

Public-Private Partnership Projects (P3P) Seminar

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Project Conception: Anatomy of a P3P and Tips for Selecting the Right Approach: Enabling Legislation



Enabling Legislation Background and Overview

Brief History of P3 Legislation in WA

- 1993 Washington enacted HB 1006 (RCW 47.46) Public-Private Initiatives in Transportation Act (also known as PPIT, or PPI). Eventually phased out and replaced with RCW 47.29.
- In 1993 only 3 states in US had P3 enabling statutes: California, Virginia and Washington.
- Today 33 states and 1 US Territory have P3 enabling statutes.
- A new office was created within the Washington Department of Transportation (WSDOT) to implement the law.
- Washington Transportation Commission was directed to oversee and approve all project agreements developed under the PPI program.

Enabling Legislation

Background and Overview

Brief History of P3 Legislation in WA Continued

- PPI program allowed WSDOT to develop up to 6 projects nominated by the private sector
- **12 projects were evaluated and short listed to 6:** 1) SR 18 Corridor between I-5 and I-90; 2) SR 520 including Evergreen Point Bridge; 3) Puget Sound Congestion Pricing Project; 4) SR 522 from Woodinville to Monroe; 5) King County Park and Ride lot improvements; and 6) **SR 16 – Tacoma Narrows Bridge**
- SR 18 Corridor project was dropped from consideration due to lack of public involvement and support
- In 1995 the PPI law was amended to require WSDOT to conduct an advisory vote on projects that were challenged by petition of 5,000 signatures. As a result, the Puget Sound Congestion Pricing project was dropped from consideration.
- In 1996 the PPI law was amended to require legislative funding for environmental, engineering, and public involvement work before proposed projects could proceed. Only SR 16 –TNB project received legislative appropriations. As a result SR 520 and SR 522 were dropped from further consideration.
- In 1997 the King County Park and Ride lot improvement proposal was dropped from consideration due to local funding concerns.

Enabling Legislation

Background and Overview

Brief History of P3 Legislation in WA Continued

- In 1997, United Infrastructure of Washington (UIW), a joint venture of Bechtel Infrastructure and Kiewit Pacific was selected as the project development and construction team for the Tacoma Narrows Bridge Project (TNBP). Tacoma Narrows Constructors, a Bechtel – Kiewit Joint Venture served as the design-builder of the TNBP.
- In 1998 the WA Legislature passed legislation to provide sales tax deferrals on construction of the TNBP: initial roundtrip toll not to exceed \$3 and the state was to contribute \$50 million to the project.
- In 1999 the Legislature authorized the \$50 million state contribution. WSDOT entered into a contract with UIW to develop the project.
- In 2000 the Governor approved \$800 million in privately-issued tax exempt financing for the project. The Supreme Court ruled that WSDOT lacked statutory authority to impose tolls to improve the existing Tacoma Narrows Bridge. This ruling halted the project.
- In 2002 Legislation was enacted that allowed the state to finance TNBP and improvements to existing bridge using state-issued bonds and public financing. The Legislature appropriated \$849 million for the project, which included \$800 million to be obtained from the sale of the bonds which would be paid back through tolling. WSDOT took over management of the construction and operation of the project and reimbursed UIW for their development efforts to date. The legislature directed a study of barriers to public-private partnerships, and enabled a legislative oversight committee to monitor the design-build contract.
- On July 15, 2007, the new bridge was open to traffic.

Enabling Legislation: The Transportation Innovative Partnerships Act of 2005

The Transportation Innovative Partnerships Act of 2005 is Washington's operative P3 enabling statute. It is codified as Chapter 47.29 of the Revised Code of Washington. It has the following basic features:

- **Allows transportation-related projects and programs of all modes to be eligible for development as a public-private partnership under the Transportation Innovative Partnership Program (TIPP);**
- Requires WSDOT to assess potential projects and, for those that demonstrate basic feasibility, make public a registry of projects that the state intends to develop as public-private partnerships;
- For transportation projects funded with toll revenues, any bonded indebtedness must be state-issued debt;
- Citizen advisory committee must be convened for projects that cost in excess of \$300 million, and a statutorily-prescribed evaluation panel and an expert review panel must be convened for all projects.

Enabling Legislation: The Transportation Innovative Partnerships Act of 2005

RCW 47.29.10 states in pertinent part:

Finding - Intent

- (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 project. 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 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 and selecting 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

Enabling Legislation: The Transportation Innovative Partnerships Act of 2005

What is the Purpose of the Act?

