
SENATE BILL 5771

State of Washington 62nd Legislature 2011 Regular Session

By Senators White, Kastama, King, Haugen, and Shin

Read first time 02/10/11. Referred to Committee on Transportation.

1 AN ACT Relating to implementing public-private partnership best
2 practices for nontoll transportation projects; amending RCW 47.29.010,
3 47.29.030, 47.29.060, 47.29.140, 47.29.150, 47.29.170, 47.29.180,
4 47.29.280, 39.10.300, and 47.12.080; reenacting and amending RCW
5 39.08.010; adding a new section to chapter 47.29 RCW; adding a new
6 section to chapter 39.10 RCW; and adding a new section to chapter 39.04
7 RCW.

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

9 **Sec. 1.** RCW 47.29.010 and 2006 c 334 s 48 are each amended to read
10 as follows:

11 (1) The legislature finds that the public-private transportation
12 initiatives act created under chapter 47.46 RCW has not met the needs
13 and expectations of the public or private sectors for the development
14 of transportation projects. The legislature intends to phase out
15 chapter 47.46 RCW coincident with the completion of the Tacoma Narrows
16 Bridge - SR 16 public-private partnership. From July 24, 2005, this
17 chapter will provide a more desirable and effective approach to
18 developing transportation projects in partnership with the private

1 sector by applying lessons learned from other states and from this
2 state's ten-year experience with chapter 47.46 RCW.

3 (2) It is the legislature's intent to achieve the following goals
4 through the creation of this new approach to public-private
5 partnerships:

6 (a) To provide a well-defined mechanism to facilitate the
7 collaboration between public and private entities in transportation;

8 (b) To bring innovative thinking from the private sector and other
9 states to bear on public projects within the state;

10 (c) To provide greater flexibility in achieving the transportation
11 projects; and

12 (d) To allow for creative cost and risk sharing between the public
13 and private partners.

14 (3) The legislature intends that the powers granted in this chapter
15 to the commission or department are in addition to any powers granted
16 under chapter 47.56 RCW.

17 (4) It is further the intent of the legislature that an expert
18 review panel be established for each project developed under chapter
19 334, Laws of 2006. Expert review panels shall be responsible for
20 reviewing selected proposals, analyzing and reviewing tentative
21 agreements, and making recommendations to the governor and the
22 transportation commission on the advisability of executing agreements
23 under chapter 334, Laws of 2006.

24 (5) The legislature intends that the review process, criteria, and
25 approvals for public-private partnership projects involving
26 toll-related facilities remain unchanged, but that the review and
27 approval process for nontoll projects be modified so that the criteria
28 and review process can be more closely tailored to the specific type of
29 proposed nontoll project or program.

30 **Sec. 2.** RCW 47.29.030 and 2005 c 317 s 3 are each amended to read
31 as follows:

32 In addition to the powers it now possesses, the commission shall:

33 (1) Approve or review contracts or agreements authorized in this
34 chapter;

35 (2) Adopt rules to carry out this chapter and govern the program,
36 which at a minimum must address the following issues:

1 (a) The types of projects allowed; (~~however, all allowed projects~~
2 ~~must be included in the Washington transportation plan or identified by~~
3 ~~the authority as being a priority need for the state;~~)

4 (b) The types of contracts allowed, with consideration given to the
5 best practices available;

6 (c) For toll projects, the composition of the team responsible for
7 the evaluation of proposals to include:

8 (i) Washington state department of transportation staff;

9 (ii) An independent representative of a consulting or contracting
10 field with no interests in the project that is prohibited from becoming
11 a project manager for the project and bidding on any part of the
12 project;

13 (iii) An observer from the state auditor's office or the joint
14 legislative audit and review committee;

15 (iv) A person appointed by the commission, if the secretary of
16 transportation is a cabinet member, or appointed by the governor if the
17 secretary of transportation is not a cabinet member; and

18 (v) A financial expert;

19 (d) Minimum standards and criteria required of all proposals;

20 (e) Procedures for the proper solicitation, acceptance, review, and
21 evaluation of projects;

22 (f) Criteria to be considered in the evaluation and selection of
23 proposals (~~that includes~~). For toll projects, this must include:

24 (i) Comparison with the department's internal ability to complete
25 the project that documents the advantages of completing the project as
26 a partnership versus solely as a public venture; and

