

RCW 39.10.500 – Definitions for RCW 39.10.510 through RCW 39.10.580

As used in RCW 39.10.510 through RCW 39.10.580, inclusive, the following words have the following meanings:

- a) “Affected Jurisdiction” means any Public Body within the State of Washington in which all or part of a project implemented by another Public Body under RCW 39.10.510 through RCW 39.10.580 is located or which is directly affected by a Public-Private Facility or Public-Private Agreement.
- b) “Capital Maintenance” means maintenance or rehabilitation performed either (i) to extend the useful life of a facility, system, or component, or (ii) to restore a Public-Private Facility to the condition required upon expiration of the Public-Private Agreement.
- c) “Construction” means the process of building, altering, repairing, improving or demolishing any Public-Private Facility, including any structure, building or other improvements of any kind to real property. “Construction” does not include the routine operation, routine repair, routine maintenance, or capital maintenance of any existing Public-Private Facility, including structures, buildings or real property.
- d) “Contract” means any agreement, including a Public-Private Agreement, for the procurement, operation, or disposal, of a public works project.
- e) “Concessionaire” means any Private Entity that has entered into a Public-Private Agreement with a Public Body under RCW 39.10.510 through .580.
- f) “Design-Build-Finance-Operate-Maintain” means a project delivery method in which a Public Body enters into a single Contract for design, construction, finance, maintenance and operation of a Public-Private Facility over a contractually defined term. No public funds shall be appropriated to pay for any part of the services provided by the Concessionaire during the Contract period except as specifically provided in the Request for Proposals and Public-Private Agreement.
- g) “Design-Build-Finance” means a project delivery method in which a Public Body enters into a single Contract for design, construction, and full or partial private financing of a Public-Private Facility over a contractually defined term. No public funds shall be appropriated to pay for any part of the services provided by the Concessionaire during the Contract period except as specifically provided in the Request for Proposals and Public-Private Agreement.
- h) “Design-Build-Operate-Maintain” means a project delivery method in which a Public Body enters into a single Contract for the design and construction, and the maintenance and/or operation of a Public-Private Facility over a contractually defined term.
- i) “Maintenance” means includes routine maintenance, routine repair, rehabilitation, capital maintenance, maintenance replacement, and any other categories of physical maintenance or upkeep of a Public-Private Facility that may be designated by the Public Body.
- j) “Material Default” means failure of a Concessionaire to perform any duties under a Public-Private Agreement which jeopardizes delivery of adequate service to the public and remains uncured within a reasonable time after the Concessionaire has received written notice from the Public Body of the failure.

- k) “Offeror” means a Private Entity who submits a statement or qualifications or a proposal in response to a Request for Qualifications or Request for Proposals for a Public-Private Agreement.
- l) “Operate” means any action other than Maintenance to operate or facilitate the use of a Public-Private Facility for its intended purpose.
- m) “Private Entity” means a person, corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public benefit corporation, non-profit entity or other business entity.
- n) “Proposal Development Documents” means drawings and other design-related documents that fix and describe the size and character of a Public-Private Facility as to architectural, structural, mechanical and electrical systems, materials and such other elements as may be appropriate to the applicable project delivery method.
- o) “Public Body” has the meaning set forth in RCW 39.10.210, and for purposes of RCW 39.10.510 through .580 specifically includes the State of Washington and the Washington State Department of Transportation. In the event of conflict with the provisions of RCW Ch. 47.29, the provisions of RCW 39.10.500 through .580 shall control.
- p) “Public-Private Agreement” means the Contract between a Public Body and a Private Entity that relates to the development, financing, maintenance or operation of a Public-Private Facility using a Design-Build-Operate-Maintain, Design-Build-Finance-Operate-Maintain, or Design-Build-Finance project delivery method.
- q) “Public-Private Facility” means a new or existing property, facility, or improvement that meets a public purpose, is developed for a Public Body, and is subject to a Public-Private Agreement.
- r) “Request for Proposals” means all documents, whether attached to or incorporated by reference, utilized for soliciting proposals for a Public-Private Facility under RCW 39.10.510 through .580.
- s) “Request for Qualifications” means a solicitation issued by a Public Body under RCW 39.10.510(d)(i).
- t) “Responsible Offeror” means a Private Entity meeting all criteria stated in RCW 39.04.350, has the capability in all respects to fully perform the requirements of the Public-Private Agreement, and the integrity and reliability to assure good faith performance.
- u) “Responsive Offeror” means a Private Entity who has submitted a statement of qualifications or a proposal which conforms in all material respects to the applicable Request for Qualifications or Request for Proposals.
- v) “User Fees” means any rate, toll, fare, fee, or other charges imposed for use of all or part of a Public-Private Facility.