Purpose: The Transportation Innovative Partnerships Act is created for the planning, acquisition, design, financing, management, development, construction, reconstruction, replacement, improvement, maintenance, preservation, repair, and operation of **transportation projects**. RWC 47.29.040

Enabling Legislation: The Transportation Innovative Partnerships Act of 2005

How does the Act define the term “Transportation project”?

RCW 47.29.020(10). “Transportation project” means a project, whether capital or operating, where the state’s primary purpose for the project is to preserve or facilitate the safe transport of people or goods via any mode of travel. However, this does not include projects that are primarily for recreational purposes, such as paths, hiking trails, off-road vehicle trails, etc.

What are some examples of transportation projects which are covered under the Act?

- (1) **Ground transportation**: roads (to include bridges), mass transit and railway;
- (2) **Air transportation**: airports; and
- (3) **Waterway transportation**: sea ports; harbors; ferry system (to include ferry terminals and ferries); preservation of commercial waterways

Enabling Legislation: The Transportation Innovative Partnerships Act of 2005

Which projects are eligible for development under the Act?

Eligible Projects: RCW 47.29.50 sets forth the type of projects that are eligible for development as a public-private partnerships. Eligible projects include:

- 1) **Transportation projects** (whether capital or operating) where the state's primary purpose for the project is to **facilitate the safe transport of people or goods via any mode of travel**. Projects that are primarily for recreational purposes are excluded (parks, trails, etc.); and
- 2) Facilities, structures, operations, properties, vehicles, vessels, or the like that are developed concurrently with an eligible transportation project and that are capable of (a) **providing revenues to support financing** of an eligible transportation project, or (b) that are public projects that advance public purposes unrelated to transportation.

Enabling Legislation: The Transportation Innovative Partnerships Act of 2005

What type of financing is eligible under the Act?

RCW 47.29.060 sets forth which type of financing is eligible under the Act. A project may be financed in whole or in part with:

- 1) **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;
- 2) **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;
- 3) **Infrastructure loans or assistance from the state infrastructure bank** established by RCW 82.44.195;
- 4) **Federal, state, or local revenues,** subject to appropriation by the applicable legislative authority;
- 5) **User fees, tolls, fares, lease proceeds, rents, gross or net receipts from sales, proceeds from the sale of development rights, franchise fees,** or other lawful form of consideration. Projects financed by tolls or equivalent funding sources must first be authorized by the legislature under RCW 47.56.820.

Enabling Legislation: The Transportation Innovative Partnerships Act of 2005

Are there restrictions on eligible financing?

Yes. RCW 47.29.60 sets forth the restrictions and conditions of eligible financing.

- (1) The revenues of a project may be pledged as security for eligible financing, but the pledge does not constitute a general obligation of the state. Any such financing may be structured on a senior, parity, or subordinate basis to other financing.
- (2) For transportation projects developed under RCW 47.29 that are 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 transportation project.
- (3) For public projects defined in RCW 47.29.50(2) that are developed in conjunction with a transportation project, financing necessary to develop, construct or operate the 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.
- (4) 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.

Note: The department (WSDOT) may accept from the United States or any of its agencies such funds as are available to this state or to any other unit of government for carrying out the purposes of RCW 47.29, whether funds are made available by grant, loan, or other financing arrangement. The Department may enter into such agreements and other arrangements with the United States or any of its agencies as may be necessary, proper, and convenient for carrying out the purpose of this chapter, subject to RCW 47.29.80.

RCW 47.29.80 allows WSDOT to receive other sources of funding or property. Pursuant to RCW 47.29.80, the department may accept from any source any grant, donation, gift, or other form of conveyance of land, money, other real or personal property, or other valuable thing made to the State of Washington, the department, or a local government for carrying out the purposes of RCW 47.29.

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Function of Transportation Commission

RCW 47.29 expands the powers and duties of the Transportation Commission in two major ways:

- 1) The Commission is responsible for reviewing and approving all contracts or agreements authorized under the Act;
- 2) The Commission is responsible for adopting rules to carry out and govern the Transportation Innovative Partnership Program (TIPP). These rules are set forth in Washington Administrative Code (WAC) 468-600-010 through 468-600-810.

RCW 47.29.030

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Project review, evaluation and selection

RCW 47.29.090 sets forth the Commission's powers to review, evaluate and select project proposals. Pursuant to RCW 47.29.090 the Commission may:

- (1) Solicit concepts or proposals for eligible projects from private entities and units of government;
- (2) On or after January 1, 2007, accept unsolicited concepts or proposals for eligible projects from private entities and units of government;
- (3) Direct the department (WSDOT) to evaluate projects for inclusion in TIPP that are already programmed or identified for traditional development by the state;
- (4) Direct the department to evaluate the concepts or proposals received; and
- (5) Select potential projects based on the concepts or proposals. The evaluation must include consultation with any appropriate unit of government.

