CAPITAL PROJECTS ADVISORY REVIEW BOARD
FOR THE STATE OF WASHINGTON

COLUMBIA RIVER BIOREGIONAL EDUCATION PROJECT,

Petitioner,

v.

STATE OF WASHINGTON CAPITAL PROJECTS ADVISORY REVIEW BOARD; PROJECT REVIEW BOARD COMMITTEE, and OKANOGAN COUNTY PUD NO. 1

Respondents.

RESPONDENT OKANOGAN PUD'S REPLY TO COLUMBIANA'S OPENING BRIEF

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I. ARGUMENT

Columbiana's fails to justify reversal of the PRC's unanimous approval of the PUD's application to use the design-build contracting method. The Board should affirm.

A. Columbiana's arguments regarding PUD's experience and the fiscal benefit of design build were thoroughly addressed and properly rejected by the PRC.

1. PUD's skilled team has the experience required by RCW 39.10.280.

Contrary to Columbiana's contentions, multiple members of the PUD's team—Robynne Parkinson, John Christensen, and Thomas McCreedy—have substantial design-build experience and will provide appropriate support to the PUD.

Ms. Parkinson has significant design-build experience, and has thoroughly educated PUD on the design-build process. R. at 834. Ms. Parkinson is not only a lawyer, but also a trainer for the Design Build Institute of America, who is well-qualified to prepare owners for design-build. R. at 834. While PUD's application indicates Ms. Parkinson will be spending ten percent of her time on the project, it is entirely appropriate that Ms. Parkinson's efforts are focused on the preliminary stages of the project, when her expertise in educating the owner, preparing procurement documents, and facilitating negotiations can be put to use. R. at 832–33.

Columbiana also raises concerns about the time commitment and experience of Mr. Christensen and Mr. McCreedy. Both have significant design-build experience and will provide appropriate support to the PUD's team. Mr. Christensen's design-build experience includes "project delivery of hydropower projects that are similar to the Enloe Project." R. at 5. Mr. McCreedy's forty years of experience includes design-build projects and construction management of hydropower and major infrastructure projects. R. at 6. In addressing the PRC's questions about the extent of his involvement, Mr. Christensen stated:

> I am in there for half my time assisting with the management of the project. There are three other gentlemen, Tom McCreedy, who is an XMK guy and has been involved in about five Design-Build projects. Dan [Hertel], ex-Vice President of Barnard Construction from Montana has been involved in private Design-Build in Washington at Snoqualmie Falls, and Paul Carson, who is more of

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> an engineering type would be very involved in the engineering phase and less involved in the construction phase.

R. at 844. Columbiana argues Mr. Christensen does not have design-build experience from the past five years, but the statute does not require this, and as PRC Member Riley-Hall stated, that "doesn't mean his experience or knowledge of Design-Build went away." R. at 843.

While one member of the PUD's team has yet to be hired, the experience of the remaining team members is more than sufficient to establish the statutory requirements. The statute does not require every member of the team to have design-build experience: it provides that PRC must find that the "public body personnel or consultants are knowledgeable in the design-build process and are able to oversee and administer the contract." RCW 39.10.280(2)(d) (emphasis added). The extensive experience PUD's consultants fully satisfies this requirement.

2. PUD established the fiscal benefit of design-build.

Columbiana's arguments regarding substantial fiscal benefit again relate to the wisdom of the project as a whole. These arguments exceed the "narrow scope"[1] of the Board's authority.

Columbiana also argues "a traditional design-bid-build process allows for the establishment of a final price prior to the selection of the builder, which allows for increased cost certainty." Pet'r Br. at 8. Columbiana misunderstands the advantages of design-build. The design-build process allows the design-builder to submit a more reliable cost estimate based on their involvement in the design process and greater familiarity with site conditions. In comparison with design-bid-build, using progressive design-build will provide more cost certainty: PUD will know the remainder of the design and the construction costs after Phase 1. Had the PUD used the traditional process on a project this specialized and complex, the bidders would be less familiar with the project and the resulting contingencies built into those bids would be significant. *See Foster Const. C.A. & Williamson Bros. Co. v. United States*, 435 F.2d 873, 887 (Ct. Cl. 1970) (noting natural product of uncertainty and lack of information is for bidders to "include in their bids a contingency element to cover the risk."). Moreover, the risk of change

[1] Pet'r Br. at 1.

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orders (and the corresponding unanticipated costs) is significantly higher with design-bid-build.

B. Columbiana is not entitled to an adjudicative hearing under the APA.

1. Columbiana's request is contrary to the plain meaning and purpose of Chapter 39.10 RCW.

As the Board Chair recognized in its Preliminary Motions Ruling, "the statutory scheme for approval of alternative public works contracting methods is intended to be speedy, streamlined, and involve minimal delay." Prelim. Ruling at 5.[2] In spite of the manifest legislative intent to streamline the PRC proceedings, Columbiana asks for an undefined period for discovery, and a trial-like proceeding complete with witness testimony and cross examination. These procedures are contrary to the legislature's intent to provide a speedy proceeding. Setting a precedent for formal adjudications before the PRC will have a chilling effect, dissuading other agencies from pursuing alternative public works approval. The Board should reject this request.

