn't work and is irrelevant, it has no basis because every bid stands on its own. It's a case-by-case analysis. I don't know what more we can do. If I had a silver bullet for you guys, trust me, if it was easy it would already be done. I know you're in a tough spot; I do.

Director Tooley said he appreciated his help in this matter. I've been on the job for almost four weeks and this has been one of the most frustrating things about this job. I understand there is frustration here and there is frustration there. Let me tell you where I'm coming from, I've worked for the government for a long time. I've worked with Federal Highways, I've worked with the Contractors but my boss is the taxpayer. I've gotten to a position in life where I spend their money and over time I always ask myself the question before we spend their money, "what about the taxpayer." In doing that I've learned a little bit about what the taxpayer expects. They want the best value, they want competitiveness but they don't mind helping the underdog or the startup. That is the cost of doing business; that's great but not at any cost. That is where I see us going under these subjective rules. When you get a job that's bid and the successful bidder is twenty plus percent above the low bid that raises a concern for me. I think we have some work to do.

One other thing I need to tell you is I've worked in a different world and I know more about quotas and what is and isn't than probably anybody here. I've got some ideas. So my expectation to try to get MDT out of this unacceptable position and we are in an unacceptable position, is to get input from the contractors. I expect that instead of being told when we're wrong, I expect cooperation from Federal Highways to at least listen and be willing to try something different that isn't so subjective. I think you have an opportunity here to be a national leader in this state on this subject. We have the solutions here in this room. There are a lot of folks over here who have ideas and you have ideas and I have some ideas. So Chairman Howlett I appreciate your willingness to force this discussion to occur and I hope that you do. I'm excited to be a part of it. MDT really is here to be a part of the solution.

Cary Hagreberg – MCA

I'm Cary Hagreberg with the Montana Contractor's Association. Director Tooley, welcome to the smooth sailing, long standing relationship between the construction industry and the Department of Transportation. I want to say thank you to Director Tooley who came to our convention a few weeks ago and came to our highway meeting and reached out to our member companies and Kevin McLaury as well for being at our meeting and interacting with our membership. It's always gratifying to know that the doors are open and we can have a conversation and we can disagree without being disagreeable.

The Contractor's Association is a chapter of Associated General Contractors (AGC) of America. At the national level we have very distinct views on the DBE Program and as we do here in the State of Montana. I want to be very clear in letting folks know that our organization represents general contractors and subcontractors. We represent union contractors and non-union contractors. We represent non DBE firms and we represent Certified DBE firms. We've had several DBE Certified Company owners serving as President of our Association, which we do right now.

We're proud of the fact that we're a big umbrella. There are a lot of interests under that umbrella that we attempt to represent.

One of the things that our organization has stood for almost 80 years is fair and open competition and we strive very hard to ensure that there's a level playing field for contractors; that nobody has a leg up on anybody else and that's is a fair and objective environment by which to secure work. The recent transition to project specific DBE goals was one that was met with great anxiety from our membership. At the risk of saying "I told you so" – we told you so. We anticipated exactly what's transpired in the last several months in terms of the bid discrepancies and the interpretations that would ensue and it's frustrating for our members to have had that anticipation and frustration ahead of time and try to convey that and end up in exactly the situation we're in today. I'm speaking in general terms, I'm not going to speak to award or non-award of a contract and I know that's still the subject that's technically on the table today. We implored the department with concurrence from FHWA to tell us what the rules are. Our member companies are accustomed to playing with rules; they're ok with that. Just give us the rule book, tell us who the referee is, and we will play by the rules. If we don't you can rap our knuckles and we'll get the message.