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Project selection and contract process:

- 1) **Registry:** Registry of projects eligible for development under a competitive solicitation process. WSDOT responsible for maintaining registry. WAC 468-600-100.
- 2) **Draft RFP sent to Commission:** Project from registry or another source is selected by WSDOT for development and a draft RFP is resented to Commission for review and approval. The proposed project must either be included in the Washington transportation plan or otherwise identified by the Commission as being a priority need for the state. WAC 468-600-102.
- 3) **Issuance of RFP (or alternative method of solicitation) by WSDOT.** WAC 468-600-103 and 105. Requirements for what must be set forth in RFP set forth in WAC 468-600-105. Public notice requirements set forth in WAC 468-600-110.
- 4) Unsolicited proposals may be considered. Subject to a two step process (conceptual and detailed). Rules for consideration and content of unsolicited proposals set forth at WAC 468-600- 200 through 250
- 5) **Additional Disclosure Requirements:** WSDOT may decide to impose additional disclosure requirements set forth in WAC 468-600-300 for solicited and unsolicited proposals after the submission of the proposals.

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Project selection and contract process continued

- 6) **Preliminary review of proposals:** conducted by evaluation panel. Solicited proposals are reviewed and certified by WSDOT and then forwarded to an expert evaluation panel to review. Unsolicited proposals are reviewed initially by an expert evaluation panel for completeness and eligibility and then the expert panel will report its evaluation results and recommendation to the Commission.
- 7) **Review of recommended proposals by Commission.** Commission has power to execute contract, commence negotiations, reject all proposals. WAC 468-600-355.
- 8) Right to protest selection or rejection of proposal. WAC 468-600-365.
- 9) **Notification of apparent successful proposer to enter into contract or development agreement.** Occurs after protest period has expired.
- 10) **Negotiation of contract terms.** Mandatory language and issues must be covered in contract as set forth in WAC 468-600-720.
- 11) Listing and approval of all major subcontractors (10% or more of the scope of the work to be performed). WAC 468-600-722.

Enabling Legislation: The Transportation Innovative Partnerships Act of 2005

Project selection and contract process continued

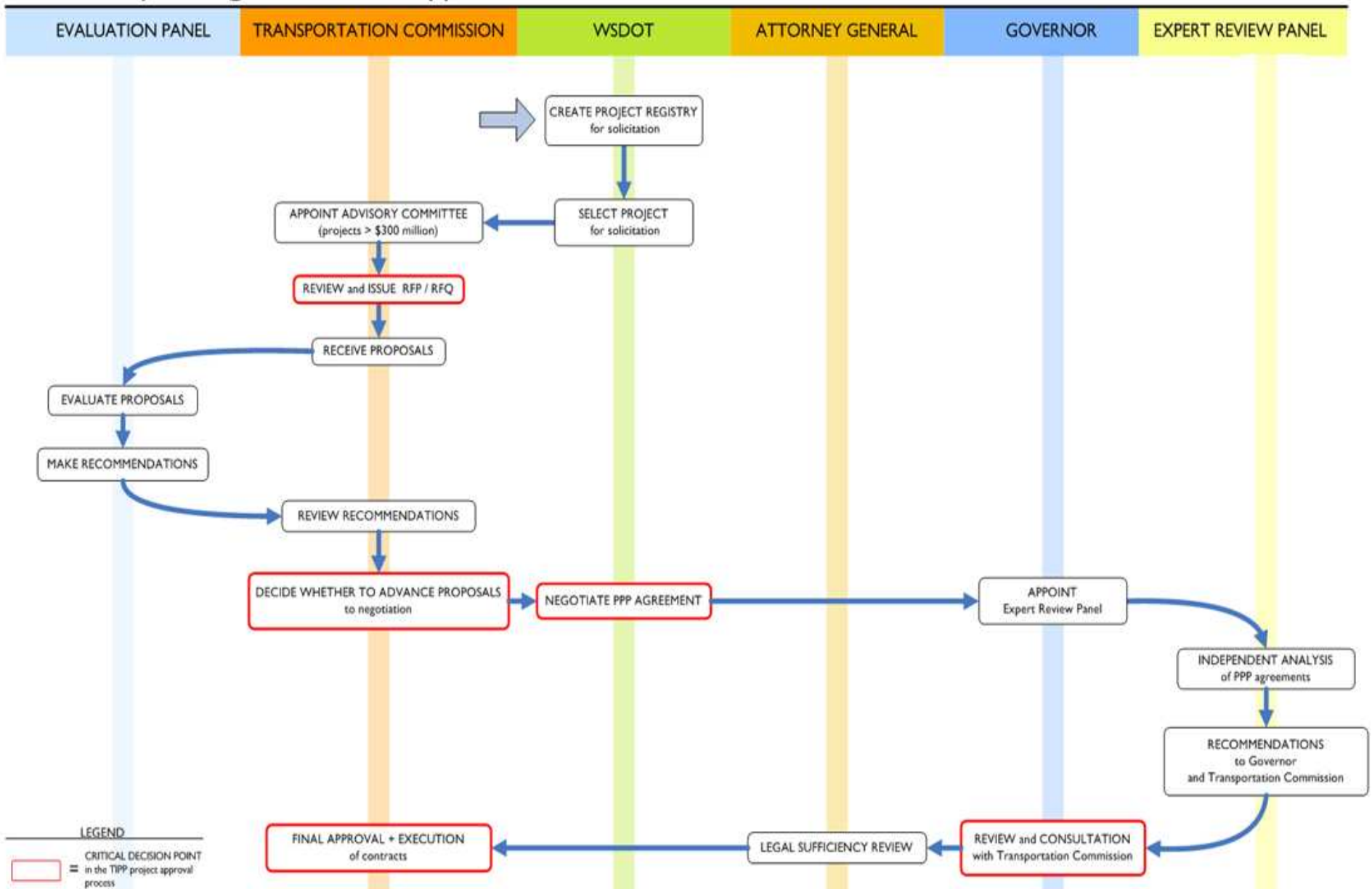
- 12) Development of tentative agreement for further review and comment
- 13) Commission Analysis:** Commission Analysis must be completed prior to execution of any agreement. Analysis must: 1) disclose all costs and costs estimates; and 2) compare WSDOT's internal ability to complete the project. An assessment of public-private partnership verses public venture must be conducted. Analysis may be conducted at any point in the proposal process. WAC 468-600-735
- 14) Attorney General's Review:** upon completion of the final agreement the attorney general will review it for legal sufficiency. WAC 468-600-730.