2. Columbiana fails to demonstrate the APA applies.

Columbiana asserts the Board has authority to depart from the procedures in Chapter 39.10 RCW, but fails to demonstrate that the APA applies. Chapter 39.10 RCW provides procedures PRC and the Board are required to use, PUD Opposition to Appeal at 4-7, and the legislature expressly excluded contracting and procurement decisions from the definition of agency action. RCW 34.05.010(3). Columbiana fails to address this exclusion.

3. RCW 34.05.070 cannot be used to convert a public meeting under Chapter 39.10 RCW into an APA proceeding.

Columbiana relies on RCW 34.05.070 for its contention that the Board may require an APA adjudication. This statute does not apply.

RCW 34.05.070 cannot be used to convert a proceeding under Chapter 39.10 RCW into an APA proceeding; it may only be used to convert proceedings already within the scope of the APA to another form of APA proceeding. RCW 34.05.070 (conversion may be appropriate if "it

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[2] *See* RCW 39.10.280(5) (project deemed approved if PRC does not meet within 60 days); RCW 39.10.280(4) (PRC decision due within 10 business days of meeting).

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becomes apparent during the course of an adjudicative or rule-making proceeding undertaken pursuant to this chapter that another form of proceeding under this chapter is necessary.") (emphasis added). For example, the statute could apply to an agency seeking to convert an APA adjudication to an APA rulemaking. Uniform Law Commissioners' Model State Administrative Procedure Act § 1-107 (1981) (noting agency may prefer to proceed with rulemaking rather than adjudication if "called upon to explore a new area of law in a declaratory order proceeding").

Because Columbiana concedes that the PRC proceeding is not an adjudication, and because the PRC proceeding is not any other form of APA proceeding, the conversion statute does not apply. Pet'r Br. at 4 ("PRC's contemplated procedures are not adjudicative.").

4. Even if the APA applied, conversion is not permissible under the statute.

Under RCW 34.05.070(3), conversion "shall not be undertaken if the rights of any party will be substantially prejudiced." RCW 34.05.070(3). Columbiana completely ignores this provision. As argued in PUD's Response to Columbiana's Motion to Convert, PUD risks losing its FERC license, and the millions of dollars it has invested in license, the design-build process, and honorarium fees if the Board requires a third public hearing on PUD's design-build application. Even if the statute could apply here, RCW 34.05.070(3)'s prejudice provision requires the Board to reject Columbiana's request.

5. The PRC's procedures did not prejudice Columbiana or deny it due process.

In comparison to substantial prejudice that would result for the PUD, the PRC's use of Chapter 39.10 RCW's procedures caused no prejudice to Columbiana. Columbiana's passing contention that it was deprived of "due process" must be rejected. Pet'r Br. at 9. The Board has no authority to rule on this constitutional question. Further, Columbiana has no legally-protected property interest—a requirement for a procedural due process claim. "[T]he range of interests protected by procedural due process is not infinite," *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 570, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972), and mere "abstract need[s] or desire[s]" are not protected. *Id.* at 577. That Chapter 39.10 RCW permits public participation does not

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create a constitutionally-protected interest.

Even if Columbiana did have such an interest, the procedures of chapter 39.10 RCW are constitutionally adequate. Due process "does not require that the agency grant a formal hearing. All that is required before a deprivation of a protected interest is notice and opportunity for hearing *appropriate to the nature of the case.*" *Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 717 (9th Cir. 2011) (internal citation and quotation omitted) (emphasis in original). In *Pinnacle*, the National Institute for Justice revoked the certification on Pinnacle's body-armor product following review of Pinnacle's written submissions. The Ninth Circuit held that given the limited nature of the inquiry, the agency's "paper review" satisfied due process. *Id.* at 717. The court reasoned that the evidence required was "susceptible to written submissions," and there was "no evidence that live testimony would improve the quality of the NIJ's decision." *Id.* Here, as in *Pinnacle*, there is no evidence live testimony would have made any difference, and the information RCW 39.10.280 requires—like documentation of team member qualifications, project design and construction schedules—is susceptible to written submissions.

C. The Board lacks authority to rule on Columbiana's SEPA contention.

Columbiana argues "the PRC's decision to allow OPUD to utilize the design build process on this Project, which has obvious environmental modification plans" is an "action" triggering SEPA review. Pet'r Br. at 9. Once again, Columbiana conflates approval for the project as a whole with PRC's limited approval to use an alternative contracting method. The PRC's decision is not an "action" requiring review under SEPA because PRC's approval of a contracting method does not "directly modify the environment." WAC 197-11-704(2)(a)(i) ("project actions" are those that "directly modify the environment").

II. CONCLUSION

Two separate panels of the PRC have now *unanimously* approved PUD's application after thorough and careful review of public comment and the record. The Board should affirm.

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DATED this 2 day of June 2017.

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