

## MEMORANDUM

**TO:** Walter Schact, Chair and Rebecca Keith, Vice Chair and CPARB Members  
**FROM:** John P. Ahlers, Chair of the CPARB PPP Committee  
**DATE:** July 18, 2018  
**RE:** Public Private Partnership Committee Report

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Walter Schact (Chair), Rebecca Keith (Vice Chair) and CPARB Members:

This report summarizes the activities of the P3 Committee since its last report (May 2018) to the CPARB Board. My schedule did not allow me to be present at the September 2018 CPARB meeting, and therefore, I am reporting on the activities of the Committee by memo.

House Bill 2726 was presented during the 2018 legislative session at the January 23, 2018 Capital Budget Committee Meeting. It did not pass out of Committee. The draft statute constitutes the CPARB P3 Committee suggested legislation based on input from this Board and numerous stakeholders who contributed generously and actively in the drafting of this legislation. As reported to CPARB in May 2018, based on the State Treasurer's unfavorable testimony regarding HB 2726, it was decided to meet face to face with the State Treasurer's Office, specifically with Jason Richter, Deputy Director of Debt in Olympia.

A meeting was scheduled with Mr. Richter's office for June 22, 2018. At that meeting were Representative Vincent Buys, Marv Hounjet, Andrew Thompson, Stephanie Fisher, Catherine Mele-Hetter (a lawyer with the Treasurer's office), Steve Massie and John Ahlers. During that meeting, Mr. Richter candidly shared his concerns with the P3 legislation:

1. Mr. Richter appeared to have a bias against P3 projects, generally stating that his review indicated that the P3 projects were failure-prone. Mr. Hounjet sought to elicit examples of P3 "failures." As to some of the projects that were on Richter's list, Hounjet explained that the "failures" were really real estate deals that masqueraded as P3 projects. The reasons for the alleged "failure" had nothing to do with the P3 process. The failures that have occurred on P3 projects are failures of the procurement process, as contrasted to project failures. The causes for the failures that did occur were generally political funding or poorly defined project scopes. The projects themselves did not fail. Mr. Hounjet went on to explain that the few examples that Mr. Richter did cite, Chicago Parking and Indiana Toll Road, were both monetization projects on which the agency met its goals; that is, raised funds that were put to other purposes. It was not the time or place to get into a discussion as to specifics. Mr. Hounjet indicated that he was unaware of the public ever

being injured as a result of a P3 project. Mr. Hounjet attempted to direct the conversation more toward the purpose of the P3, which is to shift the risk of on-time and on-budget completion of public projects and long-term operation and maintenance from the public sector to the private sector. Mr. Richter focused on the financing issue rather than risk-shifting.

2. Mr. Richter explained that the Treasurer's Office needed more flexibility to reduce payments in the future, if the State decided that funds committed to pay for the project needed to be directed elsewhere and away from maintenance of the P3 project. P3 projects do not allow the flexibility to simply defer payments. P3 projects have "break clauses" which could allow for a suspension of payment, but the main reason for P3s is to avoid the state of disrepair of public facilities. Redirecting funds committed to a P3 project is likely a non-starter for P3 projects in the future.
3. Further, Mr. Richter explained that he did not believe that the State of Washington needed the private sector to manage long-term maintenance of its facilities, a statement which is belied by the state of disrepair of many of our public facilities. Unlike public works contracts, P3 contract agreements fine the concessionaire if capital maintenance is not performed in accordance with the P3 agreement.
4. Mr. Richter did indicate that he felt maybe P3 had a place in the State of Washington for new technology projects where expertise is needed, and, as a State, we wish to bring that expertise in from outside, indicating that "foreign investments" in our state were not necessary for those projects where our state has the expertise in-state to build them.

Overall, it was my conclusion that the State Treasurer's Office is not favorably inclined toward P3 projects or P3 legislation. Mr. Richter indicated that if the legislation had a provision in it that indicated that the project had to receive the approval of the "State Finance Committee," he would be more likely to support such legislation. After the meeting with Mr. Richter, I looked up the "State Finance Committee." It is a board chaired by the Treasurer on which the Governor and Lieutenant Governor sit. Considering the Treasurer's predisposition against P3 projects, I believe any P3 project would be a challenge for the State Finance Board to support.

After the meeting, we had a short discussion among Representative Buys and Andy Thompson where I indicated I would follow up with Sound Transit as to Sound Transit's inclination toward P3 projects. Sound Transit has been provided a copy of the legislation and is considering pursuit of the PPP legislation.

Among those who participated in the Committees, there were two concerns that were brought forward to the full CPARB Board. Those two concerns are: 1) smaller architectural firms are reluctant to be employed by general contractors under the current design build legislation, and anticipate that similar opposition exists to being employed by concessionaires and/or builders on a P3 project; 2) the DBE representatives felt that the P3 legislation should go further in mandating DBE goals. The draft HB 2726 contains stronger language than the GC/CM heavy highway construction legislation that was passed a few years ago. The Committee felt that HB 2726 pushed

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the limit as far as the Committee members were comfortable in terms of “mandating” DBE participation. Other than these two concerns, no other concerns with the legislation were raised during the committee meetings or CPARB meetings that I attended.

Attached to this Memorandum is the summary of recommendation and draft legislation that was prepared for the May 11, 2017 CPARB meeting, the May 4, 2018 Sound Transit Board Workshop on organizing for system expansion, which contains a discussion on P3 legislation on page 2 of 8, and HB 2726.

**WHERE DO WE GO FROM HERE?** At this point, the Committee has fulfilled its “charter,” provided the Board with draft legislation, and has vetted the Treasurer’s Office opposition to P3 legislation. It appears at this time that unless a State agency embraces P3 and carries it forward through the legislative process, there is not sufficient support or understanding of P3 legislation to overcome the strong opposition of the State Treasurer’s office to this form of project delivery.

JPA/rmg  
Enclosure

Washington State

Capital Projects Advisory Review Board

Public Private Partnership Committee

Summary Report of Recommendations and Draft Legislation

Pre-Read for CPARB Meeting, May 11, 2017

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## P3 Committee Goal and Context

CPARB formed the Public-Private Partnership (P3) Committee in December 2014 with the charge to “Focus on public works and alternative delivery methods, evaluate existing statute, RCW 47.46 Public-Private Transportation Initiatives, Transportation Initiatives Partnership, and if existing statute isn't appropriate, draft proposed statutory language.” The P3 Committee convened beginning in early 2015 with this goal in view.

The Committee’s initial discussions evaluated and built upon two key sources. First, the Committee reviewed and discussed current Washington statutes addressing Public-Private Partnerships, particularly in RCW 47.46 (Public-Private Transportation Initiatives) and RCW 47.29 (Transportation Innovative Partnerships). The Committee’s initial work involved evaluating how these existing laws have been used—or more accurately, why they have not been used—concluding that the overall structure and specific limitations and features of the existing statutes effectively prevented the use of P3 methodologies. Among the limitations and impediments are a requirement for state-issued debt for all P3 projects, multiple stages of project review and possible termination after substantial initial investment by both public and private participants, and limited application to transportation projects only.

The P3 Committee concluded early in its work the existing statutes did not serve their originally intended purposes nor enable the effective use of P3 to deliver public benefit, and there are both opportunities for P3 methodologies to be used to provide value to the Washington public and demand within the public and private sector to participate in potential P3 projects in Washington. The Committee accordingly began developing new legislation to address the perceived shortcomings of the existing statutes and to enable P3 methodologies to be used on a variety of projects, including non-transportation and/or non-revenue projects, incorporating lessons from Washington and from other jurisdictions where P3 has been developed as a valuable tool in the public works toolbox.

Another important starting point for the P3 Committee’s work was a study and report commissioned by the Washington State Joint Transportation Committee (JTC), published by AECOM in January 2012, entitled “Evaluation of Public Private Partnerships.” The 280-page JTC/AECOM report provides detailed discussion of P3 concepts and case studies, summarizes the history and issues with the existing Washington statutory structure, and includes a variety of best practices and recommendations regarding potential future P3 legislation. The P3 Committee drew from the JTC/AECOM report in early discussions, and used the best practices and recommendations in drafting, revising, and reviewing the draft legislation as it was refined over the two years of the Committee’s discussions.

From 2015 to 2017, the P3 Committee drafted and refined its proposed legislation. The Committee’s drafting drew upon a wide variety of sources, including existing legislation from other states (e.g., Virginia, Massachusetts, Pennsylvania, Maryland, Texas, Arizona, Florida, and others), and a large volume of model legislation and best practices publications, including the National Conference of State Legislatures (NCSL),<sup>1</sup> Association for the Improvement of American Infrastructure (AIAI),<sup>2</sup> American Institute of Architects

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<sup>1</sup> *Public-Private Partnerships for Transportation, A Toolkit for Legislators*, National Conference of State Legislatures, October 2010.

<sup>2</sup> *Best Practices Guide*, Association for the Improvement of American Infrastructure, January 2014.

(AIA),<sup>3</sup> Design-Build Institute of America (DBIA),<sup>4</sup> Associated General Contractors (AGC),<sup>5</sup> National Council for Public-Private Partnerships,<sup>6</sup> U.S. Government Accountability Office,<sup>7</sup> National Association of State Procurement Officials (NASPO/NASFA/NASCA),<sup>8</sup> National Cooperative Highway Research Program,<sup>9</sup> and American Subcontractors Association (ASA),<sup>10</sup> as well as various academic papers, including several drafted by P3 Committee members.

What emerged from the P3 Committee's discussions was a piece of draft legislation intended to make P3 delivery approaches available, flexible, and useful to public bodies on a variety of potential projects, while including safeguards for the public interest through open and fair competition, protections for Washington's high labor standards, select mandatory procurement and contract considerations, and provisions promoting participation by underrepresented and disadvantaged business interests.

The P3 Committee is submitting the draft legislation to CPARB with the recommendation that the Board endorse the draft to be submitted to the Legislature through CPARB's appointed legislative members, with the proviso that the P3 Committee remain available to provide further support to the legislative members regarding any desired refinement as the draft legislation is prepared for introduction as a legislative Bill.

## Public-Private Partnership – Board Primer

### A Working Definition

The JTC / AECOM report provides a useful working description of a Public-Private Partnership, which can be summarized as a performance-based contract between the public sector (any public body) and the private sector (usually a consortium of private sector companies working together) to arrange the financing, design, construction, and typically long-term operation and maintenance of a public facility.<sup>11</sup> In a typical P3 structure, the public body provides the property for the facility, sets design and performance requirements and restrictions, and establishes the method of payment for the construction and operation of the facility, which may draw on a mix of public funds, private debt, investment equity,

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<sup>3</sup> *Public-Private Partnerships for Public Facilities, Legislative Resource Kit*, The American Institute of Architects, November 2014.

<sup>4</sup> Various resources compiled at <https://www.dbia.org/resource-center/p3-resources/Pages/default.aspx>.

<sup>5</sup> *Public Private Partnerships*, AGC Online White Paper, available online at: <https://www.agc.org/public-private-partnerships-p3s-overview>

<sup>6</sup> *7 Keys to Success*, National Center for Public-Private Partnerships, [www.ncppp.org](http://www.ncppp.org).

<sup>7</sup> *Highway Public-Private Partnerships, More Rigorous Up-Front Analysis Could Better Secure Potential Benefits and Protect the Public Interest*, GAO, February 2008.

<sup>8</sup> *Considerations for Public-Private Partnerships, A Joint Report from the National Association of State Procurement Officials, the National Association of State Facilities Administrators, and the National Association of State Chief Administrators*, September 2016.

