

1
2
3
4
5
6
7 **CAPITAL PROJECTS ADVISORY REVIEW BOARD**
8 **FOR THE STATE OF WASHINGTON**

9 COLUMBIA RIVER BIOREGIONAL
10 EDUCATION PROJECT,

11 Petitioner,

12 v.

13 STATE OF WASHINGTON CAPITAL
14 PROJECTS ADVISORY REVIEW BOARD;
15 PROJECT REVIEW COMMITTEE; and
16 OKANOGAN PUBLIC UTILITY DISTRICT,

Respondents.

RESPONDENT PROJECT REVIEW
COMMITTEE'S REPLY BRIEF

17 **I. INTRODUCTION**

18 This is Respondent, Project Review Committee's (PRC) reply to the procedural issues
19 raised by Petitioner in its Opening Brief.

20 **II. ARGUMENT**

21 **A. The PRC Followed the Appropriate Procedures in the Hearing**

22 **1. The PRC's Procedural Requirements Are Contained in RCW 39.10.260**

23 Petitioner argues in its Opening Brief that the PRC's hearing, although held in strict
24 adherence to the specific statutory requirements of RCW 39.10.260, should have been
25 "converted" to an adjudicative proceeding. It further argues that conversion is permitted by
26 RCW 34.05, the Administrative Procedures Act (APA), subsections .070 and .413(1), and that

1 the Capital Projects Advisory Review Board (CPARB) has the authority and discretion to
2 convert the PRC's meeting.

3
4 However, as established in the PRC's Opening Brief, it's clear that the Washington State
5 Legislature preferred a specific review and approval process for the approval of alternative
6 delivery methods of construction for public works and that it did not anticipate lengthy contested
7 evidentiary hearings. Instead, the Legislature required a particular procedure as set out in
8 RCW 39.10.260. Nowhere in RCW 39.10 did the Legislature authorize CPARB to apply a
9 different set of procedures to PRC hearings. Agencies only have those powers expressly granted
10 to them in their statutory delegation of authority.¹ Further, nowhere in RCW 34.05.070 or
11 RCW 34.050.413(1) does the Legislature authorize an agency to "convert" a statutorily pre-
12 determined procedure to an adjudicative proceeding. RCW 34.05.413(1) states that "[w]ithin
13 the scope of its authority, an agency may commence an adjudicative proceeding at any time
14 with respect to a matter within the agency's jurisdiction." (emphasis added). This provision does
15 not require an adjudicative proceeding and it is not within the agency's statutory authority to do
16 anything other than comply with RCW 39.10, thus CPARB lacks the authority to convert the
17 PRC hearing into an adjudicative proceeding.

18 2. Conversion Under RCW 34.05.070 Does Not Apply To This Hearing

19 Not only does RCW 34.05.070 not authorize CPARB to convert the PRC specific
20 procedures to another type of hearing, it does not provide for conversion of any hearing, of any
21 kind, to an adjudicative hearing. RCW 34.05.070 allows an agency to convert a hearing **from**
22 **an adjudicative hearing** or a rule making proceeding **to another form of proceeding**.

23 If it becomes apparent **during the course of an adjudicative or rule-making**
24 **proceeding** undertaken pursuant to this chapter that another form of proceeding
under this chapter is necessary, is in the public interest, or is more appropriate to
resolve issues affecting the participants, on his or her own motion or on the motion

25 ¹ *Ass'n of Wash. Bus. v. Dep't of Revenue*, 155 Wn.2d 430, 437-38, 120 P.3d 46 (2005); *see also Tuerk v.*
26 *Dep't of Licensing*, 123 Wn.2d 120, 124-25, 864 P.2d 1382 (1994); *Mun. of Metro. Seattle v. Pub. Emp't Relations*
Comm'n, 118 Wn.2d 621, 633, 826 P.2d 158 (1992).

1 of any party, the presiding officer or other official responsible for the original
2 proceeding shall advise the parties of necessary steps for conversion and, **if within**
3 **the official's power**, commence the new proceeding. **If the agency refuses to**
4 **convert to another proceeding, that decision is not subject to judicial review.**

5 RCW 34.05.070(1)(emphasis added).

6 This statute does not authorize CPARB to convert a hearing procedure established in
7 RCW 39.10 to an adjudicative proceeding; it authorizes the opposite of what is suggested by
8 Petitioner.