I want to make an analogy I thought of yesterday driving down the highway and one I think Director Tooley can relate to. Some years ago Montana had a speed limit that was deemed "reasonable and prudent" – proceed at a reasonable and prudent speed. We don't have a reasonable and prudent speed limit anymore in Montana because it was unenforceable. It was deemed too subjective and now we have numeric speed limits. The Montana Highway Patrol can pull people over for exceeding the speed limit and there's a record that can be taken into District Court and it's a defensible or prosecutable offense. We're trying to deal in that reasonable and prudent arena today – what's "reasonable and prudent" and who makes that determination. I don't envy anybody's situation but I'm paid to not envy the situation that my member companies are in. Whether they're getting a contract at any given point in time or whether they're losing one because of how this program is being interpreted, they all want to know the rules. They are all asking and imploring the Department of Transportation and the Federal Highway Administration to tell us what the rules are.

I want to speak to the proposal that was circulated finding it interesting that Federal Highways might not concur because we still think that it's way too subjective, way too nebulous. If they are not even willing to go along with this, then we question what kind of guidance we're ever going to get, if any, from Federal Highway Administration. No offense intended, Mr. McLaury, but it appears as though there isn't really going to be any guidance – it's going to be a case-by-case basis and it's going to be a "take your chances" situation for general contractors bidding work. This procedure sets up a Committee to determine if a bidder has made a good faith effort. In reading through this, we wonder if these meetings will be open. Can the aggrieved contractor be in attendance? Can the Contractor's Association be in attendance? Will the Committee be by consensus or will it be by majority vote? It says the Committee will make the determination but there's really no procedure set up for how that will occur. On the bottom of page 1 under the criteria to determine good faith effort, the last two sentences say "other factors or types of efforts may be relevant in appropriate cases. A determination whether a bidder has made sufficient good faith efforts is by its nature a subjective call." Well, that's not very comforting to the guys who are bidding the jobs that by its nature, it's a judgment call, especially when the department is saying they are still going to award projects to the lowest responsible bidder. What's the definition of "responsible" going to be? Under DBE assistance in this procedure one of the bullet points says "has the bidder made efforts to assist interested DBE's in obtaining necessary equipment, supplies, materials or related assistance or services." During our convention one of our representatives from AGC of America was in attendance. We had a great discussion with Mr. McLaury and Brian Deary from AGC pointed out that there are instances around the

United States where Federal Administration is prosecuting general contractors for allowing subcontractors to use their equipment and providing subcontractors with too much help. So this little bullet point is kind of setting up a general contractor for possible prosecution by the Federal Highway Administration. Is this even really legal? We don't know, but it leaves that area of subjectivity pretty open.

There's another provision under Negotiating in Good Faith which says "a bidder using good business judgment" and I would insert "reasonable and prudent" there and you can kind of get the idea, "a bidder using good business judgment would consider a number of factors in negotiating with subcontractors." Seven of our member companies a number of years ago were investigated by the U.S. Department of Justice and ultimately exonerated for anti-trust violations. That's a felony! Negotiating with subcontractors – negotiating in this business is a pretty slippery slope when you start talking about negotiating subcontracts and that's something that our member companies are very aware of. We open every meeting of the Montana Contractor's Association with an acknowledgement with our Association's policy on anti-trust and collusion. This is a problem. We have some conflicting public policy goals that are at play here and there are high stakes and it's a big deal.

There are a couple of other provisions that talk about reasonable and good business judgment. Right under the proposed matrix it talks about general guidelines for good business judgment. Who is going to make that determination? According to the document it's two levels of review both of them being employees of the Montana Department of Transportation. That's kind of like getting a speeding ticket, violating the reasonable and prudent standard and having your level of review be the management of the Montana Highway Patrol. It doesn't necessarily give folks a whole lot of comfort that due process is going to take them anywhere but straight to District Court.

There's another provision that says "other factors the department may consider in determining whether the bidder made good faith efforts include whether other bidders met the contract goal." Again there is no reference here to any price differential. If one contractor met the contract goal but was a half million dollars high on what percentage, is that going to be a determination? In a lot of these instances you could meet the contract DBE goal but at what price or what cost is MDT going to make that determination?