<sup>9</sup> *NCHRP Synthesis 391: Public Sector Decision-Making for Public-Private Partnerships*, NCHRP Transportation Research Board, 2009.

<sup>10</sup> *Public-Private Partnership Laws in the States, Including Surety Bond Requirements*, American Subcontractors Association, National Association of Surety Bond Producers, and Surety and Fidelity Association of America, 2014.

<sup>11</sup> *Evaluation of Public Private Partnerships, Washington State Joint Transportation Committee*, AECOM Report, January 19, 2012, available online at:

[http://leg.wa.gov/JTC/Documents/Studies/P3/P3FinalReport\\_Jan2012Web.pdf](http://leg.wa.gov/JTC/Documents/Studies/P3/P3FinalReport_Jan2012Web.pdf)

and/or revenues generated by the facility. The private partner is generally responsible for the facility's design, construction, and often long-term operation and maintenance of the facility, as well as full or partial financing. Of note, the property and improvements ownership is retained by the by the public sector, and control reverts to the public body after the contract term.

P3 models are used to deliver a variety of projects, including hospitals, roads (both tolled and non-tolled), transit systems, courthouses, airport facilities, water treatment facilities, utility infrastructure, school facilities, and various other public facilities. In practice, P3 is an umbrella concept that includes an array of possible variations based on the public body's financial needs, desired risk allocation, logistical and staffing capacity.

For some projects, a P3 approach may be a mechanism to use private capital to bridge funding gaps and expedite delivery of a needed public facility. For other projects, the public body's primary objective may be to shift risks associated with design and construction as well as long-term operation and maintenance.

Many P3 structures include performance-based compensation, with the public body setting performance standards and the private body's compensation based on a combination of fixed pricing, agreed rates, facility revenues, profitability, availability, volume, quality metrics, efficiency, safety, environmental goals, condition at expiry of the agreement, and other factors.

Given the varied potential contract and financing structures, a public body might enter into a Public-Private Partnership in which the distinguishing feature is that the private sector participant provides upfront capital for the project—through private equity investment and/or loans (often both)—while the project's delivery, operation, and maintenance are otherwise achieved through more traditional methods. Alternatively, a public body might structure a Public-Private Partnership to feature long-term performance-based compensation, thereby emphasizing project performance over time and shifting risks associated with future O&M costs. Such an arrangement, when coupled with appropriately defined performance requirements, may also be used to incentivize initial design quality, since the private sector participant will be responsible for the long-term performance of the facility and compliance with the public body's requirements over time.

In many cases, public owners have mixed needs and motivations, and use P3 arrangements simultaneously to lighten the initial financial impact of a major project, promote quality and speed of delivery, promote long-term performance objectives, and shift performance risks to the private sector in a way that aligns the public and private sector interests in the performance of facility. Some public owners also address concerns over staffing requirements to meet growing infrastructure programs, using P3 approaches to shift the responsibility of finding and allocating resources to a concessionaire to mitigate their own personnel bandwidth.

### **Specific P3 Methodologies**

The precise structure under which the private sector participant is to design, build, finance, operate, and/or maintain the facility depends on the public body's priorities in terms of overall cash outlay, the timing of the public body's monetary obligations, performance needs, short and long-term risk allocation (in terms of both operational and financial performance), and resource availability.

The most utilized P3 models include the following:

**Design-Build-Finance-Operate-Maintain (DBFOM).**

In a DBFOM model, the private sector entity is responsible for design, construction, financing (typically through a combination of private equity investment and debt), and long-term operation and maintenance of the facility (road, bridge, hospital, courthouse, terminal, plant, system, etc.). O&M periods range from 10 to 50 years or more, with 30 - 40 years being common, as this encourages development of facilities with a longer asset life. In this model, the private sector works much like a private developer for the project, while the public body typically defines design parameters, performance requirements, rates and any tolls, and any other required features of the facility. DBFOM models are often categorized based on how the private entity will be paid over time:

DBFOM-Availability Model – In an “availability” structure, the public body makes periodic payments to the private entity based on defined rates and subject to performance parameters—that is, the public body pays for the facility being “available” and meeting contractual requirements. The facility may or may not generate revenue (through user fees, tolls, ticket sales, usage rates, etc.), and the compensation to be paid to the private entity may include performance incentives, which performance incentives are often in the form of deductions for non-performance. Examples could include a roadway keeping traffic moving at target rates or meeting specified safety goals, or a building meeting or exceeding energy efficiency requirements, or indoor environmental conditions being met.

DBFOM-Revenue Concession – In a “concession” structure, the private entity receives all or a portion of the revenues produced by the facility over time. A concession arrangement may be used as a mechanism to shift some or all of the risk of the project’s financial performance to the private sector—the developer only makes money if the facility produces revenue. Commonly, the revenue concession represents only a portion of the private entity’s compensation, and can be used both to defray the financial performance risks that would otherwise be borne by the public body as well as a structure to incentivize the private entity to maximize the facility’s financial performance, within parameters prescribed by the public body.

In a DBFOM model, the primary purpose of the private financing component may to meet the public body’s funding needs, or may be a mechanism to ensure the private entity is sufficiently invested and incentivized to ensure successful long-term performance of the facility.

**Design-Build-Operate-Maintain (DBOM).**

DBOM design-build construction delivery with long-term private operation and maintenance by the private partner. The public body defines the design parameters and performance requirements, and the private entity is paid for the construction and long-term O&M based on agreed rates and standards. DBOM is often used to enable the public body to utilize private sector expertise and efficiency in operating specialized facilities, and may be structured to incentivize design and construction quality where the private partner must design and build a facility that it is committed to operating and maintaining over a period of years.



**Design-Build Finance (DBF).**

In a DBF model, the project is delivered using a design-build methodology, with the private entity contributing some portion of the financing, through either debt or equity. The primary advantage to this model is speed of delivery, allowing the public to take advantage of private financing to fill funding gaps.

**Design-Build-Finance-Maintain (DBFM).**

Like DBFOM, a DBFM model uses private financing—whether to fill funding gaps, expedite delivery, incentivize long-term performance, or a combination—and holds the private entity responsible for physical maintenance of the facility, while day-to-day operation remains controlled by the public body.

Generally, program functions (eg clinical processes in a hospital, education and administration functions in schools and colleges, justice functions including clerical in a court, etc) are retained by the public sector.

The following chart provides a high level summary of the features generally involved in the noted models:

<b>Project Attribute</b>	<b>DBF</b>	<b>DBOM</b>	<b>DBFM</b>	<b>DBFOM (Availability)</b>	<b>DBFOM (Revenue)</b>
Date Certain Delivery	✓		✓	✓	✓
Price Certain Delivery	✓		✓	✓	✓
D-B Interface Risk Transfer	✓	✓	✓	✓	✓
DB - FM Interface Risk Transfer				✓	✓
Whole of Life Cost Considerations			✓	✓	✓
Maintenance Cost and Performance Risk Transfer		Partial	✓	✓	✓
Operations <sup>1</sup> Cost and Performance Risk Transfer		Partial	✓	✓	✓
Energy Efficiency Performance			✓	✓	✓
Asset Condition during and at end of term Risk Transfer			✓	✓	✓
Sufficiency of funds (revenue generation to fund Project)					✓

Note<sup>1</sup> Operations refers to provision of services related to facility but are other than maintenance; eg Cleaning, landscaping, help desk, etc

Public bodies in the US, Canada, and Europe have used variations on these procurement models and others to meet a diverse mix of public objectives. Given the wide variety of possible structures—and the even wider variety of considerations for a given project in terms of financing details, public funding sources, performance security, risk allocation, performance needs, technical expertise, and ultimately value to the public—the CPARB P3 Committee concluded it was important to recognize a broad and flexible definition of a Public-Private Partnership, with specific limitations to ensure potential projects receive appropriate vetting, address key contractual issues, protect the public interest, preserve the state’s high labor standards, and promote fair competition and participation.

In many cases, the security package consists of traditional performance bonds or other security covering construction of the facility, coupled with performance-based contractual payment terms, and, in some cases, additional letters of credit, guaranties, or other security.

## The P3 Committee's Draft Legislation

With these general considerations in view, the P3 Committee (the Committee) recommends that CPARB endorse draft legislation to be presented to the Legislature through its appointed legislative members, with the P3 Committee available to those members for consultation when refining and preparing the draft for introduction.

Below is a summary of key features, public policy considerations discussed by stakeholders, and mechanics of the Committee's recommended draft.

### Overview

The Committee's draft draws from numerous sources, including statutes enacted in Washington and other jurisdictions as well as model legislation published by various public coalitions and private industry groups, in addition to the regional and national expertise of the Committee's membership and Washington-specific considerations.

In summary, the draft legislation proposes the following:

1. **Value-based procurement.** To procure a P3 project, the owner must use either a one-step Request for Proposals (RFP) process, or a two-step Request for Qualifications/Request for Proposals (RFQ/RFP) process.

The Committee notes that most P3 projects are procured using an RFQ/RFP process. The legislation outlines various requirements for the RFQ and the RFP, including various project parameters and draft contract terms. In addition to technical qualifications, past performance, and proposal value, the owner is required to include as an evaluation factors the proposers' plans for labor harmony and plans for participation by disadvantaged and underrepresented businesses.

Any honorarium must be specified up front, and any honorarium must be sufficient to generate meaningful competition and consider the level of effort required.

2. **Express "opt-in" requirement.** There are other means for some public owners to accomplish some of the ends this legislation enables. This legislation is not intended to affect an owner's ability to use any other existing avenue to implement projects, and only applies if the owner expressly elects to procure a project under this P3 legislation.
3. **Contract requirements.** Striking a balance between the flexibility needed for public owners to tailor P3 structures to their specific project needs and the desire to ensure basic public interest safeguards are in place, the legislation includes a list of P3-specific items that must be included in every P3 contract, including: basic project parameters and technical requirements; term (<50 years); property interests and compensation mechanics; any user fees and method of determination and modification; termination terms; security package; reporting; usage rights; payment bonds; prevailing wages; disadvantaged business participation plan; labor harmony plan; conditions upon expiration; and any project-specific restrictions (e.g. potential competing facilities).

4. **Public ownership.** Property remains public and control reverts to the public body upon expiration or termination of the contract. Public property involved in a P3 project is to remain public, with all rights, title, and interest reverting to the public body upon expiration or termination of the P3 Agreement.
5. **Flexible Funding and Financing.** The public body may combine private, state, federal, and other sources of funding and financing.
6. **Freestanding Requirements Regarding Subcontractors, Labor, and Disadvantaged Businesses.** The legislation includes a freestanding statutory requirement that every P3 contract must provide for, and the public body must otherwise ensure adequate provision is made for:
  - a. Payment of subcontractors, suppliers, and laborers, including payment bonds;
  - b. Payment of prevailing wages;
  - c. Prompt payment to subcontractors (including to design professionals);
  - d. Plans for participation by small, disadvantaged, minority-owned, veteran-owned, women-owned, and underutilized businesses.
7. **Project Review.** Each proposed P3 project must be reviewed by a specialist P3 subcommittee of the Project Review Committee (PRC), evaluating the proposed use of P3. The PRC P3 subcommittee will have expertise in the fields of public policy, private finance, management consulting, engineering, architectural design, construction, construction management, labor, women and minority owned businesses, public-private partnerships, operations and maintenance, and public works law. This PRC Subcommittee issues a recommendation to CPARB, which approves or disapproves the application.
8. **Pilot Period.** In the initial four years, a maximum of four P3 projects per year may be approved, with the objective of approving a balance of project types (e.g. horizontal vs. vertical).