27 (ii) Factors such as, but not limited to: Priority, cost, risk
28 sharing, scheduling, and management conditions;

29 (g) The protection of confidential proprietary information while
30 still meeting the need for public disclosure that is consistent with
31 RCW 47.29.190;

32 (h) Protection for local contractors to participate in
33 subcontracting opportunities;

34 (i) Specifying that maintenance issues must be resolved in a manner
35 consistent with the personnel system reform act, chapter 41.80 RCW;

36 (j) Specifying that provisions regarding patrolling and law
37 enforcement on a public facility are subject to approval by the
38 Washington state patrol;

1 (3) Adopt guidelines to address security and performance issues.

2 Preliminary rules and guidelines developed under this section must
3 be submitted to the chairs and ranking members of both transportation
4 committees by November 30, 2005, for review and comment. All final
5 rules and guidelines must be submitted to the full legislature during
6 the 2006 session for review.

7 **Sec. 3.** RCW 47.29.060 and 2008 c 122 s 18 are each amended to read
8 as follows:

9 (1) Subject to the limitations in this section, the department may,
10 in connection with the evaluation of eligible projects, consider any
11 financing mechanisms identified under subsections (3) through (5) of
12 this section or any other lawful source, either integrated as part of
13 a project proposal or as a separate, stand-alone proposal to finance a
14 project. Financing may be considered for all or part of a proposed
15 project. A project may be financed in whole or in part with:

16 (a) The proceeds of grant anticipation revenue bonds authorized by
17 23 U.S.C. Sec. 122 and applicable state law. Legislative authorization
18 and appropriation is required in order to use this source of financing;

19 (b) Grants, loans, loan guarantees, lines of credit, revolving
20 lines of credit, or other financing arrangements available under the
21 Transportation Infrastructure Finance and Innovation Act under 23
22 U.S.C. Sec. 181 et seq., or any other applicable federal law;

23 (c) Infrastructure loans or assistance from the state
24 infrastructure bank established by RCW 82.44.195;

25 (d) Federal, state, or local revenues, subject to appropriation by
26 the applicable legislative authority;

27 (e) User fees, tolls, fares, lease proceeds, rents, gross or net
28 receipts from sales, proceeds from the sale or exchange of development
29 rights, franchise fees, equivalent value exchanges of property, or any
30 other lawful form of consideration. However, projects financed by
31 tolls or equivalent funding sources must first be authorized by the
32 legislature under RCW 47.56.820.

33 (2) As security for the payment of financing described in this
34 section, the revenues from the project may be pledged, but no such
35 pledge of revenues constitutes in any manner or to any extent a general
36 obligation of the state. Any financing described in this section may

1 be structured on a senior, parity, or subordinate basis to any other
2 financing.

3 (3) For any toll transportation project developed under this
4 chapter that is owned, leased, used, or operated by the state, as a
5 public facility, if indebtedness is issued, it must be issued by the
6 state treasurer for the toll transportation project.

7 (4) For other public projects defined in RCW 47.29.050(2) that are
8 developed in conjunction with a transportation project, financing
9 necessary to develop, construct, or operate ((the)) a toll public
10 project must be approved by the state finance committee or by the
11 governing board of a public benefit corporation as provided in the
12 federal Internal Revenue Code section 63-20. Financing necessary to
13 develop, construct, or operate a nontoll public project that does not
14 pledge the state's credit must be approved by the state transportation
15 commission;

16 (5) For projects that are developed in conjunction with a
17 transportation project but are not themselves a public facility or
18 public project, any lawful means of financing may be used.

19 **Sec. 4.** RCW 47.29.140 and 2005 c 317 s 14 are each amended to read
20 as follows:

21 (1) The following provisions must be included in any agreement to
22 which the state is a party:

23 (a) For any toll project that proposes terms for stand-alone
24 maintenance or asset management services for a public facility, those
25 services must be provided in a manner consistent with any collective
26 bargaining agreements, the personnel system reform act (chapter 41.80
27 RCW), and civil service laws that are in effect for the public
28 facility;

29 (b) Toll transportation projects that are selected for development
30 under this chapter must be identified in the Washington transportation
31 plan or be identified by the authority as being a priority need for the
32 state;

33 (c) If there is a tolling component to the project, then it must be
34 specified that tolling technology used in the project must be
35 consistent with tolling technology standards adopted by the department
36 for transportation-related projects;

1 (d) Provisions for bonding, financial guarantees, deposits, or the
2 posting of other security to secure the payment of laborers,
3 subcontractors, and suppliers who perform work or provide materials as
4 part of the project;

5 (e) All projects must be financed in a manner consistent with RCW
6 47.29.060. This chapter is null and void if this subsection or RCW
7 47.29.060 fails to become law or is held invalid by a court of final
8 jurisdiction.

