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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

Read first time 01/15/15. Referred to Committee on Transportation.

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

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  
10 read 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  
16 Narrows Bridge - SR 16 public-private partnership. From July 24,  
17 2005, this chapter will provide a more desirable and effective  
18 approach to developing transportation projects in partnership with  
19 the private sector by applying lessons learned from other states and  
20 from this state's ten-year experience with chapter 47.46 RCW.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 (i) Washington state department of transportation staff;

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

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

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

13 (v) A financial expert;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

38       (4) For other public projects defined in RCW 47.29.050(2) that  
39 are developed in conjunction with a transportation project, financing  
40 necessary to develop, construct, or operate (~~the~~) a toll public

1 project must be approved by the state finance committee or by the  
2 governing board of a public benefit corporation as provided in the  
3 federal Internal Revenue Code section 63-20. Financing necessary to  
4 develop, construct, or operate a nontoll public project that does not  
5 pledge the state's credit must be approved by the state  
6 transportation commission;

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

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

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

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

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

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

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

32 (e) All projects must be financed in a manner consistent with RCW  
33 47.29.060. This chapter is null and void if this subsection or RCW  
34 47.29.060 fails to become law or is held invalid by a court of final  
35 jurisdiction.

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

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

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

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

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

10 (e) The penalties for nonperformance;

11 (f) The incentives for performance;

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

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

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

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

22 (1) Before final approval of any toll projects, agreements  
23 entered into under this chapter must include a process that provides  
24 for public involvement and participation with respect to the  
25 development of the toll projects. This plan must be submitted along  
26 with the proposed agreement, and both must be approved under RCW  
27 47.29.160 before the state may enter a binding agreement.

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

32 **Sec. 6.** RCW 47.29.170 and 2013 c 306 s 708 are each amended to  
33 read as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

34 (1) The commission must establish an advisory committee to advise  
35 with respect to eligible projects. An advisory committee must consist  
36 of not fewer than five and not more than nine members, as determined  
37 by the public partners. Members must be appointed by the commission,  
38 or for projects with joint public sector participation, in a manner  
39 agreed to by the commission and any participating unit of government.

1 In making appointments to the committee, the commission shall  
2 consider persons or organizations offering a diversity of viewpoints  
3 on the project.

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

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

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

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

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

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

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

35 The commission must review and approve any project that proposes  
36 to (1) sell or otherwise permanently dispose of assets owned by the  
37 department as part of a larger transaction involving a private  
38 entity; or (2) incur obligations that would significantly bind future

1 state legislative appropriations including, but not limited to, long-  
2 term lease agreements or assumption of significant facility  
3 maintenance or preservation costs, as part of a larger transaction  
4 involving a private entity.

5 **Sec. 10.** RCW 39.10.300 and 2013 c 222 s 9 are each amended to  
6 read as follows:

7 (1) Subject to the requirements in RCW 39.10.250, 39.10.270, or  
8 39.10.280, public bodies may utilize the design-build procedure for  
9 public works projects in which the total project cost is over ten  
10 million dollars and where:

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

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

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

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

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

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

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

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

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

10 **Sec. 11.** RCW 39.08.010 and 2013 c 113 s 2 are each amended to  
11 read as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1        NEW SECTION.   **Sec. 14.**   Nothing in this act shall be construed to  
2   affect the collective bargaining rights of employees provided in  
3   chapter 41.80 RCW.

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