#### 39.10.500 – Definitions

This lengthy section defines various terms used in the legislation. Key definitions include “Public-Private Agreement” and “Public-Private Facility.” The Committee discussed these terms and definitions extensively, ultimately adopting a flexible definition that references specific P3 methodologies (DBFOM, DBOM, DBF) and provides examples of horizontal and vertical facilities, while providing public bodies flexibility in defining and structuring P3 arrangements to provide public benefit.

### 39.10.510 – Project Planning and Procurement

This section lays out the procurement process for a P3 project. Highlights addressed by the Committee include:

1. **Express enabling language** (.510(a)).
2. **Owner opt-in requirement** (.510(b)). Owners are not required to use the P3 procurement process and are not bound by P3 requirements unless they expressly elect to procure the project as a Public-Private Agreement.
3. **Professional services** (.510(b)). Owners may use traditional Qualifications Based Selection for professional services.
4. **Public interest determination** (.510(c)). The public body must determine P3 is in the best interest of the public. This requires notice and a public hearing, consideration of public comment, and a written final determination, with protest procedures.
5. **RFP or RFQ-RFP Procurement** (.510(d)-(g)). The Committee discussed extensively the details of the procurement process and the appropriate balance between flexibility for owners and defined protections for competitors, project participants, and the public. Many of the RFQ and RFP requirements are adapted from the existing Design-Build statutes in RCW 39.10.
6. **Unsolicited Proposals** (.510(d)). A hot topic in the P3 industry, the Committee recommends allowing private entities to submit unsolicited proposals, but requiring any unsolicited proposal to be subject to the public RFP or RFQ-RFP process. The goal of this approach is to ensure fair competition for potential projects, while avoiding distraction to public owners responding to unsolicited proposals. The Committee recognizes this may provide a disincentive for private entities to submit unsolicited proposals and leave potential value “on the table.” But it also preserves the private sector’s ability to identify innovative opportunities, bring unique financing and funding options to public owners, potentially gaining a marginal advantage over competitors for such innovation. Several other jurisdictions follow this approach.
7. **Evaluation Factors** (.510(g)(i)(4)). While providing flexibility for owners to frame their evaluation process and scoring, the legislation includes a short list of mandatory evaluation factors. Several of the factors draw from and add to the existing design-build statute within RCW 39.10, while others are intended to ensure P3-specific considerations are included.

A freestanding subsection expands upon existing provisions—e.g., in design-build—regarding both labor and disadvantaged business enterprise interests by requiring offerors’ plans for labor harmony and for disadvantaged business enterprise participation to be included as evaluation factors and to be included in the contract (.510(g)(i)(4)(b), .520(c)(9), .570).

8. **Honorarium** (.510(g)(i)(8)). The owner must specify the honorarium terms in the solicitation. This was another point of extensive discussion to achieve an appropriate balance. The legislation requires the owner to delineate whether an honorarium will be paid, including whether the honorarium will be paid if the solicitation is cancelled, and specifies that if an honorarium is to be paid, the honorarium must be sufficient to generate competition and must consider the level of effort required to meet selection criteria, similar to the design-build statute. The honorarium

provision leaves open the possibility that an owner might elect not to provide an honorarium if the circumstances do not warrant one, though it is the Committee's recommendation that owners should generally provide an honorarium except in unusual circumstances.

#### **39.10.520 – Required Contract Terms**

While the P3 Committee anticipates P3 projects will likely be implemented by sophisticated public owners who will significantly exceed the basic statutory requirements, the draft legislation includes a short list of fundamental issues that every P3 Agreement must address, as outlined in the Overview above. This section is tailored to provide flexibility for a public owner and private concessionaire to negotiate precisely *how* many of the specified issues will be addressed, while specifically prescribing certain terms such as payment bonds and prevailing wages (.520(c)(9)).

#### **39.10.530 – Reversion to Public Upon Expiration / Termination**

Public property involved in a P3 project is to remain public, with all rights, title, and interest reverting to the public body upon expiration or termination of the P3 Agreement.

#### **39.10.540 – Owner Rights Upon Default**

This section ensures the owner retains the right, upon material default by the concessionaire and an opportunity to cure, to take over the facility and assume any contracts related to the facility, and to terminate and exercise any other rights and remedies available.

#### **39.10.550 – Public Financing and Funding**

The public body may use public financing, including various forms of bonds and notes, to finance all or a portion of a P3 project.

The P3 Committee intentionally did not address the effect of P3 financing on the public body's debt limits, avoiding potential state constitutional issues and preserving issues regarding debt limits, "on-book" vs. "off-book" financing and liabilities, and related issues for analysis under existing law. The P3 Committee recognizes after CPARB, additional work is recommended to be done with the State Treasurer's Office, Joint Transportation Committee, and Governor's Office of Financial Management.

#### **39.10.560 – Additional Funding Sources**

The public body may accept and/or enter into agreements with state and federal agencies and private entities for funds through grants, loans, financial assistance, donations, gifts, or property, and may combine funds to finance a P3 facility.

#### **39.10.570 – Labor and DBE**

In addition to inclusion in the list of mandatory evaluation factors and contract terms, this section is a freestanding requirement that adequate provision must be made for:

1. Payment of subcontractors, suppliers and laborers, including payment bonds;
2. Prevailing wages;
3. Prompt payment to subcontractors; and
4. A disadvantaged business enterprise participation plan.

### **39.10.570 – Project Review**

A public body must apply to use a P3 method in a process similar to, but more rigorous than, the existing Project Review Committee procedure for D-B and GC/CM. Initial review is by a new PRC Subcommittee with expertise and interest in specified areas relevant to P3 delivery. The application is more involved than D-B or GC/CM, though the legislation recognizes the application will often occur early in the process when the applicant will have only preliminary project parameters and financial data.

The P3 PRC Subcommittee reviews the application and issues a recommendation to CPARB. The application is approved or disapproved by CPARB. CPARB's decision is limited to the proposed alternative public works procurement method only. The Committee's intention is to clarify that the PRC and CPARB are not involved in reviewing the merits of a project or its overall benefit or cost to the public, which evaluation is appropriately addressed through the public body's political and administrative processes.

The legislation includes a four-year pilot period during which a maximum of four P3 projects per year will be approved, ideally including a balance of horizontal and vertical projects. The Committee's intention is to ensure the P3 process is implemented carefully and thoughtfully, with time to implement lessons learned during the rollout period, whether through legislative amendment or an increased focus on best practices among owners and private partners delivering P3 projects.

## Additional Owner Considerations for P3

While the P3 Committee's draft legislation would enable public owners flexibility to use P3 approaches to serve the public while protecting key interests of the public and stakeholders, public bodies considering using P3 approaches enabled by the legislation will ultimately need to determine whether a P3 model is appropriate and beneficial for a particular project.

Some projects do not lend themselves well to P3 delivery. As with design/build, GC/CM, or any other delivery approach, the public body must determine whether and how it can use a P3 method to provide value to the project. The public body must similarly determine how to protect and public interest in the arrangement, particularly given the long-term nature of many P3 contract structures.

To provide further context for the Committee's draft enabling legislation, common issues addressed by owners contemplating a P3 approach are summarized below.

### Value for Money

As emphasized in the JTC report, a P3 program demands rigorous screening by the public body with analysis tools to determine whether a project is suitable for P3 delivery. As with any significant public project, the public owner's analysis begins with basic programming, feasibility, financial assumptions and pro formas, and evaluation of possible delivery and operational options. The Committee's draft legislation contemplates early financial evaluation by the public owner in considering the suitability of P3.

When considering a possible P3 approach, part of the public owner's initial process often includes a "Value for Money" analysis. In a Value for Money Analysis, the public body compares the projected life cycle cost of possible P3 structures against other more "traditional" options. The Value for Money Analysis generally includes not only estimates of development, design, and construction costs, but also projected costs for operations and maintenance over the full life of the facility, as well as financing costs and any anticipated revenues over time. The Value for Money Analysis typically evaluates the time value of money, analyzing not only how much the project will cost, but when the public body may be required to pay, how the projected costs might differ if the project is implemented at different times, and when the public's payment obligations will be incurred in comparison to any anticipated revenues.

A major consideration in the Value for Money analysis is the possible availability of grants, incentives, and special bonds available for P3 projects. A detailed discussion of the various possible grants, Public Availability Bonds, and other incentives is beyond the scope of this report, except to observe that an owner considering a P3 approach will invariably include the availability of such funding and financing sources in its financial analysis of possible options.

The Value for Money Analysis is just one tool to evaluate whether a P3 approach may be appropriate for a particular project or facility, but it is a useful one that enables a reasoned comparison of the financial impacts of various options.

### Design Excellence and Facility Quality

A public body evaluating a potential P3 model must often analyze whether and how it can use the private partner's potential financing and operational responsibilities to incentivize quality design, environmental responsibility, safety, and high long-term performance. In some cases, the public body may be able to

structure the P3 contract so the concessionaire will make more money if the facility runs efficiently and meets environmental and safety targets. The public owner may prioritize design innovation and technical competency in the procurement process. In other cases, the nature of the project itself may incentivize quality design and construction, particularly where the private entity will be required to operate and maintain the facility that it designs and builds. In still other cases, the public owner will need to include extensive and detailed requirements to ensure design and performance parameters are met, with clear consequences for inferior design, low physical quality, or non-performance. Depending on the public owner's objectives, selection of the right P3 model can facilitate meeting these objectives.

As with financial considerations, not all projects are suitable for P3 from a design and quality standpoint. For example, an owner with highly prescriptive design demands, existing specialty operational and maintenance staff, and low O&M costs may find little benefit in a P3 structure, or perhaps a P3 model with less risk transfer. In each case, the public owner must determine whether a P3 model can be used to incentivize or obligate the private party to meet the owner's priorities more effectively than other models.

### Risk Allocation

While the financial and technical aspects of a P3 structure must make sense for the approach to be viable, the ability to allocate long-term risk is often a crucial consideration in assessing a P3 model.

One category of risk the owner must often consider involves financial performance. How variable are the initial projections of the facility's costs and revenues? If the project is intended to generate revenue, what happens if the project does not produce the revenue originally projected? What if the facility costs more to operate than expected? If the facility's financial performance is relatively predictable and adequate public financing is available, there will be less value to the owner in transferring risk to the private partner. If there is greater uncertainty regarding costs and revenues, and the private partner may be able to optimize the facility's financial performance, then there may be value to be realized by shifting financial risk from the public to the private sector participants. The P3 contract may be structured to allocate this risk in the manner that best meets the owner's objectives. That could mean the owner retains all financial/revenue risk and simply pays the private entity to keep the facility running and without deferred maintenance, while meeting specified performance criteria (as in the availability model described above). It could alternatively mean the owner shifts all financial risk to the private sector, essentially enabling the private entity to develop and operate the facility to maximize revenue, within bounds prescribed by the owner (e.g. prescribed or maximum rates, usage metrics, efficiency rates, availability standards, safety requirements, etc.)

Another category of risk that might be shifted in a P3 structure involves performance and operational risks. Is there value in having a single entity responsible for the development and operation of the facility? In other words, can a better facility be delivered for the public if the private entity must develop the facility knowing that it must operate the facility for many years? Is there value to the public body in transferring the risk of the facility's underperformance or non-performance to the private developer? What benefits can the public body derive from a structure in which its payment obligation is tied to successful long-term performance? If long-term operational performance is a priority, a P3 arrangement may create value for the public owner. If design and construction parameters are well known and long-term operation and maintenance costs are adequately controllable through traditional contracting methods, a P3 approach may not be beneficial.