9 (2) Agreements between the state and private sector partners
10 entered into under this section must specifically include the following
11 contractual elements:

12 (a) The point in the project at which public and private sector
13 partners will enter the project and which partners will assume
14 responsibility for specific project elements;

15 (b) How the partners will share management of the risks of the
16 project;

17 (c) How the partners will share the costs of development of the
18 project;

19 (d) How the partners will allocate financial responsibility for
20 cost overruns;

21 (e) The penalties for nonperformance;

22 (f) The incentives for performance;

23 (g) The accounting and auditing standards to be used to evaluate
24 work on the project;

25 (h) For any project that reverts to public ownership, the
26 responsibility for reconstruction or renovations that are required in
27 order for a facility to meet all applicable government standards upon
28 reversion of the facility to the state; and

29 (i) Provisions for patrolling and law enforcement on transportation
30 projects that are public facilities.

31 **Sec. 5.** RCW 47.29.150 and 2005 c 317 s 15 are each amended to read
32 as follows:

33 (1) Before final approval of any toll projects, agreements entered
34 into under this chapter must include a process that provides for public
35 involvement and participation with respect to the development of the
36 toll projects. This plan must be submitted along with the proposed

1 agreement, and both must be approved under RCW 47.29.160 before the
2 state may enter a binding agreement.

3 (2) All workshops, forums, open houses, meetings, public hearings,
4 or similar public gatherings must be administered and attended by
5 representatives of the state and any other public entities that are
6 party to an agreement authorized by this chapter.

7 **Sec. 6.** RCW 47.29.170 and 2009 c 470 s 702 are each amended to
8 read as follows:

9 Before accepting any unsolicited toll project proposals, the
10 commission must adopt rules to facilitate the acceptance, review,
11 evaluation, and selection of unsolicited toll project proposals. These
12 rules must include the following:

13 (1) Provisions that specify unsolicited proposals must meet
14 predetermined criteria;

15 (2) Provisions governing procedures for the cessation of
16 negotiations and consideration;

17 (3) Provisions outlining that unsolicited proposals are subject to
18 a two-step process that begins with concept proposals and would only
19 advance to the second step, which are fully detailed proposals, if the
20 commission so directed;

21 (4) Provisions that require concept proposals to include at least
22 the following information: Proposers' qualifications and experience;
23 description of the proposed project and impact; proposed toll project
24 financing; and known public benefits and opposition; and

25 (5) Provisions that specify the process to be followed if the
26 commission is interested in the concept proposal, which must include
27 provisions:

28 (a) Requiring that information regarding the potential project
29 would be published for a period of not less than thirty days, during
30 which time entities could express interest in submitting a proposal;

31 (b) Specifying that if letters of interest were received during the
32 thirty days, then an additional sixty days for submission of the fully
33 detailed proposal would be allowed; and

34 (c) Procedures for what will happen if there are insufficient
35 proposals submitted or if there are no letters of interest submitted in
36 the appropriate time frame.

1 The commission may adopt other rules as necessary to avoid
2 conflicts with existing laws, statutes, or contractual obligations of
3 the state.

4 The commission may not accept or consider any unsolicited proposals
5 before July 1, 2011.

6 **Sec. 7.** RCW 47.29.180 and 2005 c 317 s 18 are each amended to read
7 as follows:

8 For toll projects with costs, including financing costs, of three
9 hundred million dollars or greater, advisory committees are required.

10 (1) The commission must establish an advisory committee to advise
11 with respect to eligible projects. An advisory committee must consist
12 of not fewer than five and not more than nine members, as determined by
13 the public partners. Members must be appointed by the commission, or
14 for projects with joint public sector participation, in a manner agreed
15 to by the commission and any participating unit of government. In
16 making appointments to the committee, the commission shall consider
17 persons or organizations offering a diversity of viewpoints on the
18 project.