One of the things I would offer today in discussing this matter internally with our membership and with AGC of America, I would say the point at which the Department of Transportation is most vulnerable is the Disparity Study that has been referenced several times today. I would ask that the Department and FHWA go back, re-assess what's actually in that Disparity Study and what isn't in there, and maybe regroup a little bit. We've had some legal interpretation that the Disparity Study performed for the Montana Department of Transportation is inadequate, indefensible, and if there is litigation I would surmise that it's going to go right at the validity of that Disparity Study. I think that may be the crux of where you might be able to find some wiggle room in this program. Please don't perceive this as any kind of threat because it's not. I sit through meetings every month with the Montana Department of Transportation and we go through specifications, proposals and all the different gyrations and problems that occur between our members and MDT. The thought occurs to me if you could work for anybody else, why wouldn't you? If and when the private sector of Montana starts to recover and we see private capital investment returning to the state, in a few years I'd hate to be sitting here with the Commission wondering why nobody is bidding your jobs but I wouldn't necessarily be surprised by that. If the lack of competition in federal aid highway work tends to dissipate over time because the contractors don't understand the rules and they're subjecting their company to significant liability and/or loss, they're going to go take the path of least resistance. There are a lot of things you have to take into consideration and we try to be sympathetic to that but honestly where we're headed

... I can't speak for every member of the Montana Contactor's Association when it comes down to making their own decisions, but I fear that where we're headed with this program is a perception that we'd better just meet the goal. The good faith effort is too subjective, too risky, subjects your company to too much risk, so we'll just meet the goal. That may be a public policy objective that's out there and maybe it should just be stated that way, then our members know what the rules are. If that happens there will be some subcontractors that go out of business. I'll just tell you that right up front – there will be some subcontractors that go out of business as a result of that interpretation whether it's stated up front or whether it's inferred and implemented by the general contracting industry. I'll be happy to try and answer any questions that you might have. I apologize if I just wrapped it around the axle some more. I want to thank the department for trying to clarify the rules. You may have gone too far for the Federal Highway Administration but not nearly far enough for us and that's an awkward position to be in. Thank you.

Commissioner Griffith moved to accept the department's recommendation and not award the contract on the 2003 Safety Improvement Project – Whitefish South. Commissioner Lambert seconded the Motion. All Commissioners voted aye.

The motion passed unanimously.

Commissioner Discussion

Commissioner Howlett asked the Director of the Department of Transportation, Federal Highways to identify persons in their organization that can come together to formulate the multi-agency review of the DBE Program legal issues and all the issues involved in it. We need to try to get this done in the next 90 days. Dwane Kailey said through the course of this meeting we've been attempting to work with FHWA and right now we have a tentative meeting scheduled for tomorrow. We need to make sure it's agreeable with Director Tooley as well. We do have a meeting scheduled for tomorrow with legal staff, various MDT staff and we'll work to move this forward. Commissioner Howlett said he recognized the Legislature is in session but we also need to reach out to the Contractors, we need to look at Training Institutions, we need to look at this thing with a broad stroke. It isn't a turn-key proposition. So report back to this Commission with your recommendations for implementation of a program in a 90-day timeframe. That seems reasonable to me. The Commission was in agreement with that.

Lynn Zanto said let the Commission know they we're moving toward implementing the Transportation Alternatives Program. A couple of the requirements from Federal Highways came out toward the end of the year. Since then Dwane and I and a group of staff people have been looking at the guidance to see what our competitive process will look that. The law did require a competitive process and that's a little different than the Enhancement Program. Our group has laid out a tentative schedule because we heard from our constituents that they want us to get the money out to them as quick as we can. We've done four different things – we've established a draft schedule, a proposal description along with how we intend to support things, and then the application. Some of our goals in working toward this were to try and simplify to the extent we can. We are not limiting anything that is allowed in the law; we are treating it open and allowing applications for all the eligibilities in the law. In the scoring criteria we are emphasizing safety, connectivity, and project delivery.