## Performance Security

A significant consideration in any P3 project is the security package. How will the private concessionaire's performance be secured, not only during the design and construction phase, but over the often decades-long operational life of the facility.

In a DBFOM structure where the private entity is accountable to lenders and investors, and the private entity's compensation is contractually tied to its performance, the lenders and investors have a substantial independent interest in ensuring performance of the contract, since they will not recover their investment if it does not perform. At the same time, the public owner receives a significant degree of security in the fact that it will not be required to pay if the project does not perform. In such cases, the owner might obtain adequate security through the contract structure or by requiring the owner to be a beneficiary of the lender's required security instruments.

At the other end of the spectrum, such as a DBOM model where lenders and investors are not exerting separate performance pressure on the developer, the public owner might require a greater degree of security. The owner might require separate security for various phases of the contract, from design to construction, and then through the O&M period. Is it important for the public to owner to transfer the "interface risk" between the design and construction entity and the O&M provider. Who is accountable if there are performance issues related to design and construction? Again, selection of the right P3 model based on the public owner's needs will impact the value for money.

## Public Staffing and Resources

For many major projects where P3 is a viable possibility, the public body must consider whether it has or can assemble the necessary in-house team to deliver and operate the project, or whether it would be more efficient and cost-effective for the project to be delivered and operated through the private sector. In evaluating a potential P3 structure, the owner must additionally consider the extent to which it would need to regulate and oversee the private entity's activities, particularly in comparison to the level of effort and cost if the public body operated the facility directly in the long-term.

## **BOARD WORKSHOP ON ORGANIZING FOR SYSTEM EXPANSION**

### **Summary Minutes**

**May 4, 2018**

### **CALL TO ORDER**

The workshop was called to order at 1:37 p.m. by Chair Dave Somers, in the Holland America Line Room, World Trade Center, 2200 Alaskan Way, Seattle, Washington

### **BOARD MEMBERS PRESENT**

#### Chair

(P) *Dave Somers, Snohomish County Executive*

#### Vice Chairs

(A) *John Marchione, City of Redmond Mayor*

(P) *Ron Lucas, City of Steilacoom Mayor*

#### Board Members

(P) *Nancy Backus, City of Auburn Mayor*

(P) *David Baker, City of Kenmore Mayor*

(P) *Claudia Balducci, King County Councilmember*

(P) *Dow Constantine, King County Executive*

(A) *Bruce Dammeier, Pierce County Executive*

(A) *Jenny Durkan, Seattle Mayor*

(P) *Dave Earling, City of Edmonds Mayor*

(A) *Rob Johnson, Seattle Councilmember*

(A) *Kent Keel, City of University Place Mayor*

(P) *Joe McDermott, King County Council Chair*

(P) *Roger Millar, WSDOT Secretary*

(P) *Paul Roberts, Everett Councilmember*

(A) *Dave Upthegrove, King County Councilmember*

(A) *Peter von Reichbauer, King County*

*Councilmember*

(P) *Victoria Woodards, City of Tacoma Mayor*

### **WELCOME AND INTRODUCTIONS**

Chair Dave Somers welcomed the Board and stated that the purpose of the workshop was to discuss board organization for the successful implementation of the Sound Transit system expansion program. He noted that Boardmember Roberts would be participating in the workshop by phone.

Chair Somers introduced the workshop facilitator, David Knowles. Mr. Knowles has 25 years of experience in planning and policy making for transit agencies. He has a broad-based perspective on public agency challenges from his work as a consultant; former Director of Planning for the City of Portland, Oregon; and two-term elected councilor at Metro, Portland's regional government.

### **MEETING PURPOSE AND DESIRED OUTCOMES**

Chair Somers stated that Sound Transit is undertaking an ambitious effort to build a transformative mass transit system for the Puget Sound Region. To accomplish its mission of building out the voter-approved ST2 and ST3 plans, Sound Transit must reform the way it does business to ensure projects are being built on time and within budget. Sound Transit must also adopt internal reforms to maintain a focus on excellent customer service and project delivery.

Chair Somers stated that over the past year, he has met with board members to look at the board's existing processes in light of the changes brought on by the passage of ST3. Three of the themes that emerged during those conversations will be discussed during the workshop. Those themes are the work ahead over the next five years, organizing the board's committees to handle the work, and looking at ways to rebalance the board's workload and approval levels.

Chair Somers said that Mr. Rogoff would be presenting a five-year outlook so that board members are fully cognizant of the work ahead while discussing changes to board committees and how to balance

the board's workload and oversight role. Board member involvement in this effort is crucial for maintaining public support and regional unity. His goal is to give the board the necessary tools to ensure appropriate oversight and to maintain positive strategic direction.

By the end of the day, the desired outcomes will be solid direction to staff on changes to the board committee structure and changes to the delegations of board, committee, and executive oversight that will allow both oversight and guidance in all important strategic areas and improved efficiencies for day-to-day agency business. There will be no action taken at the workshop.

## **FIVE-YEAR OUTLOOK**

Peter Rogoff, CEO, provided an overview of future challenges and opportunities during the next five years.

### Leadership on Project Development

The System Expansion Implementation Plan will seek to shorten project delivery times. This will only be possible through assistance from the board by establishing trust with municipalities, tribes, and stakeholders; driving to a preferred alternative earlier while maintaining project scope discipline; and executing partnering agreements that will allow environmental review and permitting processes to be streamlined. Major project decisions are coming to the board faster than ever before and will require board member knowledge of project details regarding preferred alternatives.

Vice Chair Lucas asked staff to look at the possibility of board members having alternates at the meetings.

### Capital Project Delivery

Decisions about project alignments will be coming to the Board in rapid succession, with several large project alignments being selected within months of each other.

The board will be asked for assistance with determining the feasibility and efficacy of possible public-private partnerships (P3). Possible benefits to P3s could include financing, community acceptance, agency bandwidth, and contractor performance and management. Potential P3 projects could include I-405 and SR 522 bus rapid transit, the ST2 bus base, and the South Kirkland-Issaquah Link.

There will need to be board deliberation and decisions made around several other large issues including managing the agency's relationships with the Washington State Department of Transportation (WSDOT), mitigating workforce shortages, promoting local hiring, and advancing and prioritizing diversity for the Sound Transit workforce.

Chair Somers asked how P3 would work with subarea enhancements. Mr. Rogoff stated that P3 might provide opportunities to expedite projects sooner. Where there is a subarea equity challenge for financing, it is possible that Sound Transit will find a financial partnership to speed up the work.

### Operations Business Model

Sound Transit will need the right operations business model to meet growing demand. Decisions will include who is operating Sound Transit services and managing and protecting the Sound Transit brand.

Significant light rail expansion may require a different operating and maintenance model with the expansion into Pierce and Snohomish Counties. With ownership of the Downtown Seattle Transit

Tunnel (DSTT), operations and maintenance will either be transferred to Sound Transit or the agency will contract with King County Metro.

As more light rail goes into operation, there will be discussions surrounding existing ST Express bus service. Questions include whether demand for bus service will decline as light rail is expanded, or whether both systems will remain at capacity and face crowding issues. There will be decisions around bus base and bus contracting expansion and whether to pay for partner bus base expansions or build capacity for Sound Transit buses.

#### New Policy Directions

Equitable transit oriented development (TOD) is becoming an ongoing board responsibility. TOD transactions will continue coming to the board with an increase outside of the City of Seattle. Decisions will need to be made about partnering with public housing authorities; opportunities to support community TOD within a half mile of the stations; and structure, goals, and governance of the new TOD revolving fund.

There will be board direction needed on the issue of paid parking and parking permitting, specifically on the cost and percent utilization of paid parking in existing facilities and the parking allotted for single occupancy drivers.

Future policy questions include issues with the System Access Fund as it currently exists and how to divide those resources, developing a process for subarea equity, and determining the agency's approach to ridesharing. They also include sustainability issues including battery-operated vehicles, the acquisition and possible change to double-decker vehicles, and reviewing opportunities for electricity needs and how to keep operations within sustainability goals.

Enhanced customer experience strategies will come to the board to look at simplifying fare policy and payment options, establishing a customer defined performance metrics, replacing existing wayfinding, enhancing seamless modal integration, prohibiting bicycles on Link during peak hours, and improving customer communication.

#### Continuing Oversight and Governance

The largest challenge approaching the board in terms of routine functions is the volume of actions and contract approvals that will be occurring. The number of board actions will be increasing quickly as the agency launches major projects in all five subareas.

Routine board governance also includes management of the Financial Plan and the management of the capital program as it moves forward. There is a potential need to reassess the capital program should there be a loss in federal funding, motor vehicle excise tax funding, and economic factors.

The agency will need to mitigate community disruption during construction when the buses come out of the DSTT, during street and lane closures, and operating change to existing service to facilitate construction.

Another area for board direction is how to approach the long-term future for Sound Transit offices. The agency is currently working out of five buildings with lease expirations ending in 2023. The board will need to decide if the agency should transition to a unified administrative office.

There is also the issue of all required partner integration work, cooperation with the Puget Sound Regional Council (PSRC), transit integration and coordination with partners' projects, and board composition.

Mr. Rogoff ended with a summary of the next five years. There will be a need for intensified board engagement for project development in collaboration with jurisdictions for expedited project timelines, dramatic increase in the number of contract actions, critical decisions on capital delivery approaches, fundamentals of operating business models, policy debate and decision-making, and continued oversight of dynamic financial plan and budget development.

## **BOARD COMMITTEE RESPONSIBILITIES AND STRUCTURES**

Mr. Knowles stated that there will be an increased workload ahead for the agency, which will impact the board's committee structure. During discussions with Chair Somers, board members comments included restructuring the board committees to focus on strategic issues and build on board member expertise, and looking at how to address new subject areas either through changes to committee structure or other options.

Chair Somers presented his recommendation for a new committee structure. He suggested the following four committees: Executive Committee, Rider Experience and Operations Committee, Capital Expansion Committee, and Finance and Audit Committee. Monetary authority should be given for the Executive Committee, Rider Experience and Operations Committee, and Capital Expansion Committee at the same level.

### Executive Committee

The Executive Committee would add direction and implementation of systemwide programs like the System Access Fund and Innovation Fund; add monetary authority equal to the Capital Committee and Operations and Administration Committee; and add transit oriented development transactions and all surplus property declarations. Financial oversight would move to the Finance and Audit Committee.

### Rider Experience and Operations Committee

The Operations and Administration Committee would be renamed the Rider Experience and Operations Committee. This change would add greater emphasis on customer-facing programs and proposals and rider experience activities. The committee would review system enhancement and state of good repair projects as well as quarterly financial and contract reports related to agency operations.

### Capital Expansion Committee

The Capital Committee would be renamed the Capital Expansion Committee. The proposed change would remove system enhancement and state of good repair projects, and surplus property declarations from the existing Capital Committee. The committee would review quarterly financial reports and contract reports related to system expansion.

### Finance and Audit Committee

The Audit and Reporting Committee would be disbanded and a Finance and Audit Committee would be established and tasked with more stringent oversight of the budget and financial plan. This committee would retain the current Audit and Reporting Committee responsibilities. The committee would also review agency risks, annual investment, debt plan, budgets, and financial plan. The committee would meet more frequently than quarterly.

Chair Somers asked the board members for their input on his recommended committee structure.

Boardmembers appreciated the addition of the rider experience. This component is currently discussed but does not have a home with any one committee.