19 (2) An advisory committee shall review concepts or proposals for
20 eligible projects and submit comments to the public sector partners.

21 (3) An advisory committee shall meet as necessary at times and
22 places fixed by the department, but not less than twice per year. The
23 state shall provide personnel services to assist the advisory committee
24 within the limits of available funds. An advisory committee may adopt
25 rules to govern its proceedings and may select officers.

26 (4) An advisory committee must be dissolved once the project has
27 been fully constructed and debt issued to pay for the project has been
28 fully retired.

29 **Sec. 8.** RCW 47.29.280 and 2006 c 334 s 49 are each amended to read
30 as follows:

31 (1) For projects that involve toll facilities, the department shall
32 establish an expert review panel to review, analyze, and make
33 recommendations to the governor and the transportation commission on
34 whether to approve, reject, or continue negotiations on a proposed
35 project agreement under this chapter. The department shall provide
36 staff to support the expert review panel, if requested by the panel.

1 The expert review panel may utilize any of the consultants under
2 contract for the department, and the expert review panel may contract
3 for consulting expertise in specific areas as it deems necessary to
4 ensure a thorough and critical review of any proposed project
5 agreement.

6 (2) The governor shall appoint members of an expert review panel
7 that have experience in large capital project delivery, public-private
8 partnerships, public financing of infrastructure improvements, or other
9 areas of expertise that will benefit the panel. The panel shall
10 consist of no less than three, but no more than five members, as
11 determined by the governor.

12 NEW SECTION. **Sec. 9.** A new section is added to chapter 47.29 RCW
13 to read as follows:

14 The commission must review and approve any project that proposes to
15 (1) sell or otherwise permanently dispose of assets owned by the
16 department as part of a larger transaction involving a private entity;
17 or (2) incur obligations that would significantly bind future state
18 legislative appropriations including, but not limited to, long-term
19 lease agreements or assumption of significant facility maintenance or
20 preservation costs, as part of a larger transaction involving a private
21 entity.

22 **Sec. 10.** RCW 39.10.300 and 2009 c 75 s 4 are each amended to read
23 as follows:

24 (1) Subject to the process in RCW 39.10.270 or 39.10.280, public
25 bodies may utilize the design-build procedure for public works projects
26 in which the total project cost is over ten million dollars and where:

27 (a) The design and construction activities, technologies, or
28 schedule to be used are highly specialized and a design-build approach
29 is critical in developing the construction methodology or implementing
30 the proposed technology; or

31 (b) The project design is repetitive in nature and is an incidental
32 part of the installation or construction; or

33 (c) Regular interaction with and feedback from facilities users and
34 operators during design is not critical to an effective facility
35 design.

1 (2) Subject to the process in RCW 39.10.270 or 39.10.280, public
2 bodies may use the design-build procedure for parking garages,
3 regardless of cost.

4 (3) The design-build procedure may be used for the construction or
5 erection of preengineered metal buildings or prefabricated modular
6 buildings, regardless of cost and is not subject to approval by the
7 committee.

8 (4) Except for utility projects and approved demonstration
9 projects, the design-build procedure may not be used to procure
10 operations and maintenance services for a period longer than three
11 years. State agency projects that propose to use the design-build-
12 operate-maintain procedure shall submit cost estimates for the
13 construction portion of the project consistent with the office of
14 financial management's capital budget requirements. Operations and
15 maintenance costs must be shown separately and must not be included as
16 part of the capital budget request.

17 (5) Subject to the process in RCW 39.10.280, public bodies may use
18 the design-build procedure for public works projects in which the total
19 project cost is between two million and ten million dollars and that
20 meet one of the criteria in subsection (1)(a), (b), or (c) of this
21 section.

22 (6) Subject to the process in RCW 39.10.280, a public body may seek
23 committee approval for a design-build demonstration project that
24 includes procurement of operations and maintenance services for a
25 period longer than three years.

26 (7) For projects proposed under RCW 47.29.090, the department of
27 transportation may use the design-build procedure for public works
28 projects in which the total project cost is under ten million dollars
29 and that meet one of the criteria in subsection (1)(a), (b), or (c) of
30 this section.