I will quickly go over the schedule – we've briefed Director Tooley, the Commission is the next step, the next step for us would be to send a notice out to our constituents, put this on our website and allow opportunity for input. We thought about doing a webinar so they could join in and we could go through and describe what we've put together and give them a chance to ask questions. We put a notice in our quarterly newsletter. Commissioner Howlett asked when they would adopt the

plan formally. We don't want to go through what we just went through. Lynn said in terms of a formal adoption, I'm not sure that's necessary but we want the Commission comfortable with what we're doing. Under the old Enhancement Program we sub-allocated the funds but in this case it is truly a competitive process. They submit applications and then you will be approving the projects that come forward through a review process. Commissioner Howlett asked if there was a uniform application. Lynn said there was and the Commission had a copy. Commissioner Howlett said they were going to have to base it on some criteria. Lynn said they had criteria. Commissioner Howlett said he felt the Commission ought to adopt it at some point because it's our money – to concur in the process. I want the opportunity to comment on the process and approve it. Lynn February would be the best time to allow for comment from the outside. Then sometime in late spring or early summer we will issue the call. So before we issue that call, we can come back in and report to the Commission. Dwane Kailey said this is the first time we are going to roll this program out and we are absolutely putting every effort forward including bringing in the constituents. When we say constituents, please understand that who can participate in this program has actually grown from CTEP because it now also incorporates Safe Routes to School and it also allows for other state agencies to participate. MDT is actually not an agency or an entity that can apply for these funds, state DOTs are limited out; we cannot option projects in for these funds. We also understand that we're not going to get everything perfect, so our thought process is that we need to be dynamic and available to address issues that come up. We are trying to avoid having to delay it as much as two months or more in order to get the Commission's approval to tweak, modify the program and best address the needs of the entities and the program out there. Commissioner Howlett said the Commission could adopt it understanding it's new and we can amend it when we need to. Dwane said if they endorse the program then I believe that we would still have the authority to make modifications. Commissioner Howlett said that what he doesn't want to happen and it's already started to happen, is this Commission getting lobbied by these interest groups. So unless we have something that we've all agreed upon – these are the rules, this is the application process, this the criteria, then we're going to spend a lot of time trying to explain a subjective kind of an application. I don't want to do that! I've been there, done that! You know that we're getting lobbied by MPO's and Transit – we're getting lobbied already. Let's just get something uniform – these are the rules, this is who is eligible to apply and we'll adopt that. Commissioner Griffith said if there are rules, then you can say "these are your own rules, you've got to live by then."

Lynn said that is what this process is attempting to do. The first document on the calendar is the description, the next is our scoring criteria, and the next is an application and then we want to give them the opportunity to ask questions before any of this is final. I intend to get this to you so you can take a look at it and give us input if you see some things in there. We don't want too much detail. Today I would hope that you take a look at this and we won't put this out before February 15th – that would give you time before we make it public. This is just a draft and is just for comment, then after the public comment period we'll come back to you and report what we heard and what we think needs to be tweaked. Then our hope is to issue the call for projects in late spring or early summer. Then we'll come back to you for approval. This call would be for the full funding of MAP21 for two years because we are already well into the first year. This is not an action item, it's just information for now and we're very interested in your input.

Legislative Update

Tim Reardon updated the Commission on some legislative items. There are two bills – one to increase the gas tax by \$.02, there is also a distribution formula that would give a penny to counties and a penny to transit. The other is to require the department to buy some additional chairs for space for four additional

Commissioners. Those bills are out and introduced. Commissioner Howlett said apparently those aren't department initiated bills. Tim Reardon said no they are not.

Kevin McLaury said he was very confident that we can come together and hopefully resolve something that is somewhat acceptable to everyone and move forward in a very positive manner.

Commissioner Howlett thanked Mr. Reardon for serving as Director of the Department of Transportation. Now you go from the frying pan to the griddle. I wish you the best. He thanked Lori Ryan for accommodating the Commission and asked her to give their best to the staff and wish them well in the coming year.

Next Commission Meeting

The next Conference Call was scheduled for February 26, and March 12, 2013. The next Commission Meeting was scheduled for March 28, 2012.

Adjourned

Meeting Adjourned

Commissioner Howlett, Chairman
Montana Transportation Commission

Mike Tooley, Director
Montana Department of Transportation

Lori K. Ryan, Secretary
Montana Transportation Commission