Boardmembers also wanted to tie the work with partners to a committee. Mr. Rogoff felt that partner relationships would come under the Executive Committee because it includes policy and because the

membership of that committee includes county executives and committee chairs. Boardmembers also felt that information on those issues should also be provided to other committees.

Boardmembers questioned if Capital Expansion is the right name since not everything in the capital budget is related to the expansion program. It was suggested the Capital Expansion Committee be named System Expansion Committee to eliminate losing financial focus on those projects. There was also concern that the capital functions are being split between the Rider Experience and Operations Committee and the Capital Expansion Committee. Mr. Rogoff clarified that operations information would be provided to the capital expansion committee when projects are being reviewed.

Boardmembers were generally supportive of the concept of moving some of the responsibilities to different committees as a way to manage the workload. There was concern that the committees will have workload challenges unless the authority level of the committees is changed. Due to challenges in getting a quorum for some meetings, the board needs to be strategic about committee appointments.

The new structure needs to meet the needs of staff. There should be a change to the rules to allow actions to be further delegated to the Executive Committee. One suggestion was for policy issues to come to the board every other meeting.

Boardmembers asked if financial oversight is being taken out of the Executive Committee. Mr. Rogoff clarified that the Finance and Audit Committee would be reviewing the Financial Plan. The budget is currently reviewed and recommended to the Board by the Operations and Administration and the Capital Committees. This change to the committees could augment that or the Rider Experience and Operations Committee and Capital Expansion Committee could forward the budget to the Finance and Audit Committee. There are different ways this could be structured.

Chair Somers advised the board that the goal is to get the committee structure completed by the end of the year. He asked staff to come to the Executive Committee in May or June with a presentation.

## **BALANCE OF BOARD OVERSIGHT AND WORKLOAD**

Mr. Knowles stated that during Chair Somers' conversations with board members, board oversight and board workload were discussed. Board members suggested providing more opportunities for board engagement on strategic issues and to consider increasing approval levels. The board is being asked to provide direction to staff on a balance of board versus CEO authority to provide efficiency over the next five years. Expenditures and board actions have grown and will continue to grow.

The existing board policy establishes approval levels for a variety of actions. Current delegations are CEO up to \$200,000, committees up to \$5 million, and anything over \$5 million goes to the board. The board oversees 3 percent of the actions and 97 percent of the dollars.

Peer analysis indicates that transit agencies rely on dollar levels with delegations to CEO's or general managers ranging from a low of \$100,000 to a high of unlimited value. CEO's or general managers may elevate any particular approval within their dollar authority as appropriate on a case-to-case basis.

Over the next five years, board responsibilities will expand and the quantity of agenda items will minimize time needed for strategic discussion during meetings. Mr. Knowles presented the board members with four possible approval levels to prompt discussion.

### Example A

- Committee delegation increased to \$10 million; CEO delegation increased to \$500K.
  - Decreases the number of annual actions approved by the Board by 9 percent, or around 13 actions.

- Decreases the number of annual actions delegated to the committees by 6 percent, or around 4 actions.
- Board controls 94 percent of the annual procurement dollars.
- Committee controls 5 percent of the annual procurement dollars.

Example B

- Committee delegation increased to \$20 million; CEO delegation increased to \$1 million.
  - Decreases the number of annual actions approved by the Board by 18 percent, or around 27 actions.
  - Decreases the number of annual actions delegated to the committees by 9 percent, or around 6 actions.
  - Board controls 90 percent of the annual procurement dollars.
  - Committee controls 9 percent of the annual procurement dollars.

Example C

- Committee delegation increased to \$20 million; CEO delegation increased to \$2 million.
  - Decreases the number of annual actions approved by the Board by 18 percent, or around 27 actions.
  - Decreases the number of annual actions delegated to the committees by 30 percent, or around 18 actions.
  - Board controls 89 percent of the annual procurement dollars.
  - Committee controls 9 percent of the annual procurement dollars.

Example D

- Committee delegation increased to \$50 million; CEO delegation increased to \$5 million.
  - Decreases the number of annual actions approved by the Board by 24 percent, or around 35 actions.
  - Decreases the number of annual actions delegated to the committees by 43 percent, or around 26 actions.
  - Board controls 82 percent of the annual procurement dollars.
  - Committee controls 15 percent of the annual procurement dollars.

Mr. Knowles commented that some peer agencies set different approval levels based on contract type or procurement method. Sound Transit currently has different approval levels for sole source contracts and proprietary contracts. The board could consider a categorical approach with more than one approval level, or exceptions/exclusions to the approval levels. There is a clear relationship between how much accountability and oversight the board exercises and how much business can be accomplished at meetings.

Boardmembers noted that issues that come up are usually not related to the dollar amount of the contract. There was an interest in identifying a trigger that should bump something up to the board because of controversy, a procurement method, the nature of the business, a sole source contract, or lobbying contracts.

Boardmembers spoke in favor of accountability and transparency, fairness for those attempting to contract with Sound Transit, and the need to keep projects moving. The board needs to receive the right reports, even if they are being reviewed retrospectively.

Mr. Rogoff suggested that instead of reporting on one major project, staff could do a major project update presentation. Staff would need to find a different way to provide meaningful, substantive information on projects.

Boardmembers asked if there has been an analysis on where there have been problems or patterns on certain contracts in the past. Staff should find procedural ways to manage the workload and ways to

look at contracts to determine when there needs to be board discussion. Mr. Rogoff replied that staff looked at peer agencies to see how they handle this and they almost all fell back to the quantitative measure because they are easy to manage. There are certain contracts, no matter how small, that should come to the board. Some issues get media attention that should go to the board. It is hard to find a quantitative approach to measure those.

Boardmembers asked Michael Trzupsek, Sound Transit Interim CFO, to share his thoughts. Mr. Trzupsek commented that he agrees with the importance of transparency. He stated that transparency could be solved in many ways. Should the board increase the CEO's budget authority, the board should have access to those contracts and reports. The CEO can bring anything controversial to the board. He said the dollar amounts in the options presented may look large, but they are a small percentage of the annual budget.

Chair Somers commented that he would like to give more responsibility to the CEO. He asked the board members to identify categories of issues where the Board should retain authority. Areas identified by the board included: lobbying contracts, sole source contracts, public-private partnerships (P3), any contract the CEO determines should be elevated to the board level, contracts outside of the approved annual budget, contracts the CEO views as a possible conflict of interest, and contracts with embedded policy implications. Mr. Rogoff stated that staff will look further into recommended categorical exceptions and bring suggestions to the board.

Boardmembers supported moving toward an increased approval authority level. However, contract approvals that have a policy decision embedded in them should come to the board.

Mr. Knowles asked the board members to give staff direction about where the board is leaning in terms of authority levels.

Boardmembers spoke in favor of option C and D. Option D received the most support. Board members commented that when looking at the overall budget for this agency, Option D is still not that large and it would free up time for other work that needs to be done by the board. Unless there is a dramatic change in board responsibilities, the committees and board will be slowed down by contracts. Boardmembers also felt the higher approval authority would allow committees to take final action on more contracts, which would free up the board for more briefings.

Peter Rogoff commented that routine expenses are handled at the lower dollar levels, but capital contracts should exceed the higher thresholds. This puts more responsibility on the CEO to be the arbiter of what should or should not be in front of the board. Policy issues would be brought to the Board for direction.

Mr. Knowles summarized the discussion by stating that there was an emerging consensus for Option D to increase the delegation to the committees to \$50 million and CEO to \$5 million with the following exemptions:

- Lobbying contracts
- Sole source contracts
- Any contract the CEO determines should be elevated to the board level
- Contracts outside of the approved annual budget
- Any contract the CEO views as a possible conflict of interest
- Any contract with embedded policy implications

The boardmembers asked that the regular reporting of contracts approved by the CEO be increased in frequency for board review. Internal controls of the contracting process must be adjusted to ensure the highest level of equity and transparency in contracting practices.



**BOARD COMMUNICATION**

Mr. Knowles introduced the subject of board member feedback on communications. During the CEO’s discussions with board members, feedback on communications included the desire to have more opportunities for communication between board members and opportunities for outside perspectives.

Staff would like to ensure that the board has the information they need at the right time to address the work ahead. Currently, each year the board receives approximately 40 meeting packets with over 200 staff reports, a variety of reports and publications including monthly reports, quarterly reports, and annual reports. He asked the board what information is important for their decision-making and whether the board would like to see changes to existing reports.

Boardmembers expressed concern that they are not able to read everything that is sent by staff. There was support for ensuring documents have executive summaries or more visual presentations with a link to additional information. Boardmembers also commented that the board meeting is important for hearing information from staff during the presentations. Boardmembers also asked for modifications to current communications, including finding ways to consolidate emails, combine communications into a summary report, or standardize email subject lines.

Boardmembers supported the current format of the staff reports that accompany actions. The reports are a nice length, normally 3 to 4 pages, but can be repetitive.

Boardmembers asked staff to look at all the reports and suggest what might be deleted, merged, or slimmed down and let the board react to the staff’s suggestions.

Staff was also asked to create a work plan to show boardmembers the schedule for the year and be able to see upcoming policy decisions and the steps involved. Board members discussed creating a work plan at the first of the year or by quarter based on a general sense of the timing from staff, and update it throughout the year. Mr. Rogoff commented that it may be difficult to do for contract actions, but it could be done for non-contract actions, such as policy.

**NEXT STEPS**

Dave Somers asked staff to present a more detailed proposal on committees at the June Executive Committee and Board meetings. The goal is to finish before the end of the year or earlier.

**ADJOURN**

The workshop was adjourned at 1:10 p.m.

ATTEST:

\_\_\_\_\_  
Dave Somers  
Board Chair

\_\_\_\_\_  
Kathryn Flores  
Board Administrator

APPROVED on \_\_\_\_\_ 2018, JE

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HOUSE BILL 2726

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State of Washington

65th Legislature

2018 Regular Session

By Representatives Buys and Tarleton

Read first time 01/15/18. Referred to Committee on Capital Budget.

1 AN ACT Relating to public-private partnerships for alternative  
2 public works contracting; amending RCW 39.10.230; reenacting and  
3 amending RCW 43.131.408; adding a new chapter to Title 39 RCW; and  
4 providing an expiration date.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6 NEW SECTION. **Sec. 1.** The definitions in this section apply  
7 throughout this chapter unless the context clearly requires  
8 otherwise.

9 (1) "Affected jurisdiction" means any public body within the  
10 state of Washington in which all or part of a project implemented by  
11 another public body under this chapter is located or which is  
12 directly affected by a public-private facility or public-private  
13 agreement.

14 (2) "Capital maintenance" means maintenance or rehabilitation  
15 performed either (a) to extend the useful life of a facility, system,  
16 or component or (b) to restore a public-private facility to the  
17 condition required before expiration of the public-private agreement.

18 (3) "Concessionaire" means any private entity that has entered  
19 into a public-private agreement with a public body under this  
20 chapter.

1 (4) "Construction" means the process of building, altering,  
2 retrofitting, improving, or demolishing any public-private facility,  
3 including any structure, building, or other improvements of any kind  
4 to real property. "Construction" does not include the routine  
5 operation, routine repair, routine maintenance, or capital  
6 maintenance of any existing public-private facility, including  
7 structures, buildings, or real property.

8 (5) "Design-build-finance" means a project delivery method in  
9 which a public body enters into a single contract for design,  
10 construction, and full or partial private financing of a public-  
11 private facility over a contractually defined term.