RCW 39.10.510

- (a) Notwithstanding any provision of law to the contrary, a Public Body may, subject to the requirements of RCW 39.60.500 through 39.10.580, issue a Request for Qualifications or Request for Proposals, and

enter into Public-Private Agreements with that Responsible and Responsive Offeror who submits the proposal receiving the highest evaluation score using the procurement method described in this section with regard to the development, financing, design, construction, lease, operation, and/or maintenance of a Public-Private Facility; provided, however, that such proposal shall be in full compliance with all applicable requirements of federal, state and local law, including RCW Chapters 39.08, 39.12, 39.19. A Public-Private Agreement procured in compliance with RCW 39.10.500 through .580 shall not be subject to the competitive bid requirements set forth in RCW Chapter 39.04. No provision of RCW 39.10.500 through .580 applies unless the Public Body expressly elects to procure the project as a Public-Private Agreement, and nothing in RCW 39.10.500 through .580 limits a Public Body's ability to procure, execute, or administer any lease or other form of contract to improve public property under existing law.

- (b) A Public-Private Agreement shall be awarded through competitive public procurement set forth in this section using either the RFQ-RFP process or the Request for Proposals process.
- (c) The Public Body shall provide adequate public notice of its Request for Qualifications or Request for Proposals, which shall at a minimum include publishing at least once in a legal newspaper of general circulation published in, or as near as possible to, that part of the State in which the public work will be done, a notice of its Request for Qualifications or Request for Proposals, and the availability and location of the Request for Qualifications or Request for Proposals. The Public Body may seek input from potential applicants who may have an interest or expertise relevant to the project through a request for expression of interest, registration of interest, or otherwise.
- (d) The "RFQ-RFP" process means the following:
 - i. The Public Body shall issue a Request for Qualifications including at least the following:
 1. A general description of the project that provides sufficient information for offerors to submit qualifications;
 2. A description of the intended Design-Build-Finance-Operate-Maintain method and the reasons for using such method;
 3. A description of the qualifications required of Offerors including, but not limited to, technical competence and experience, financial capacity, capability to perform, any team structure, past performance of the offeror's team and/or team members, demonstrated ability to meet time and budget requirements, ability to meet performance and payment bond requirements, firm workloads, location, safety records, and other qualifications as determined by the Public Body;
 4. Public bodies are encouraged to include as evaluation factors the offeror's past performance and specific plans to include participation by small business entities, disadvantaged business entities, veteran-owned businesses, minority and women-owned businesses, and any other underutilized businesses as the offeror or Public Body may designate;
 5. The honorarium, if any, to be paid to finalists who submit responsive proposals and who are not awarded a Contract, and the Public Body's intellectual property or other rights, if any, to utilize

documents, concepts, designs, or information submitted by finalists who are not awarded a Contract;

