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**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 COMMITTEE; and
OKANOGAN PUBLIC UTILITY DISTRICT,

Respondents.

RESPONDENT PROJECT REVIEW
COMMITTEE'S OPENING BRIEF

I. STATEMENT OF THE CASE

This is an appeal by Columbia River Bioregional Education Project (Petitioner) pursuant to RCW 39.10.290 of a decision by the Capital Projects Advisory Review Board's (CPARB) Project Review Committee (PRC).¹ The decision approved the Okanogan County Public Utility District No. 1's (OPUD) application to use the design-build construction method for a public works project on the powerhouse on Enloe Dam. At an open public meeting, an eight-member panel of the PRC reviewed OPUD's application, heard a presentation from OPUD, received and

¹ The PRC is a state committee charged with reviewing applications filed by public bodies for certification to use the design-build or general contractor/construction manager contracting procedure, or both in constructing public works. (RCW 39.10.270).

1 reviewed public comment, and voted to approve the application.² Following the meeting, the
2 PRC chair formally approved the application in writing.

3 Petitioner argues in its appeal that pursuant to RCW 34.05, the Washington
4 Administrative Procedure Act (APA), an adjudicative proceeding should have been used for the
5 approval process for the OPUD application and that the approval of the design-build construction
6 method should not have been approved for the project.

7 The PRC submits this brief in response to the procedural issues raised in the appeal. The
8 PRC does not address the argument on the merits regarding approval of the design-build
9 procedure.³

10 II. ARGUMENT

11 A. PRC Hearings Are Subject To the Open Public Meetings Act and Not the 12 Administrative Procedures Act

13 Petitioner argues that the hearing in this matter should have been held in accordance with
14 an adjudicative proceeding under the APA. An “adjudicative proceeding” means a proceeding
15 before an agency in which an opportunity for a contested hearing before that agency is required
16 by statute or constitutional right before or after the entry of an order by the agency.⁴ However,
17 it’s clear in RCW 39.10 that the Washington State Legislature preferred a specific review and
18 approval process for the certification of alternative contracting methods for public works and not
19 the APA procedures. While agencies are generally subject to the APA,⁵ a more specific statute,
20 RCW 39.10, was enacted more recently than the APA and governs the procedures of the PRC.
21 “[T]he latest enacted [statutory] provision prevails when it is more specific than its

22 ² Administrative Record 1-845.

23 ³ PRC’s role on appeal is limited. *See Kaiser Aluminum & Chem. Corp. v. Dep’t of Labor & Indus.*,
24 121 Wn.2d 776, 781, 854 P.2d 611, 614 (1993). However, courts recognize that where a quasi-judicial agency has
25 non-judicial authority to enforce or administer policy, it is allowed to appeal court decisions regarding the
26 implementation of this executive or legislative authority just as an ordinary enforcement administrative agency
would do. *Id.* at 782. The PRC is such an agency. The PRC has a legitimate interest “in preserving the integrity of
its decision-making process and challenges to its decision-making process.” *Kaiser Aluminum*, 121 Wn.2d at 782.

⁴ RCW 34.05.010(1)

⁵ RCW 34.05.030(5)

1 predecessor.”” *State v. J.P.*, 149 Wn.2d 444, 452, 69 P.3d 318, 321 (2003).⁶ The Legislature
2 enacted the APA in 1988.⁷ It created CPARB and alternative contracting methods in 1994.⁸ It
3 created the PRC and its specific meeting procedures, specifically including compliance with the
4 Open Public Meetings Act (OPMA)⁹ in 2007.¹⁰ Therefore, if the Legislature wanted the general
5 APA procedures to apply it would have applied that set of procedures instead of the ones it
6 crafted specifically for the PRC,¹¹ which are as follows:

7
8 (1) The committee shall hold regular public meetings to carry out its duties
as described in RCW 39.10.250. Committee meetings are subject to chapter 42.30
RCW.

9
10 (2) The committee shall publish notice of its public meetings at least twenty
days before the meeting in a legal newspaper circulated in the area where the
11 public body seeking certification is located, or where each of the proposed
projects under consideration will be constructed. All meeting notices must be
12 posted on the committee’s web site.

13 (3) The meeting notice must identify the public body that is seeking
certification or project approval, and where applicable, a description of projects
14 to be considered at the meeting. The notice must indicate when, where, and how
the public may present comments regarding the committee's certification of a
15 public body or approval of a project. Information submitted by a public body to
be reviewed at the meeting shall be available on the committee's web site at the
16 time the notice is published.

17 (4) The committee must allow for public comment on the appropriateness of
certification of a public body or on the appropriateness of the use of the proposed
18 contracting procedure and the qualifications of a public body to use the
contracting procedure. The committee shall receive and record both written and
19 oral comments at the public meeting.

20 Moreover, some of the specific PRC procedures are inconsistent with the requirements
21 of an adjudicative proceeding. For instance, the APA notice requirements in RCW 39.10, *supra*

22
23 ⁶ Citing to *State v. Landrum*, 66 Wn. App. 791, 796–97, 832 P.2d 1359 (1992). *See also*, *State ex rel.*
Graham v. San Juan Cty., 102 Wn.2d 311, 320, 686 P.2d 1073 (1984); *Citizens for Clean Air v. City of Spokane*,
114 Wn.2d 20, 37, 785 P.2d 447 (1990); and *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 210–11, 118 P.3d 311, 318
24 (2005).

