CPARB Public-Private Partnership Committee

November 19, 2015, 9:00-11:10 a.m.
South Seattle Community College, Georgetown Campus, Bldg. E, Finishing Trades Building, Room 370a

Minutes (DRAFT)

Attendees:

John Ahlers, Ahlers & Cressman
James Lynch, Ahlers & Cressman
Bob Maruska, Port of Seattle/CPARB
Mark Riker, Sheet Metal Workers 66/CPARB
Andrew Thompson, Granite Construction
Mark Gaines, WSDOT
Loren Armstrong, Sound Transit
Ahmed Abdel Aziz, University of Washington

I. Welcome & Introductions by John Ahlers (Ahlers & Cressman), interim chair (self-introductions by attendees)

II. Preliminary Discussion

The committee discussed several preliminary matters, including possible additional sources of information for consideration in finalizing the draft legislation under current consideration. Nationally, the AIAI has published a P3 best practices guide. Locally, WSDOT has recently completed a guide for use in selecting project delivery methods, which may be relevant and provide context for the committee's efforts. Committee members reiterated the benefits of continuing discussions with public project owners and legislators to identify and address needs and concerns to address in the draft legislation.

The committee's focus is on making useful P3 methodologies available to a broader the spectrum of public project owners. While the committee intends to achieve legislation that addresses some perceived shortcomings of the Innovative Transportation Partnership statutes currently available to WSDOT, the goal is to provide universally useful legislation; it will be for the legislature and WSDOT to determine whether the old statutes remain necessary or useful. The committee would particularly welcome input from WSDOT's innovative partnerships office on this and related points.

Committee members discussed whether "63-20" financing is permitted under the proposed legislation. Under the 63-20 structure, tax exempt bonds are issued by a non-profit corporation on behalf of a public agency. The non-profit corporation causes the project to be designed and built, typically through a fixed-price contract with a private real estate development company. The real estate development company contracts with the architect and general contractor to deliver a building that meets the specifications set by the public agency. The current draft P3 legislation does not specifically contemplate 63-20 financing, but is intended to be flexible enabling legislation. There is a concern that 63-20 structures may be used to undermine prevailing wage and other labor protections. This committee's draft legislation is clear that projects procured thereunder are subject to prevailing wage, payment bonding, and other protections available to labor and trade contractors on traditional public works projects.

III. Committee Timing Objectives

The current objective is to present viable P3 legislation for consideration in the 2017 legislative session. The committee's draft legislation can be completed in the short-term, but there will likely need to be substantial groundwork providing information, identifying supporters, and addressing any concerns. The committee also anticipates several rounds of review and discussion by CPARB in 2016 prior to presentation to the legislature.

IV. Discussion of Draft Legislation

The committee walked through each section of the draft legislation for evaluation, comment, and proposed revisions.

.510 - Definitions

- Subsection (b): The definition of Architectural and Engineering Services here may create unnecessary confusion and conflict with existing law. This definition should cross reference to existing RCW definitions. *Note: Upon review, this term is not used as a term of art in the current draft and will therefore simply be eliminated from the definitions.*

- Subsection (h): The term "capital maintenance" was discussed, as well as the related reference to "expiration of the useful life of systems or components." These definitions also implicate the definition of "Construction" (subsection d), as well as section .520(d), addressing what must be included in every public-private agreement. The intention of the reference to "capital maintenance" is to clarify that work to extend the life of systems or components, or to restore facilities to the condition required upon turnover to the public body at the end of the Public-Private Agreement, may be performed as part of the Public-Private Agreement rather than requiring a new procurement and contract. The next draft should clarify this intention, as well as requiring (in section .520) the Public-Private Agreement to specify the condition the Public-Private Facility must be in upon turnover to the public body at the end of the agreement. This will effectively enable the public body to decide, based on the nature of the project, the facility, and its financial objectives, the extent to which the concessionaire must build any restoration costs into the public-private agreement pricing, or to which the public body will undertake its own restoration or improvement of the facility through a new procurement after the public-private agreement expires.

- The committee discussed whether the legislation should be limited to design-build-finance-operate-maintain (DBFOM) or also include design-build-operate-maintain (DBOM), and other public-private partnership structures. Differing views and feedback have been received to date. On one hand, the committee's intention is to provide broad enabling legislation to promote innovation, efficiency, and quality, while implementing substantive and procedural safeguards to protect the public interest, fair competition, labor, and other legitimate interests. On the other hand, existing legislation may already permit some DBOM and similar structures. Based on the discussion, the next draft of the legislation will be drafted enable more than just DBFOM, and committee members should be prepared to discuss the appropriate scope of the enabling legislation in the next meeting.

Section .510(a)

The intent of the final sentence of this section is to clarify that entities such as the Port of Seattle are not obligated to use the P3 legislation or follow its procurement requirements for projects, leases, and other contract arrangements that are already allowed under other provisions law. However, as worded, the last sentence of subsection (a) could reasonably be read not to address that concern, but instead to restrict non-compete type provisions that have been used in some P3 arrangements (for example, a provision preventing a public body from opening a roadway parallel to an existing). While this was not the intention of the language currently in the last sentence of .510(a), a clarification on this point is appropriate and will be added to the next draft. The Current language will be edited two more clearly reflect its intent.

Other jurisdictions have found it useful to solicit a "registration of interest" prior to the RFQ. A provision will be added to allow (but not required) this preliminary step in the procurement process.

The legislation should be clarified with respect to the Public Records Act, similar to RCW 39.10.470.

The legislation should address the extent to which the public body acquires any intellectual property or related rights or interests in designs or concepts submitted by unsuccessful proposers, particularly where an honorarium is paid. The public body should be permitted to decide what rights it will acquire, but required to announce its intentions.

Section .520

Subsection (c)(5): User Fees are only one form of potential compensation. This provision and others addressing payment should more broadly address a variety of payment mechanisms, including user fees, availability payments, safety-based compensation, grants, credits, etc.

Subsection (c)(7): This provision should address not only the grounds for termination, but also the applicable procedure and compensation, if any.

Section .550

Committee members will solicit input from municipal finance experts regarding this section.

Section .560

This section should contemplate funding from other entities within the state, or elsewhere.

Section .570

The committee discussed whether performance bonds should be required, or only permissive. The consensus was that the public-private agreement itself, and often the financing structure, will often provide sufficient incentives and safeguards of adequate performance. Thus, the public body should be permitted to decide whether to require a performance bond on any given P3 project.

Payment bonds are required.

Section .610

The committee discussed several potential structures to obtain appropriate oversight over proposed P3 projects. The consensus was that the legislation should utilize the existing Project Review Committee (PRC), with a review and approval process tailored for evaluation of P3 projects, including appropriate expertise within the applicable review panel (technical, financial, legal, etc.).

A revised draft will be prepared based on these points and circulated to the P3 subcommittee email list.