31 **Sec. 11.** RCW 39.08.010 and 2007 c 218 s 88 and 2007 c 210 s 3 are
32 each reenacted and amended to read as follows:

33 Except as provided under RCW 47.29.140(1)(d), whenever any board,
34 council, commission, trustees, or body acting for the state or any
35 county or municipality or any public body shall contract with any
36 person or corporation to do any work for the state, county, or
37 municipality, or other public body, city, town, or district, such

1 board, council, commission, trustees, or body shall require the person
2 or persons with whom such contract is made to make, execute, and
3 deliver to such board, council, commission, trustees, or body a good
4 and sufficient bond, with a surety company as surety, conditioned that
5 such person or persons shall faithfully perform all the provisions of
6 such contract and pay all laborers, mechanics, and subcontractors and
7 material suppliers, and all persons who supply such person or persons,
8 or subcontractors, with provisions and supplies for the carrying on of
9 such work, which bond in cases of cities and towns shall be filed with
10 the clerk or comptroller thereof, and any person or persons performing
11 such services or furnishing material to any subcontractor shall have
12 the same right under the provisions of such bond as if such work,
13 services, or material was furnished to the original contractor:
14 PROVIDED, HOWEVER, That the provisions of RCW 39.08.010 through
15 39.08.030 shall not apply to any money loaned or advanced to any such
16 contractor, subcontractor or other person in the performance of any
17 such work: PROVIDED FURTHER, That on contracts of thirty-five thousand
18 dollars or less, at the option of the contractor the respective public
19 entity may, in lieu of the bond, retain fifty percent of the contract
20 amount for a period of thirty days after date of final acceptance, or
21 until receipt of all necessary releases from the department of revenue
22 and the department of labor and industries and settlement of any liens
23 filed under chapter 60.28 RCW, whichever is later: PROVIDED FURTHER,
24 That for contracts of one hundred thousand dollars or less, the public
25 entity may accept a full payment and performance bond from an
26 individual surety or sureties: AND PROVIDED FURTHER, That the surety
27 must agree to be bound by the laws of the state of Washington and
28 subjected to the jurisdiction of the state of Washington.

29 NEW SECTION. **Sec. 12.** A new section is added to chapter 39.10 RCW
30 to read as follows:

31 The transportation commission may develop guidelines for, and
32 oversee, a project review and approval process that allows the
33 department of transportation to enter into predevelopment agreements
34 for the possible construction or delivery of projects or programs under
35 chapter 47.29 RCW.

1 NEW SECTION. **Sec. 13.** A new section is added to chapter 39.04 RCW
2 to read as follows:

3 (1) The department of transportation may competitively procure a
4 potential development partner solely on the basis of that development
5 partner's qualifications to successfully develop a nontoll road
6 transportation project under chapter 47.29 RCW. The transportation
7 commission must develop guidelines for, and oversee, a project review
8 and approval process for projects proposed for development under this
9 pilot program.

10 (2) At a minimum, the transportation commission guidelines must
11 include the following:

12 (a) No more than five projects may enter into predevelopment
13 agreements; and

14 (b) The value of a single project under this pilot program may not
15 exceed ten million dollars.

16 **Sec. 14.** RCW 47.12.080 and 1984 c 7 s 121 are each amended to read
17 as follows:

18 The secretary of transportation may transfer and convey to the
19 United States, its agencies or instrumentalities, to any other state
20 agency, to any county or city or port district of this state, or to any
21 public utility company, any unused state-owned real property under the
22 jurisdiction of the department of transportation when, in the judgment
23 of the secretary of transportation and the attorney general, the
24 transfer and conveyance is consistent with public interest. Whenever
25 the secretary makes an agreement for any such transfer or conveyance,
26 and the attorney general concurs therein, the secretary shall execute
27 and deliver unto the grantee a deed of conveyance, easement, or other
28 instrument, duly acknowledged, as shall be necessary to fulfill the
29 terms of the aforesaid agreement. The state must receive equal or
30 greater value in the sale or exchange of unused state-owned real
31 property. In determining whether the state has received adequate
32 compensation, the value of the exchange must consider all forms of
33 consideration including, but not limited to, cash, exchange of property
34 or development rights, property banking or similar credits, and
35 benefits gained from the advancement of transportation-related projects

1 and priorities. All moneys paid to the state of Washington under any
2 of the provisions hereof shall be deposited in the motor vehicle fund.

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