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But wait there's more....

- 15) Public Notice:** once a tentative agreement is reached a summary of the agreement must be prepared and made available to the public. Notice of existence of the agreement must be published in all counties that are, or could be, affected by the project. WAC 468-600-740.
- 16) Public Hearing:** prior to taking any further action on a tentative agreement the Commission must hold an informal session and public hearing in the county seat of the boundaries of the proposed project with at least twenty calendar days advanced notice. WAC 468-600-741.
- 17) Twenty Day Evaluation Period:** the Commission must consider any testimony received at the public hearing and must wait twenty days before taking any further action on the tentative contract. WAC 468-600-742.
- 18) Final Commission Decision:** after consideration of the Attorney General's legal sufficiency review and after consideration of public comment the Commission must: 1) Approve the final agreement; 2) Reject the final agreement; or 3) return the final agreement to the team for further negotiation on issues the Commission specifies.

TIPP Project Agreements: Approval Process



July 18, 2009 presentation to the Washington State Transportation Commission | Jeff Doyle, Director, Transportation Innovative Partnerships

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Pros

- Language of the act is broad. Very broad definition of “transportation project”. Broad scope of what constitutes an eligible project pursuant to the Act;
- Act has a mechanism for receiving, evaluating and accepting unsolicited proposals from any private entity or unit of government; and
- There are a lot of checks and balances with respect to the receipt, evaluation and acceptance of a proposal.

Cons

- Complicated selection process which involves multiple levels of approval in the project selection, contract award and contract to develop/construct process;
- Complicated restrictions on project financing which involve legislative approval in order to authorize certain types of financing for eligible projects (tolls, grant anticipation revenue bonds and revenues); and
- It takes too much time from the project registry stage to enter into a Public-Private Partnership agreement to construct or develop.

Enabling Legislation: The Transportation Innovative Partnerships Act of 2005

SOURCES:

- Washington State Department of Transportation
- Washington State Transportation Commission – Best Practices Review of Washington State Public-Private Partnership Programs and Laws for Non-Toll Facility Projects: January 25, 2011
- Chapter 47.29 of the Revised Code of Washington
- WAC 468-600-010 through WAC 468-600-810
- Public-Private Partnerships – Transportation Resource Manual
- Public/Private Partnerships in Washington State, Washington State Department of Transportation, Paula J. Hammond, David L. Dye, Steve Reinmuth, Jeff Doyle – prepared for the House Transportation Committee, January 24, 2011
- **All research performed by Allen W. Estes, III and Steffanie M. Fain, Gordon & Rees, LLP, Seattle**

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QUESTIONS

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