12 (6) "Design-build-finance-operate-maintain" means a project  
13 delivery method in which a public body enters into a single contract  
14 for design, construction, finance, maintenance, and operation of a  
15 public-private facility over a contractually defined term. Public  
16 funds must not be appropriated to pay for any part of the services  
17 provided by the concessionaire during the agreement period, except as  
18 provided in the request for proposals and final public-private  
19 agreement.

20 (7) "Design-build-operate-maintain" means a project delivery  
21 method in which a public body enters into a single contract for the  
22 design and construction, and the maintenance or operation, or both,  
23 of a public-private facility over a contractually defined term, and  
24 for which public funds are appropriated.

25 (8) "Maintenance" means routine maintenance, routine repair,  
26 rehabilitation, capital maintenance, maintenance replacement, and any  
27 other categories of physical maintenance or upkeep of a public-  
28 private facility that may be designated by the public body.

29 (9) "Offeror" means a private entity who submits a statement or  
30 qualifications or a proposal in response to a request for  
31 qualifications or request for proposals for a public-private  
32 agreement.

33 (10) "Operate" means any action other than maintenance to operate  
34 or facilitate the use of a public-private facility for its intended  
35 purpose.

36 (11) "Private entity" means a person, corporation, general  
37 partnership, limited liability company, limited partnership, joint  
38 venture, business trust, public benefit corporation, nonprofit  
39 entity, or other business entity.

1 (12) "Public body" has the same meaning as defined in RCW  
2 39.10.210.

3 (13) "Public-private agreement" means a contract between a public  
4 body and a private entity that relates to the development, financing,  
5 maintenance, or operation of a public-private facility. The public-  
6 private agreement may implement a design-build-operate-maintain,  
7 design-build-finance-operate-maintain, design-build-finance, or other  
8 public-private project delivery method.

9 (14) "Public-private facility" means a new or existing property,  
10 facility, or improvement that serves a public purpose, is developed  
11 for a public body, and is subject to a public-private agreement  
12 including, but not limited to, civic or education facilities, roads,  
13 bridges, public transit systems, ferry facilities, port facilities,  
14 airports, intermodal systems, other transportation facilities,  
15 cultural or recreational facilities, medical facilities, utility  
16 facilities, and telecommunications facilities.

17 (15) "Request for proposals" means all documents, whether  
18 attached to or incorporated by reference, utilized for soliciting  
19 proposals for a public-private facility under this chapter.

20 (16) "Request for qualifications" means a solicitation issued by  
21 a public body under section 2(7)(a) of this act.

22 (17) "Responsible offeror" means a private entity that meets all  
23 criteria stated in RCW 39.04.350, has the capability in all respects  
24 to fully perform the requirements of the public-private agreement,  
25 and has the integrity and reliability to assure good faith  
26 performance.

27 (18) "Responsive offeror" means a private entity who has  
28 submitted a statement of qualifications or a proposal that conforms  
29 in all material respects to the applicable request for qualifications  
30 or request for proposals.

31 (19) "User fees" means any rates, tolls, fares, fees, or other  
32 charges imposed for use of all or part of a public-private facility.

33 **NEW SECTION.** **Sec. 2.** (1) A public body may, subject to the  
34 requirements of this chapter, utilize the request for qualifications-  
35 request for proposals process or request for proposals process  
36 provided in this section and enter into a public-private agreement  
37 with the responsible and responsive offeror who submits the proposal  
38 receiving the highest evaluation for the development, financing,  
39 design, construction, operation, or maintenance of a public-private

1 facility. The proposal must fully comply with all applicable  
2 requirements of federal, state, and local law, including chapters  
3 39.08, 39.12, and 39.19 RCW. Chapter 39.19 RCW applies to any public-  
4 private agreement procured pursuant to this chapter regardless of the  
5 source of financing or funding. A public-private agreement procured  
6 in compliance with this chapter is not subject to the competitive bid  
7 requirements set forth in chapter 39.04 RCW or to the requirements,  
8 restrictions, or limits in this chapter regarding design-build,  
9 general contractor/construction manager, or job order contract  
10 procedures.

11 (2) This chapter (a) applies if the public body expressly elects  
12 to procure the project as a public-private agreement and (b) does not  
13 limit a public body's ability to procure, execute, or administer any  
14 lease or other form of contract to improve public property or operate  
15 a public facility under existing law. A public body may elect to  
16 procure professional services for or related to a public-private  
17 facility or public-private agreement using procurement procedures  
18 otherwise available to the public body for such services.

19 (3) A transportation project eligible for development under  
20 chapter 47.29 RCW is eligible to enter into a public-private  
21 agreement under this chapter if it meets the eligibility criteria  
22 established in this chapter. A transportation project developed under  
23 this chapter must satisfy the requirements of this chapter and is not  
24 subject to the requirements of chapter 47.29 RCW.

25 (4) To use the procurement process provided in this chapter, the  
26 public body must, before applying for approval pursuant to section 9  
27 of this act, determine that it is in the best interest of the public.  
28 In making this determination, the public body must:

29 (a) Publish a notice of intent to use this procurement process in  
30 a legal newspaper published in or as near as possible to that part of  
31 the county where the public work will be constructed. Notice must be  
32 published at least fourteen calendar days before conducting a public  
33 hearing. The notice must include: The date, time, and location of the  
34 hearing; a statement justifying the basis for the procurement  
35 process; and how interested parties may, before the hearing, obtain  
36 additional information;

37 (b) Conduct a hearing and provide an opportunity for any  
38 interested party to submit written and verbal comments regarding the  
39 justification for using this selection process;

1 (c) After the public hearing, consider the written and verbal  
2 comments received and determine if using this procurement process is  
3 in the best interests of the public; and

4 (d) Publish a written final determination. All protests of the  
5 decision to use the procurement process must be in writing and  
6 submitted to the public body within seven calendar days of the final  
7 determination. Any modifications to the criteria, weights, and  
8 protest procedures based on comments received during the public  
9 hearing process must be included in the final determination.

10 (5) A public-private agreement must be awarded through a  
11 competitive public procurement process set forth in this section  
12 using either the request for qualifications-request for proposals  
13 process or the request for proposals process. A private entity may  
14 submit, and a public body may, but is not obligated to, receive and  
15 consider, an unsolicited proposal regarding a potential public-  
16 private agreement or public-private facility; however, the public  
17 body may not enter into a public-private agreement in connection with  
18 such unsolicited proposal without first complying with the  
19 competitive public request for qualifications-request for proposals  
20 process or the request for proposals process set forth in this  
21 section.

22 (6) The public body must provide adequate public notice of its  
23 request for qualifications or request for proposals, which must at a  
24 minimum include publishing at least once in a legal newspaper of  
25 general circulation published in, or as near as possible to, that  
26 part of the state in which the public work will be done, a notice of  
27 its request for qualifications or request for proposals, and the  
28 availability and location of the request for qualifications or  
29 request for proposals. Before issuing a request for qualifications or  
30 request for proposals, the public body may, by direct contact or  
31 otherwise, seek input from potential applicants who may have an  
32 interest or expertise relevant to the project through a request for  
33 expression of interest, registration of interest, or otherwise.

34 (7) For purposes of this section, "request for qualifications-  
35 request for proposals process" means the following:

36 (a) The public body must issue a request for qualifications,  
37 including at least the following:

38 (i) A general description of the project that provides sufficient  
39 information for offerors to submit qualifications;

1 (ii) A description of the intended project delivery method, the  
2 reasons for using such method, and the public body's anticipated  
3 sources of funding;

4 (iii) A description of the qualifications required of offerors  
5 including, but not limited to, technical competence and experience,  
6 financial capacity, capability to perform, any team structure, past  
7 performance of the offeror's team or team members, demonstrated  
8 ability to meet time and budget requirements, ability to meet  
9 performance and payment bond requirements, firm workloads, location,  
10 safety records, and other qualifications as determined by the public  
11 body;

12 (iv) The honorarium, if any, to be paid to finalists who submit  
13 responsive proposals and who are not awarded a contract. Honorarium  
14 payments, if any, must be sufficient to generate meaningful  
15 competition among potential proposers and the amount of the  
16 honorarium must consider the level of effort required to meet the  
17 selection criteria. The request for qualifications must include a  
18 statement indicating whether any portion of the honorarium will be  
19 paid if the solicitation is canceled before proposals are submitted,  
20 and the public body's rights, if any, to utilize intellectual  
21 property, including documents, concepts, designs, or information  
22 submitted by finalists who are not awarded a contract;

23 (v) The anticipated schedule for the procurement process and the  
24 project;

25 (vi) A description of the process the public body will use to  
26 evaluate qualifications, including evaluation factors, the relative  
27 weights of factors, and any specific forms to be used by offerors;  
28 and

29 (vii) Protest procedures.

30 (b) The public body must establish an evaluation committee to  
31 evaluate responses to the request for qualifications based solely on  
32 the factors, weighting, and process identified in the request for  
33 qualifications and any addenda issued by the public body. Based on  
34 the evaluation committee's findings, the public body must select no  
35 more than four responsive and responsible offerors as finalists to  
36 submit proposals. The public body may reject all qualification  
37 submissions and must provide its reasons for rejection in writing to  
38 all offerors.

39 (c) The public body must notify all offerors of the list of  
40 finalists selected to move to the next phase of the selection

1 process. At the request of an offeror not selected as a finalist, the  
2 public body must provide the requesting offeror a summary of the  
3 evaluation results for its proposal. The process may not proceed to  
4 the next phase until two business days after all offerors are  
5 notified of the public body's selection decision. Any offeror filing  
6 a protest on the selection of the finalists must file the protest in  
7 accordance with published protest procedures and applicable law. The  
8 selection process may not advance to the next phase of selection  
9 until two business days after the final protest decision is  
10 transmitted to the offeror.

11 (d) Upon selection of the finalists, the public body must proceed  
12 with the request for proposals process with the finalists.

13 (8) For purposes of this section, the "request for proposals  
14 process" means the following:

15 (a) The public body must issue a request for proposals,  
16 consistent with the request for qualifications, if any, including at  
17 least the following:

18 (i) A detailed description of the project including, but not  
19 limited to:

20 (A) The public body's design requirements regarding project  
21 features, functions, characteristics, qualities, properties, and  
22 parameters;

23 (B) Requirements and constraints pertaining to the construction,  
24 financing, operation, and maintenance of the public-private facility;

25 (C) Programmatic, performance, and technical requirements and  
26 specifications;

27 (D) Any facility performance goals, validation requirements, and  
28 nonperformance terms;

29 (E) Financial requirements, constraints, incentives, and  
30 objectives, including terms of agreement;

31 (F) Authorized payment mechanisms, provided that the public body  
32 may request or permit proposals regarding alternate payment  
33 mechanisms and authorize payment mechanisms not specified in the  
34 request for proposals;

35 (ii) A description of the intended project delivery method and  
36 the reasons for using such method;

37 (iii) A description of required proposal development documents,  
38 if any, including drawings and other design-related documents that  
39 describe the size and character of a public-private facility as to  
40 architectural, structural, mechanical, and electrical systems,



1 materials, any maintenance and operation requirements, and such other  
2 elements as may be appropriate to the applicable project delivery  
3 method;

4 (iv) A description of the process the public body will use to  
5 evaluate offerors' qualifications and proposals, including evaluation  
6 factors and the relative weight of factors, and any specific forms to  
7 be used;

8 (A) Evaluation factors must include, but are not limited to:

9 (I) The offeror's qualifications, including technical competence and  
10 experience, financial capacity, capability to perform, past  
11 performance of the offeror's team, demonstrated ability to meet time  
12 and budget requirements, ability to meet performance and payment bond  
13 requirements, firm workloads, location, safety records, and accident  
14 prevention plan, provided that if using the request for  
15 qualifications-request for proposals process the public body may  
16 forego this evaluation factor or may utilize the results from the  
17 request for qualifications evaluations; (II) compliance with the  
18 public body's design and other requirements set forth in the request  
19 for proposals; (III) cost or other price-related considerations,  
20 which may include short and long-term costs to the public body, the  
21 impact on public debt, the anticipated cost savings to the public  
22 body by selecting the offeror, and the offeror's fees; (IV) technical  
23 and operational feasibility and merit; (V) schedule; (VI) anticipated  
24 user fees, charges, or price over the term of the public-private  
25 agreement; and (VII) other appropriate factors, if any.