6. The anticipated schedule for the procurement process and the project;
 7. A description of the process the Public Body will use to evaluate qualifications, including evaluation factors, the relative weights of factors, and any specific forms to be used by offerors; and
 8. Protest procedures
- ii. The Public Body shall establish an evaluation committee to evaluate responses to the Request for Qualifications based solely on the factors, weighting, and process identified in the Request for Qualifications and any addenda issued by the Public Body. Based on the evaluation committee's findings, the Public Body shall select not more than four Responsive and Responsible Offerors as finalists to submit proposals. The Public Body may, in its sole discretion, reject all qualification submissions and shall provide its reasons for rejection in writing to all Offerors.
 - iii. The Public Body must notify all Offerors of the list of finalists selected to move to the next phase of the selection process and must provide each Offeror a scoring summary of the evaluation factors. The process may not proceed to the next phase until two business days after all Offerors are notified of the committee's selection decision. Offerors filing a protest on the selection of the finalists must file the protest in accordance with published protest procedures and applicable law. The selection process may not advance to the next phase of selection until two business days after the final protest decision is transmitted to the Offeror.
 - iv. Upon selection of the finalists, the Public Body shall proceed with the Request for Proposals process with the finalists.
 - v. Upon completion of the Request for Proposals process, the Public Body shall make the honorarium payments specified in the Request for Qualifications to finalists who submit responsive proposals and who are not awarded a Contract.
- (e) The "Request for Proposals" process means the following:
- i. The Public Body shall issue a Request for Proposals including at least the following:
 1. A detailed description of the project, including but not limited to:
 - a. The Public Body's design requirements regarding project features, functions, characteristics, qualities, properties, and parameters;
 - b. Requirements and constraints pertaining to the construction, financing, operation, and maintenance of the Public-Private Facility;
 - c. Programmatic, performance, and technical requirements and specifications;
 - d. Any facility performance goals and validation requirements;

- e. Financial requirements, constraints, incentives, and objectives, including term of agreement; and
 - f. Target budgets, as applicable;
2. A description of the intended project delivery method, and the reasons for using such method;
 3. A description of any required Proposal Development Documents;
 4. A description of the process the Public Body will use to evaluate offerors' qualifications and proposals, including evaluation factors and the relative weight of factors, and any specific forms to be used.
 - a. Evaluation factors shall include, but are not limited to: (1) if the Public Body is not using the RFQ-RFP process, the offeror's qualifications, including technical competence and experience, financial capacity, capability to perform, past performance of the offeror's team, demonstrated ability to meet time and budget requirements, ability to meet performance and payment bond requirements, firm workloads, location, safety records, and accident prevention plan; (2) compliance with the Public Body's design and other requirements set forth in the Request for Proposals; (3) short and long term cost to the Public Body and impact on public debt; (4) technical and operational feasibility and merit (5) schedule; (6) projected User Fees, charges, or price over the term of the Public-Private Agreement; and (7) other appropriate factors, if any.
 - b. Public bodies are encouraged to include as evaluation factors (a) the offeror's specific plans to include participation by small business entities, disadvantaged business entities, veteran-owned businesses, minority and women-owned businesses, and any other underutilized businesses as the offeror or Public Body may designate, and (b) the offeror's plans for labor harmony for the entire term of the Public-Private Agreement, including construction, reconstruction, operation, and capital and routine maintenance.
 5. Protest procedures;
 6. The form of the Public-Private Agreement to be awarded;
 7. The anticipated schedule for the procurement process and the project;
 8. The Public Body's intellectual property or other rights, if any, to utilize documents, concepts, designs, or information submitted by offerors who are not awarded a Contract; and
 9. Other information relevant to the project.
- ii. The Public Body shall establish an evaluation committee to evaluate offerors' proposals. The proposals shall be evaluated and scored based solely on the factors, weighting, and process identified in the Request for Proposals and in any addenda published by the Public Body. Discussions may be conducted with Responsible Offerors who submit proposals determined to be reasonably susceptible of being selected for award, for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors shall be accorded fair and equal treatment

with respect to any opportunity for discussion and revision of proposals, and such revisions may be permitted after submission and prior to award for the purpose of obtaining best and final offers. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors. Public bodies may request best and final proposals from offerors.