⁷ RCW 34.05.001 [Session Law - 1988 c 288 § 18]

⁸ RCW 39.10.200 [recodified from RCW 39.10.010 - Session Law 1994 c 132 § 1]

⁹ RCW 42.30

¹⁰ RCW 39.10.240 [Session Law 2007 c 494 § 104]

¹¹ RCW 39.10.260

1 are very different from the APA notice requirements:

2 (1) The agency . . . shall set the time and place of the hearing and give not
3 less than seven days advance written notice to all parties and to all persons who
4 have filed written petitions to intervene in the matter.

5 (2) The notice shall include:

6 (a) Unless otherwise ordered by the presiding officer, the names
7 and mailing addresses of all parties to whom notice is being given and, if
8 known, the names and addresses of their representatives;

9 (b) If the agency intends to appear, the mailing address and
10 telephone number of the office designated to represent the agency in the
11 proceeding;

12 (c) The official file or other reference number and the name of the
13 proceeding;

14 (d) The name, official title, mailing address, and telephone number
15 of the presiding officer, if known;

16 (e) A statement of the time, place and nature of the proceeding;

17 (f) A statement of the legal authority and jurisdiction under which
18 the hearing is to be held;

19 (g) A reference to the particular sections of the statutes and rules
20 involved;

21 (h) A short and plain statement of the matters asserted by the
22 agency; and

23 (i) A statement that a party who fails to attend or participate in a
24 hearing or other stage of an adjudicative proceeding may be held in
25 default in accordance with this chapter.

26 (3) If the agency is unable to state the matters required by
subsection (2)(h) of this section at the time the notice is served, the initial notice
may be limited to a statement of the issues involved. If the proceeding is initiated
by a person other than the agency, the initial notice may be limited to the inclusion
of a copy of the initiating document. Thereafter, upon request, a more definite
and detailed statement shall be furnished.

(4) The notice may include any other matters considered desirable by the
agency.

(5) The notice may be served on a party via electronic distribution, with a
party's agreement.

Adjudicative proceedings also don't allow for public comment,¹² as required by the PRC
procedures.¹³ Finally, RCW 39.10 does not require or appear to intend a contested procedure,
instead it requires a public body to present its application and request to use alternative

¹² RCW 34.05.449(5)

¹³ RCW 39.10.260(4)

1 contracting procedures in an open public meeting, where the public is allowed to provide
2 comment.

3 Therefore, it is clear that the Legislature did not intend for adjudicative proceedings to
4 be used in the PRC review process, but instead the less formal presentation process that allows
5 for public comment.

6 **B. The APA Does Not Apply To the PRC Review Process Because Its Decision Is Not**
7 **an “Agency Decision”**

8 The APA does not apply to an agency decision regarding contracting or procurement of
9 public works. Under the APA, “agency” means “any state board, commission, department,
10 institution of higher education, or officer, authorized by law to make rules or to conduct
11 adjudicative proceedings”¹⁴ “Agency action” means “licensing, the implementation or
12 enforcement of a statute, the adoption or application of an agency rule or order, the imposition
13 of sanctions, or the granting or withholding of benefits.”¹⁵ “Agency action does not include an
14 agency decision regarding (a) contracting or procurement of goods, services, public works, . . .
15 as well as all activities necessarily related to those functions”

16 The approval and certification of an alternative construction method, like design-build,
17 is approval for a procurement process that affects decision making and control over a public
18 works project and is specifically excluded as an “agency decision” subject to the APA.

19 **C. Petitioner Is Not Entitled To an Adjudicative Procedure Upon Request**

20 Petitioner argues in its notice of appeal that, even if the PRC is not required to always
21 follow the APA in its hearings, it is entitled to an adjudicative procedure upon request pursuant
22 to RCW 34.05.413, which states:

23 (1) Within the scope of its authority, an agency may commence an
24 adjudicative proceeding at any time with respect to a matter within the agency's
jurisdiction.

25 _____
26 ¹⁴ RCW 34.05.010(2)

¹⁵ RCW 34.05.010(3)

1 (2) When required by law or constitutional right, and upon the timely
2 application of any person, an agency shall commence an adjudicative proceeding.

3

4 (4) If an agency is required to hold an adjudicative proceeding, an
5 application for an agency to enter an order includes an application for the agency
6 to conduct appropriate adjudicative proceedings, whether or not the applicant
7 expressly requests those proceedings.

8 (Emphasis added).

9 Petitioner has not argued, and the PRC does not agree, that there is a constitutional right
10 to an adjudicative proceeding. Further, since the agency is not required by law, as argued above,
11 or constitutional right to hold an adjudicative proceeding as demonstrated in subsection II. B
12 above, RCW 34.05.413 is not applicable.

13 III. CONCLUSION

14 Since the PRC is subject to the specific procedures set out by the Legislature in
15 RCW 39.10 and because agency decisions related to the procurement of public works projects
16 are not subject to the APA, the APA procedures do not apply to the PRC hearing to consider the
17 OPUD's application to utilize the design-build alternative method. Therefore, Petitioner's appeal
18 seeking remand to the PRC should be denied.

19 DATED this 30th day of May, 2017.

20 ROBERT W. FERGUSON
21 Attorney General

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23 _____
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25 Assistant Attorney General
26 Attorneys for Respondent
Washington State Capital Project Advisory
Review Board's Project Review Committee