26 (B) A public body must include as evaluation factors (I) the  
27 offeror's specific plans to include participation by small business  
28 entities, disadvantaged business entities, veteran-owned businesses,  
29 minority and women-owned businesses, and any other underutilized  
30 businesses as the public body may designate, and (II) the offeror's  
31 plans for labor harmony for the entire term of the public-private  
32 agreement, including construction, reconstruction, operation, and  
33 capital and routine maintenance. Nothing in this subsection  
34 (8)(a)(iv)(B) must be construed to restrain fair and open  
35 competition. Regardless of the source of financing or funding for a  
36 public-private agreement, this chapter does not prevent a public body  
37 from applying any program, factors, goals, or standards regarding  
38 such plans to the extent otherwise permitted by law;

39 (v) Protest procedures;

40 (vi) The form of the public-private agreement to be awarded;

1 (vii) The anticipated process and procurement schedule for the  
2 project, which may include opportunities for clarifications,  
3 interviews, written questions, discussions, confidential discussions,  
4 revisions, negotiations, and best-and-final offers, provided that  
5 such opportunities must be fairly and equitably available to  
6 offerors;

7 (viii) The honorarium, if any, to be paid to finalists who submit  
8 responsive proposals and who are not awarded a contract. Honorarium  
9 payments, if any, must be sufficient to generate meaningful  
10 competition among potential proposers, and the amount of the  
11 honorarium must consider the level of effort required to meet the  
12 selection criteria. The request for proposals must include a  
13 statement indicating whether any portion of the honorarium will be  
14 paid if the solicitation is canceled before proposals are submitted,  
15 and the public body's rights, if any, to utilize intellectual  
16 property including documents, concepts, designs, or information  
17 submitted by finalists who are not awarded a contract. A public body  
18 utilizing the request for qualifications-request for proposals  
19 procedure satisfies this subsection (8)(a)(viii) if it has specified  
20 the honorarium and intellectual property terms in the request for  
21 qualifications;

22 (ix) The public body's intellectual property or other rights, if  
23 any, to utilize documents, concepts, designs, or information  
24 submitted by offerors who are not awarded a contract; and

25 (x) Other information relevant to the project.

26 (b) The public body must establish an evaluation committee to  
27 evaluate offerors' proposals. The public body must follow the  
28 procurement process described in the request for proposals. Proposals  
29 must be evaluated based solely on the factors, weighting, and process  
30 identified in the request for proposals and in any addenda published  
31 by the public body.

32 (c) The public body may initiate negotiations with the offeror  
33 submitting the highest evaluated proposal. If the public body is  
34 unable to successfully negotiate and execute an agreement with the  
35 offeror submitting the highest evaluated proposal, negotiations with  
36 that offeror may be suspended or terminated and the public body may  
37 proceed to negotiate with the next highest evaluated proposer. Public  
38 bodies may continue in accordance with this procedure until an  
39 agreement is reached or the selection process is terminated.

1 (d) The public body must notify all offerors of the selection  
2 decision and make a selection summary of the final proposals  
3 available to all offerors within two business days of such  
4 notification. If the public body receives a timely written protest,  
5 the public body may not execute an agreement until two business days  
6 after the final protest decision is transmitted to the protestor. The  
7 protestor must submit its protest in accordance with the published  
8 protest procedures.

9 (e) Upon completion of the request for proposals process, the  
10 public body must make, or cause to be made, the honorarium payments  
11 specified in the request for qualifications and request for proposals  
12 to finalists who submit responsive proposals and who are not awarded  
13 a contract.

14 (9) The public disclosure and inspection requirements set forth  
15 in RCW 39.10.470 apply to procurements under this chapter, and  
16 statements of qualifications, proposals, and other documents and  
17 information submitted as part of the request for proposals or request  
18 for qualifications-request for proposals process must be treated in  
19 the same manner as proposals by design-build finalists pursuant to  
20 RCW 39.10.470(3).

21 **NEW SECTION. Sec. 3.** (1) The request for proposals regarding a  
22 public-private agreement must contain a draft form of agreement.

23 (2) After selecting an offeror's proposal and completing any  
24 negotiations with such offeror, the public body may enter into the  
25 public-private agreement with the selected private entity. An  
26 affected jurisdiction may be a party to a public-private agreement  
27 entered into by another public body.

28 (3) All public-private agreements procured under this chapter  
29 must include provisions expressly addressing each of the following:

30 (a) The planning, permitting, acquisition, engineering,  
31 financing, development, design, construction, reconstruction,  
32 replacement, improvement, maintenance, management, repair, or  
33 operation of a public-private facility, including provisions for the  
34 replacement and relocation of utility facilities;

35 (b) The term of the public-private agreement, which must not  
36 exceed fifty years unless authorized in the review process described  
37 in section 9 of this act;

38 (c) The type of interest, if any, the concessionaire has in the  
39 public-private facility, and the means of compensation to the

1 concessionaire, whether through direct payment by the public body,  
2 user fees, grants, credits, property, or otherwise, and any  
3 incentives or deductions based on performance, safety, or other  
4 criteria;

5 (d) Whether user fees will be collected on the public-private  
6 facility, and the basis by which such user fees will be determined  
7 and modified;

8 (e) Grounds for termination of the public-private agreement by  
9 the public body or concessionaire, and the procedures and  
10 compensation, if any, upon termination;

11 (f) A security package securing the performance of the public-  
12 private agreement and protecting the public body in the event of  
13 default or nonperformance by the concessionaire or its  
14 subcontractors, which may include, in the public body's discretion,  
15 performance bonds, letters of credit, security interests, or other  
16 measures;

17 (g) Filing by the concessionaire, on a periodic basis, of  
18 performance, service, utilization, efficiency, financial, and other  
19 reports identified by the public body, in a form acceptable to the  
20 public body;

21 (h) The rights and duties of the concessionaire, the public body,  
22 and other state and local governmental entities with respect to use  
23 of the public-private facility;

24 (i) Provisions requiring the concessionaire to:

25 (i) Cause a bond for the construction price to be executed and  
26 delivered consistent with the requirements of chapter 39.08 RCW,  
27 provided that for a public-private agreement entered into pursuant to  
28 this section, the term "subcontractors," as used in RCW 39.08.010,  
29 includes professional design consultants and sub-tier consultants  
30 engaged by the concessionaire or its contractors;

31 (ii) Require payment of prevailing wages for labor performed on  
32 the project in accordance with chapter 39.12 RCW; and

33 (iii) Implement plans for (A) participation by small business  
34 entities, disadvantaged business entities, veteran-owned businesses,  
35 minority and women-owned businesses, and any other underutilized  
36 businesses as the concessionaire or public body may designate, and  
37 (B) compliance with chapter 39.19 RCW;

38 (j) The concessionaire's plans for labor harmony for the entire  
39 term of the agreement, including construction, reconstruction, and  
40 capital and routine maintenance and adequate remedies to address the

1 concessionaire's failure to maintain labor harmony, which may include  
2 assessment of liquidated damages and contract termination;

3 (k) The condition of physical quality, maintenance, and repair in  
4 which the concessionaire must provide the public-private facility to  
5 the public body upon expiration of the public-private agreement;

6 (l) Any restrictions or terms regarding the procurement or  
7 development of other projects that may compete with or otherwise  
8 impact the revenues, cost, or operation of the public-private  
9 facility; and

10 (m) Other terms and conditions as the public body may deem  
11 appropriate.

12 NEW SECTION. **Sec. 4.** Unless otherwise provided, upon the end of  
13 the term of the public-private agreement or in the event of  
14 termination of the public-private agreement, the public body and  
15 duties of the concessionaire cease, except any duties and obligations  
16 that extend beyond the termination as provided in the public-private  
17 agreement. All rights, title, and interest in such public-private  
18 facility and all property involved in the facility must revert to the  
19 public body to the extent owned by the public body before the public-  
20 private agreement or acquired by the public body for the public-  
21 private agreement and must be dedicated to the public body for public  
22 use.

23 NEW SECTION. **Sec. 5.** Upon the occurrence and during the  
24 continuation of a material default of the public-private agreement by  
25 a concessionaire, after notice and opportunity for the concessionaire  
26 or its financing institution to cure, the public body may:

27 (1) Elect to take over the public-private facility, including the  
28 succession of all rights, title, and interest in the public-private  
29 facility and may assume the concessionaire's rights and obligations  
30 pursuant to any contracts related to the public-private facility; and

31 (2) Terminate the public-private agreement and exercise any other  
32 rights and remedies available.

33 NEW SECTION. **Sec. 6.** (1) The public body may issue and sell  
34 bonds or notes of the public body for the purpose of providing funds  
35 to carry out this chapter, with respect to the development,  
36 financing, or operation of a public-private facility or the refunding

1 of any bonds or notes, together with any costs associated with the  
2 transaction.

3 (2) For the purpose of financing a public-private facility, the  
4 public body and concessionaire may apply for, obtain, issue, and use  
5 any funding available under any federal law or program. A  
6 nonexhaustive list of examples include private activity bonds,  
7 transportation infrastructure finance and innovation act funding,  
8 water infrastructure finance and innovation act funding, or railroad  
9 rehabilitation and improvement financing. Other federal or other  
10 funding programs may also be utilized.

11 (3) This section does not limit a public body or any authority of  
12 the state of Washington from issuing bonds for public works projects.

13 NEW SECTION. **Sec. 7.** (1)(a) The public body may accept from the  
14 United States, the state of Washington, or any of their agencies  
15 funds for developing a public-private facility or carrying out a  
16 public-private agreement, whether the funds are made available by  
17 grant, loan, or other financial assistance.

18 (b) The public body may enter into agreements or other  
19 arrangements with the United States, the state of Washington, or any  
20 of their agencies to facilitate the development, execution, or  
21 administration of a public-private facility or public-private  
22 agreement.

23 (2) The public body may accept from any source any grant,  
24 donation, gift, or other form of conveyance of land, money, other  
25 real or personal property, or other item of value made to the public  
26 body for developing a public-private facility or carrying out a  
27 public-private agreement.

28 (3) Any public-private facility or public-private agreement may  
29 be financed in whole or in part by contribution of any funds or  
30 property made by any public body, private entity, or affected  
31 jurisdiction.

32 (4) The public body may combine federal, state, local, and  
33 private funds to finance a public-private agreement or public-private  
34 facility.