- iii. The Public Body may initiate negotiations with the proposer submitting the highest scored proposal. If the Public Body is unable to execute a Contract with the proposer submitting the highest scored proposal, negotiations with that proposer may be suspended or terminated and the Public Body may proceed to negotiate with the next highest scored proposer. Public bodies shall continue in accordance with this procedure until a Contract agreement is reached or the selection process is terminated.
 - iv. The Public Body shall notify all proposers of the selection decision and make a selection summary of the final proposals available to all proposers within two business days of such notification. If the Public Body receives a timely written protest, the Public Body may not execute a Contract until two business days after the final protest decision is transmitted to the protestor. The protestor must submit its protest in accordance with the published protest procedures.
 - v. The Private Entity awarded the Contract shall provide a payment bond for the contracted amount. The Public Body may require the Private Entity to provide a performance bond.
- (f) The public disclosure and inspection requirements set forth in RCW 39.10.470 shall apply to procurements under RCW 39.10.500 through .580, and statements of qualifications, proposals, and other documents and information submitted as part of the RFQ-RFP process shall be treated as proposals by design build finalists pursuant to RCW 39.10.470(3).

RCW 39.10.520

- (a) The Request for Proposals regarding a Public-Private Agreement shall contain a draft form of Contract or agreement to be executed between the successful Offeror and the Public Body upon award, and shall have been approved as to content and form by the Project Review Committee and by the Public Body before the Request for Proposals is issued.
- (b) After selecting an Offeror's proposal, the Public Body shall enter into the Public-Private Agreement with the selected Private Entity. An Affected Jurisdiction may be a party to a Public-Private Agreement entered into by another Public Body and a selected Private Entity or combination of private entities.
- (c) All Public-Private Agreements procured under RCW 39.10.500 through .580 shall include provisions expressly addressing each of the following:
- (1) the planning, acquisition, engineering, financing, development, design, construction, reconstruction, replacement, improvement, maintenance, management, repair, or operation of a Public-Private Facility, including provisions for the replacement and relocation of utility facilities;
 - (2) the term of the Public-Private Agreement, which shall not exceed 50 years;
 - (3) the type of interest, if any, the Concessionaire shall have in the Public-Private Facility, and the means of compensation to the Concessionaire, whether through direct payment by the Public Body, User

Fees, availability payments, safety-based compensation, performance-based compensation, grants, credits, or otherwise;

- (4) a description of the actions the Public Body may take to ensure proper maintenance of the Public-Private Facility;
- (5) whether User Fees will be collected on the Public-Private Facility, and the basis by which such User Fees shall be determined and modified;
- (6) compliance with applicable Federal, state and local laws;
- (7) grounds for termination of the Public-Private Agreement by the Public Body or Concessionaire, and the procedures and compensation, if any, upon termination;
- (8) procedures for amendment of the agreement by mutual agreement and for changes in the agreement by written order from the Public Body;
- (9) review and approval by the Public Body of the Concessionaire's plans for the development and operation of the Public-Private Facility;
- (10) inspection and approval by the Public Body of the design and construction of, or improvements to, the Public-Private Facility;
- (11) maintenance by the Concessionaire of a policy of liability insurance or self-insurance reasonably acceptable to the Public Body;
- (12) filing by the Concessionaire, on a periodic basis, of appropriate financial statements for the Public-Private Facility in a form acceptable to the Public Body;
- (13) filing by the Concessionaire, on a periodic basis, of performance, service, utilization, efficiency, financial, and other reports identified by the Public Body, in a form acceptable to the Public Body;
- (14) financing obligations of the Concessionaire and the Public Body;
- (15) apportionment of expenses between the Concessionaire and the Public Body;
- (16) the rights and duties of the Concessionaire, the Public Body, and other state and local governmental entities with respect to use of the Public-Private Facility;
- (17) the rights and remedies available in the event of default or delay;
- (18) the terms and conditions of indemnification of the Concessionaire by the Public Body, as required by applicable law;
- (19) assignment, subcontracting or other delegation of responsibilities of the Concessionaire or the Public Body under the agreement to third parties, including other private entities and other state agencies;
- (20) sale or lease to the Concessionaire of private property related to the Public-Private Facility;

