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**HOUSE BILL 1218**

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**State of Washington 64th Legislature 2015 Regular Session**

**By** Representatives Zeiger, Clibborn, Orcutt, Fey, Kochmar, Hargrove, Muri, Pike, Hayes, Stambaugh, Magendanz, Buys, and Moscoso

AN ACT Relating to implementing public-private partnership best practices for nontoll transportation projects; amending RCW 47.29.010, 47.29.030, 47.29.060, 47.29.140, 47.29.150, 47.29.170, 47.29.180, 47.29.280, 39.10.300, and 39.08.010; adding a new section to chapter 47.29 RCW; adding a new section to chapter 39.10 RCW; adding a new section to chapter 39.04 RCW; and creating a new section.

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

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

(1) The legislature finds that the public-private transportation initiatives act created under chapter 47.46 RCW has not met the needs and expectations of the public or private sectors for the development of transportation projects. The legislature intends to phase out chapter 47.46 RCW coincident with the completion of the Tacoma Narrows Bridge - SR 16 public-private partnership. From July 24, 2005, this chapter will provide a more desirable and effective approach to developing transportation projects in partnership with the private sector by applying lessons learned from other states and from this state's ten-year experience with chapter 47.46 RCW.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) Washington state department of transportation staff;

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

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

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

(v) A financial expert;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) As security for the payment of financing described in this section, the revenues from the project may be pledged, but no such pledge of revenues constitutes in any manner or to any extent a general obligation of the state. Any financing described in this section may be structured on a senior, parity, or subordinate basis to any other financing.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(e) The penalties for nonperformance;

(f) The incentives for performance;

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

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

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

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

(1) Before final approval of any toll projects, agreements entered into under this chapter must include a process that provides for public involvement and participation with respect to the development of the toll projects. This plan must be submitted along with the proposed agreement, and both must be approved under RCW 47.29.160 before the state may enter a binding agreement.

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

**Sec.**  RCW 47.29.170 and 2013 c 306 s 708 are each amended to read as follows:

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

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

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

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

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

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

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

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

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

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

The commission may not accept or consider any unsolicited proposals before July 1, 2015.

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

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

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

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

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

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

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

(1) For projects that involve toll facilities, the department shall establish an expert review panel to review, analyze, and make recommendations to the governor and the transportation commission on whether to approve, reject, or continue negotiations on a proposed project agreement under this chapter. The department shall provide staff to support the expert review panel, if requested by the panel. The expert review panel may utilize any of the consultants under contract for the department, and the expert review panel may contract for consulting expertise in specific areas as it deems necessary to ensure a thorough and critical review of any proposed project agreement.

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

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

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

**Sec.**  RCW 39.10.300 and 2013 c 222 s 9 are each amended to read as follows:

(1) Subject to the requirements in RCW 39.10.250, 39.10.270, or 39.10.280, public bodies may utilize the design-build procedure for public works projects in which the total project cost is over ten million dollars and where:

(a) The construction activities are highly specialized and a design-build approach is critical in developing the construction methodology; or

(b) The projects selected provide opportunity for greater innovation or efficiencies between the designer and the builder; or

(c) Significant savings in project delivery time would be realized.

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

(3) The design-build procedure may be used for the construction or erection of portable facilities as defined in WAC 392-343-018, preengineered metal buildings, or not more than ten prefabricated modular buildings per installation site, regardless of cost and is not subject to approval by the committee.

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

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

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

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

**Sec.**  RCW 39.08.010 and 2013 c 113 s 2 are each amended to read as follows:

(1)(a) Except as provided under RCW 47.29.140(1)(d), whenever any board, council, commission, trustees, or body acting for the state or any county or municipality or any public body must contract with any person or corporation to do any work for the state, county, or municipality, or other public body, city, town, or district, such board, council, commission, trustees, or body must require the person or persons with whom such contract is made to make, execute, and deliver to such board, council, commission, trustees, or body a good and sufficient bond, with a surety company as surety, conditioned that such person or persons must:

(i) Faithfully perform all the provisions of such contract;

(ii) Pay all laborers, mechanics, and subcontractors and material suppliers, and all persons who supply such person or persons, or subcontractors, with provisions and supplies for the carrying on of such work; and

(iii) Pay the taxes, increases, and penalties incurred on the project under Titles 50, 51, and 82 RCW on: (A) Projects referred to in RCW 60.28.011(1)(b); and/or (B) projects for which the bond is conditioned on the payment of such taxes, increases, and penalties.

(b) The bond, in cases of cities and towns, must be filed with the clerk or comptroller thereof, and any person or persons performing such services or furnishing material to any subcontractor has the same right under the provisions of such bond as if such work, services, or material was furnished to the original contractor.

(2) The provisions of RCW 39.08.010 through 39.08.030 do not apply to any money loaned or advanced to any such contractor, subcontractor, or other person in the performance of any such work.

(3) On contracts of thirty-five thousand dollars or less, at the option of the contractor the respective public entity may, in lieu of the bond, retain fifty percent of the contract amount for a period of thirty days after date of final acceptance, or until receipt of all necessary releases from the department of revenue, the employment security department, and the department of labor and industries and settlement of any liens filed under chapter 60.28 RCW, whichever is later.

(4) For contracts of one hundred thousand dollars or less, the public entity may accept a full payment and performance bond from an individual surety or sureties.

(5) The surety must agree to be bound by the laws of the state of Washington and subjected to the jurisdiction of the state of Washington.

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

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

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

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

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

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

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

NEW SECTION. **Sec.**  Nothing in this act shall be construed to affect the collective bargaining rights of employees provided in chapter 41.80 RCW.

**--- END ---**