9 Petitioner argues that because there is no case law interpreting the use of RCW 34.05.070
10 that CPARB is required to use the principles of statutory construction and look to other case law
11 to determine whether it is appropriate here. Petitioner is mistaken; case law is not required to
12 interpret the plain language of a statute:

13 When interpreting a statute, we first look to its plain language. *State v. Armendariz*,
14 160 Wn.2d 106, 110, 156 P.3d 201 (2007). If the plain language is subject to only
15 one interpretation, our inquiry ends because plain language does not require
16 construction. *Id.*; *State v. Thornton*, 119 Wn.2d 578, 580, 835 P.2d 216 (1992).
17 "Where statutory language is plain and unambiguous, a statute's meaning must be
18 derived from the wording of the statute itself." *Wash. State Human Rights Comm'n*
19 *v. Cheney Sch. Dist. No. 30*, 97 Wn.2d 118, 121, 641 P.2d 163 (1982). Absent
20 ambiguity or a statutory definition, we give the words in a statute their common
21 and ordinary meaning. *Garrison v. Wash. State Nursing Bd.*, 87 Wn.2d 195, 196,
22 550 P.2d 7 (1976).

23 *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009). Reviewing the
24 plain language of RCW 39.10, RCW 34.05.070, and RCW 34.05.413, it is clear that the PRC is
25 required to follow the procedures set out in RCW 39.10.260 and that CPARB lacks the authority
26 to order an adjudicative procedure under the APA.

27 **B. The State Environmental Protection Act Considerations Are Not Properly Before**
28 **the PRC**

29 RCW 39.10.280(2) establishes the criteria the PRC is authorized to consider in approving
30 an application for alternative construction methods.

31 To approve a proposed project, the committee shall determine that:

32 (a) The alternative contracting procedure will provide a substantial fiscal
33 benefit or the use of the traditional method of awarding contracts in lump sum to
34

1 the low responsive bidder is not practical for meeting desired quality standards or
2 delivery schedules;

3 (b) The proposed project meets the requirements for using the alternative
4 contracting procedure as described in RCW 39.10.300 or 39.10.340;

5 (c) The public body has the necessary experience or qualified team to carry
6 out the alternative contracting procedure including, but not limited to: (i) Project
7 delivery knowledge and experience; (ii) sufficient personnel with construction
8 experience to administer the contract; (iii) a written management plan that shows
9 clear and logical lines of authority; (iv) the necessary and appropriate funding and
10 time to properly manage the job and complete the project; (v) continuity of project
11 management team, including personnel with experience managing projects of
12 similar scope and size to the project being proposed; and (vi) necessary and
13 appropriate construction budget;

14 (d) For design-build projects, public body personnel or consultants are
15 knowledgeable in the design-build process and are able to oversee and administer
16 the contract; and

17 (e) The public body has resolved any audit findings related to previous
18 public works projects in a manner satisfactory to the committee.

19 There is no requirement in RCW 39.10 for the PRC to consider environmental impacts or to
20 consider criteria under RCW 43.21C, the State Environmental Protection Act (SEPA). Further,
21 under SEPA environmental impact statements and considerations are required for "major actions
22 having a probable significant, adverse environmental impact" and "to analyze only those
23 probable adverse environmental impacts which are significant." RCW 43.21C.031. While the
24 underlying public work may meet the RCW 43.21C.031 criteria, the PRC does not review the
25 public works projects, it reviews applications for the use of alternative delivery methods of
26 construction. If an alternative delivery method, like design-build, is not desired or denied by the
PRC, the applicant can simply move forward with the traditional design-bid-build method. A
decision as to whether the public works project in this case will be accomplished via the
traditional delivery method or an alternative method does not have an impact on the environment
and does not meet the criteria for requiring an environment impact statement and consideration
of it. Therefore, the requirements under SEPA are not an appropriate consideration by the PRC.

III. CONCLUSION

Since the PRC is subject to the specific procedures set out by the Legislature in
RCW 39.10 and because agency decisions related to the procurement of public works projects

1 are not subject to the APA or SEPA, those statutes do not apply to the PRC hearing. The PRC's
2 procedures complied with statutory requirements and a remand should be denied.

3 DATED this 2nd day of June, 2017.

4 ROBERT W. FERGUSON
5 Attorney General

6
7 Brian J. Kelly for #18508
8 DAWN C. CORTEZ, WSBA #19568
9 Assistant Attorney General
10 Attorneys for Respondent
11 Washington State Capital Project Advisory
12 Review Board's Project Review Committee
13
14
15
16
17
18
19
20
21
22
23
24
25
26