- (21) if, and how, the parties will share costs of development of the project;
- (22) if, and how, the parties will allocate financial responsibility for cost overruns;
- (23) liability for nonperformance;
- (24) any incentives or disincentives for performance;
- (25) any accounting and auditing standards to be used to evaluate progress on the project;
- (26) the Concessionaire's plans to:
 - (i) obtain bonds required by RCW Chapter 39.08, covering all construction, reconstruction or maintenance, including capital maintenance, work of the project;
 - (ii) require the payment of prevailing wages for labor performed on the project in accordance with RCW Chapter 39.12; and
 - (iii) to include participation by small business entities, disadvantaged business entities, veteran-owned businesses, minority and women-owned businesses, and any other underutilized businesses as the Concessionaire or Public Body may designate.
- (27) the Concessionaire's plans for labor harmony for the entire term of the agreement, including construction, reconstruction and capital and routine maintenance and adequate remedies to address the Concessionaire's failure to maintain labor harmony which shall include, but not be limited to, assessment of liquidated damages and Contract termination;
- (28) traffic enforcement and other policing issues, subject to RCW 39.10.590, including any reimbursement by the Concessionaire for such services;
- (29) the condition of physical quality, maintenance, and repair in which the Concessionaire must provide the Public-Private Facility to the Public Body upon expiration of the Public Private Agreement;
- (30) any restrictions or terms regarding the procurement or development of other projects that may compete with or otherwise impact the revenues, cost, or operation of the Public-Private Facility, and
- (31) other terms and conditions.

RCW 39.10.530

Unless otherwise provided, upon the end of the term of the Public-Private Agreement or in the event of termination of the Public-Private Agreement, the Public Body and duties of the Concessionaire shall cease, except any duties and obligations that extend beyond the termination as provided in the Public-Private Agreement, and all the rights, title and interest in such Public-Private Facility and all property involved therein shall revert to the Public Body to the extent owned by the Public Body before the Public-Private Agreement or acquired by the Public Body for the Public-Private Agreement and shall be dedicated to the Public Body for public use.

RCW 39.10.540

(a) Upon the occurrence and during the continuation of a Material Default by a Concessionaire, and upon the failure by the Concessionaire or its financing institution on the Concessionaire's behalf, to cure such Material Default within 30 days of written notice of such default by the Public Body, the Public Body may:

- (1) elect to take over the Public-Private Facility, including the succession of all right, title and interest in the Public-Private Facility; and
- (2) terminate the Public-Private Agreement and exercise any other rights and remedies available.

(b) In the event that the Public Body elects to take over a Public-Private Facility under subsection (a), the Public Body:

- (1) shall make interim payments, on behalf of the Concessionaire and for the Concessionaire's account, of any amounts subject to a mechanics lien or bond claim pursuant to RCW Chapter 39.08 or 60.04;
- (2) may develop and operate the Public-Private Facility, impose User Fees for the use of the Public-Private Facility and comply with any service contracts; and
- (3) may solicit new proposals for the maintenance and operation of the Public-Private Facility.

RCW 39.10.550

(a)(1) The Public Body may issue and sell bonds or notes of the Public Body for the purpose of providing funds to carry out RCW 39.10.510 through .580, with respect to the development, financing, or operation of a Public-Private Facility or the refunding of any bonds or notes, together with any costs associated with the transaction.

(2) Any bond or note issued under this section:

- (A) constitutes the corporate obligation of the Public Body;
- (B) shall not constitute a debt of the State of Washington or the Public Body within the meaning or application of the constitution of the State of Washington; and
- (C) shall be payable solely as to both principal and interest from:
 - (i) the revenues from a lease to the Public Body, if any;
 - (ii) proceeds of bonds or notes, if any;
 - (iii) investment earnings on the proceeds of bonds or notes; or
 - (iv) other funds appropriated by or to the Public Body for such purpose.

(b)(1) For the purpose of financing a Public-Private Facility, the Public Body and Concessionaire may apply for, obtain, issue and use private activity bonds available under any Federal law or program.

(2) Any bonds, debt, other securities or other financing issued for the purposes of RCW 39.10.510 through .580, shall not be considered a debt of the Public Body or a pledge of the faith and credit of the State of Washington or any political subdivision.

(c) Nothing in this section shall limit a Public Body or any authority of the State of Washington to issue bonds for public works projects.