35 NEW SECTION. **Sec. 8.** Every public-private agreement must  
36 provide for, and the public body must otherwise ensure that adequate  
37 provision is made for, the following:

1 (1) Payment of all subcontractors, suppliers, and laborers, which  
2 must, at a minimum, include the provision of a payment bond in  
3 compliance with chapter 39.08 RCW, which is required regardless of  
4 the ownership or control of any property involved in the public-  
5 private agreement or the public-private facility;

6 (2) Payment of prevailing wages in accordance with chapter 39.12  
7 RCW;

8 (3) Prompt payment to the concessionaire and subcontractors  
9 pursuant to RCW 39.04.250. RCW 39.04.250 applies only to the extent  
10 of payments to be made by the public body; and

11 (4) Participation plans for (a) small business entities,  
12 disadvantaged business entities, veteran-owned businesses, minority  
13 and women-owned businesses, and any other underutilized businesses as  
14 the public body may designate, and (b) compliance with chapter 39.19  
15 RCW.

16 **NEW SECTION.** **Sec. 9.** (1) The capital projects advisory review  
17 board must establish a public-private project review subcommittee of  
18 the project review committee to review applications regarding public-  
19 private agreements. The public-private project review subcommittee  
20 must include individuals with expertise in the fields of public  
21 policy, private finance, management consulting, engineering,  
22 architectural design, construction, construction management, labor,  
23 women and minority-owned businesses, public-private partnerships,  
24 operations and maintenance, and public works law. Members of the  
25 public-private project review subcommittee must be nominated by the  
26 project review committee and approved by the capital projects  
27 advisory review board in sufficient numbers such that each proposed  
28 public-private agreement is reviewed by a panel of members with each  
29 of the areas of expertise as listed in this subsection. A member of  
30 the public-private project review subcommittee may satisfy more than  
31 one of the required areas of expertise. The public-private project  
32 review subcommittee may include members of the project review  
33 committee.

34 (2) A public body desiring to procure a public-private agreement  
35 must apply for and receive approval of the procurement method as set  
36 forth in this section. The public-private project review subcommittee  
37 and the public body must follow the process and apply the review  
38 standards set forth in RCW 39.10.280, including a public meeting and  
39 consideration of public comment. The public-private project review

1 subcommittee must provide a written recommendation and rationale to  
2 the capital projects advisory review board, along with the  
3 application package. The board must approve or disapprove the  
4 application. Such approval or disapproval does not constitute a  
5 decision on the merit of the proposed project, but is limited to  
6 approval or disapproval of the public body's proposed alternative  
7 public works procurement method only. The capital projects advisory  
8 review board may publish additional information, implementation  
9 manuals, best practices, guidelines, or criteria for consideration in  
10 evaluating proposed public-private procurement applications.

11 (3) An application regarding a public-private agreement is not  
12 subject to and does not affect the number of projects or dollar  
13 values to be reviewed by the project review committee under RCW  
14 39.10.250.

15 (4) In its application regarding a public-private agreement, the  
16 public body must provide a project report, in a form acceptable to  
17 the public-private project review subcommittee, describing the public  
18 body's intended team for the project, the experience and expertise of  
19 the team and key personnel, the public body's reasons for using the  
20 selected procurement method, and the reasons such procurement method  
21 is suited to the intended project. The project report may include,  
22 but is not limited to, the public body's descriptions of the  
23 following information: (a) A general description of the proposed  
24 public-private facility and public-private agreement; (b) the policy  
25 and regulatory structure for overseeing the public-private facility  
26 and its operations; (c) the public body's preliminary business case  
27 analysis, if any; (d) preliminary discussion of financial data, pro  
28 formas, cost and revenue allocation, taxation, profit sharing, and  
29 anticipated public and private funding sources; (e) general financial  
30 evaluation of the public-private facility, including the public  
31 body's preliminary draft value-for-money analysis, if any;  
32 (f) additional responsibilities by both the private concessionaire  
33 and the public body during the agreement period; (g) the anticipated  
34 advantages of entering into the anticipated public-private agreement;  
35 and (h) the public body's plans to protect the interests of  
36 subcontractors, suppliers, and laborers, and to include participation  
37 by minority, women-owned, veteran-owned, small, disadvantaged, or  
38 underutilized businesses.

39 (5) Deviation from the requirements of this public-private  
40 agreement provides grounds for denial of the procurement method, but



1 does not invalidate any public-private agreement after approval or  
2 award except through timely protest to the public body pursuant to  
3 section 2 of this act and the public body's published protest  
4 procedures.

5 (6) The public body must submit an annual project report to the  
6 project review committee addressing the operation and financial  
7 performance of the public-private facility and public-private  
8 agreement and the public body's compliance and deviation from the  
9 project report submitted in the public body's application. The annual  
10 report must be submitted during construction and the first five years  
11 of operation of the public-private facility.

12 (7) The board may authorize a maximum of four public-private  
13 agreement procurements per year. If more than four applications are  
14 received in a single year during such time, the public-private  
15 project review subcommittee and capital projects advisory review  
16 board must make reasonable efforts to balance the types of projects  
17 recommended pursuant to subsection (2) of this section. The capital  
18 projects advisory review board may establish processes, forms,  
19 guidelines, and deadlines for submitting and reviewing applications  
20 to promote fairness and avoid unnecessary expense. The capital  
21 projects advisory review board may additionally impose reporting  
22 requirements regarding project performance and propose to the  
23 legislature modifications to improve the procurement and  
24 implementation of public-private agreements.

25 **Sec. 10.** RCW 39.10.230 and 2013 c 222 s 3 are each amended to  
26 read as follows:

27 The board has the following powers and duties:

28 (1) Develop and recommend to the legislature policies to further  
29 enhance the quality, efficiency, and accountability of capital  
30 construction projects through the use of traditional and alternative  
31 delivery methods in Washington, and make recommendations regarding  
32 expansion, continuation, elimination, or modification of the  
33 alternative public works contracting methods;

34 (2) Evaluate the use of existing contracting procedures and the  
35 potential future use of other alternative contracting procedures  
36 including competitive negotiation contracts;

37 (3) Submit recommendations to the appropriate committees of the  
38 legislature evaluating alternative contracting procedures that are  
39 not authorized under this chapter;

1 (4) Appoint members of committees and approve or disapprove  
2 applications to utilize the public-private agreement procurement  
3 method pursuant to section 9 of this act; and

4 (5) Develop and administer questionnaires designed to provide  
5 quantitative and qualitative data on alternative public works  
6 contracting procedures on which evaluations are based.

7 The capital projects advisory review board is directed to review  
8 current statutes regarding life-cycle cost analysis and energy  
9 efficiency as related to the design-build procurement method  
10 performed under this chapter (~~39.10 RCW~~). Capital projects advisory  
11 review board shall report to the appropriate committees of the  
12 legislature by December 31, 2013, with recommendations for statutory  
13 changes that promote energy efficiency and reduce the total cost to  
14 construct, operate, and maintain public buildings. Recommendation  
15 must include provisions for postoccupancy validation of estimated  
16 energy efficiency measures, and operating and maintenance cost  
17 estimates. Life-cycle estimates of energy use must include estimates  
18 of energy consumptions for materials used in construction.

19 **Sec. 11.** RCW 43.131.408 and 2017 c 211 s 2 and 2017 c 136 s 2  
20 are each reenacted and amended to read as follows:

21 The following acts or parts of acts, as now existing or hereafter  
22 amended, are each repealed, effective June 30, 2022:

23 (1) RCW 39.10.200 and 2010 1st sp.s. c 21 s 2, 2007 c 494 s 1, &  
24 1994 c 132 s 1;

25 (2) RCW 39.10.210 and 2014 c 42 s 1 & 2013 c 222 s 1;

26 (3) RCW 39.10.220 and 2013 c 222 s 2, 2007 c 494 s 102, & 2005 c  
27 377 s 1;

28 (4) RCW 39.10.230 and 2018 c . . . s 10 (section 10 of this act),  
29 2013 c 222 s 3, 2010 1st sp.s. c 21 s 3, 2009 c 75 s 1, 2007 c 494 s  
30 103, & 2005 c 377 s 2;

31 (5) RCW 39.10.240 and 2013 c 222 s 4 & 2007 c 494 s 104;

32 (6) RCW 39.10.250 and 2013 c 222 s 5, 2009 c 75 s 2, & 2007 c 494  
33 s 105;

34 (7) RCW 39.10.260 and 2013 c 222 s 6 & 2007 c 494 s 106;

35 (8) RCW 39.10.270 and 2017 c 211 s 1, 2013 c 222 s 7, 2009 c 75 s  
36 3, & 2007 c 494 s 107;

37 (9) RCW 39.10.280 and 2014 c 42 s 2, 2013 c 222 s 8, & 2007 c 494  
38 s 108;

39 (10) RCW 39.10.290 and 2007 c 494 s 109;

- 1 (11) RCW 39.10.300 and 2013 c 222 s 9, 2009 c 75 s 4, & 2007 c  
2 494 s 201;
- 3 (12) RCW 39.10.320 and 2013 c 222 s 10, 2007 c 494 s 203, & 1994  
4 c 132 s 7;
- 5 (13) RCW 39.10.330 and 2014 c 19 s 1, 2013 c 222 s 11, 2009 c 75  
6 s 5, & 2007 c 494 s 204;
- 7 (14) RCW 39.10.340 and 2014 c 42 s 3, 2013 c 222 s 12, & 2007 c  
8 494 s 301;
- 9 (15) RCW 39.10.350 and 2014 c 42 s 4 & 2007 c 494 s 302;
- 10 (16) RCW 39.10.360 and 2014 c 42 s 5, 2013 c 222 s 13, 2009 c 75  
11 s 6, & 2007 c 494 s 303;
- 12 (17) RCW 39.10.370 and 2014 c 42 s 6 & 2007 c 494 s 304;
- 13 (18) RCW 39.10.380 and 2013 c 222 s 14 & 2007 c 494 s 305;
- 14 (19) RCW 39.10.385 and 2013 c 222 s 15 & 2010 c 163 s 1;
- 15 (20) RCW 39.10.390 and 2014 c 42 s 7, 2013 c 222 s 16, & 2007 c  
16 494 s 306;
- 17 (21) RCW 39.10.400 and 2013 c 222 s 17 & 2007 c 494 s 307;
- 18 (22) RCW 39.10.410 and 2007 c 494 s 308;
- 19 (23) RCW 39.10.420 and 2017 c 136 s 1 & 2016 c 52 s 1;
- 20 (24) RCW 39.10.430 and 2007 c 494 s 402;
- 21 (25) RCW 39.10.440 and 2015 c 173 s 1, 2013 c 222 s 19, & 2007 c  
22 494 s 403;
- 23 (26) RCW 39.10.450 and 2012 c 102 s 2 & 2007 c 494 s 404;
- 24 (27) RCW 39.10.460 and 2012 c 102 s 3 & 2007 c 494 s 405;
- 25 (28) RCW 39.10.470 and 2014 c 19 s 2, 2005 c 274 s 275, & 1994 c  
26 132 s 10;
- 27 (29) RCW 39.10.480 and 1994 c 132 s 9;
- 28 (30) RCW 39.10.490 and 2013 c 222 s 20, 2007 c 494 s 501, & 2001  
29 c 328 s 5;
- 30 (31) RCW 39.10.900 and 1994 c 132 s 13;
- 31 (32) RCW 39.10.901 and 1994 c 132 s 14;
- 32 (33) RCW 39.10.903 and 2007 c 494 s 510;
- 33 (34) RCW 39.10.904 and 2007 c 494 s 512; and
- 34 (35) RCW 39.10.905 and 2007 c 494 s 513.

35 NEW SECTION. **Sec. 12.** Except for sections 10 and 11 of this  
36 act, this act expires four years after the effective date of this  
37 section.

1        NEW SECTION.    **Sec. 13.**    Sections 1 through 9 of this act  
2    constitute a new chapter in Title 39 RCW.

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