RCW 39.10.560

(a)(1) The Public Body may accept from the United States, the State of Washington, or any of their agencies funds for developing a Public-Private Facility or carrying out a Public-Private Agreement, whether the funds are made available by grant, loan or other financial assistance.

(2) The Public Body may enter into agreements or other arrangements with the United States or any of its agencies to facilitate for development, execution, or administration of a Public-Private Facility or Public-Private Agreement.

(b) The Public Body may accept from any source any grant, donation, gift or other form of conveyance of land, money, other real or personal property or other item of value made to the Public Body for developing a Public-Private Facility or carrying out a Public-Private Agreement.

(c) Any Public-Private Facility or Public-Private Agreement may be financed in whole or in part by contribution of any funds or property made by any Private Entity or Affected Jurisdiction.

(d) The Public Body may combine Federal, state, local and private funds to finance a Public-Private Agreement or facility.

RCW 39.10.570

Every Public-Private Agreement shall provide for, and the Public Body shall otherwise ensure that adequate provision is made for, the following:

(a) Payment of all subcontractors, suppliers, and laborers, which shall at a minimum include provision of a payment bond in compliance with RCW Chapter 39.08, which bond shall be required regardless of the ownership or control of any property involved in the Public-Private Agreement or the Public-Private Facility;

(b) Payment of prevailing wages in accordance with RCW Chapter 39.12; and

(c) Outreach to small business entities, disadvantaged business entities, veteran-owned businesses, minority and women-owned businesses, and any other underutilized businesses as the Public Body may designate, and compliance with RCW Chapter 39.19.

RCW 39.10.580

a) The Project Review Committee established pursuant to RCW 39.10.240 shall establish a Public-Private Project Subcommittee to review applications regarding Public-Private Agreements. The Public-Private Project Subcommittee must include individuals with expertise in the fields of public policy, public finance,

management consulting, engineering or architectural design, construction, public-private partnerships, and public works law.

- b) A Public Body desiring to issue a Request for Proposals for a Public-Private Agreement must apply for and receive approval from the Public-Private Project Subcommittee. The Public-Private Project Subcommittee and the Public Body must follow the project approval process set forth in RCW 39.10.280 and apply the review and approval standards of that section. The appeal process set forth in RCW 39.10.290 applies to the Public-Private Project Subcommittee's determination regarding a Public-Private Agreement. An application regarding a Public-Private Agreement is not subject to and does not affect the number of projects or dollar values to be reviewed by the Project Review Committee pursuant to RCW 39.10.250.
- c) In its application regarding a Public-Private Agreement, the Public Body must additionally provide the following:
 - (i) A draft of the Request for Proposals;
 - (ii) A draft form of the Public-Private Agreement; and
 - (iii) A Project Report from the Public Body in a form acceptable to the committee including, but not limited to: (1) a general description of the proposed Public-Private Facility and Public Private Agreement; (2) the policy and regulatory structure for overseeing the Public-Private Facility and its operations, including on-going governmental oversight; (3) a discussion of financial data and pro formas, including issues of cost and revenue allocation, taxation, profit-sharing, and all anticipated public and private funding sources; (4) advertising and marketing; (5) use of new technologies; (6) lease terms, if any, and termination clauses; (7) additional responsibilities by both the private Concessionaire and the Public Body during the lease period; (8) financial evaluation of the Public-Private Facility; (9) the anticipated advantages of entering into the anticipated Public-Private Agreement for Design-Build-Finance-Operate-Maintain or Design-Build-Operate-Maintain services, and (10) the Public Body's plans to protect subcontractors, suppliers, and laborers, and to promote participation by minority, women-owned, veteran-owned, small, disadvantaged, or underutilized businesses.
- d) Deviation from the requirements of RCW 39.10.500 through .580 provides grounds to deny approval of a project, but shall not invalidate any Public-Private Agreement after approval or award except through timely protest.
- e) The Public Body must submit annual project reports to the Project Review Committee addressing the operation and financial performance of the Public-Private Facility and Public-Private Agreement, and the project's compliance and deviation from the Project Report submitted in the Public Body's application.