



**STATE OF WASHINGTON**  
**Capital Projects Advisory Review Board**

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Alyssa Englebrecht  
Smith & Lowney, PLLC  
2317 East John Street  
Seattle, WA 98112  
[alyssae@igc.org](mailto:alyssae@igc.org)

Colm Nelson  
Foster Pepper, PLLC  
1111 Third Avenue, Suite 3000  
Seattle, WA 98101  
[colm.nelson@foster.com](mailto:colm.nelson@foster.com)

Dawn Cortez, AAG  
Washington Office of the Attorney General  
P.O. Box 40113  
Olympia, WA 98504-0113  
[DawnC@atg.wa.gov](mailto:DawnC@atg.wa.gov)

**RE: FINAL WRITTEN DETERMINATION – ENLOE DAM HYDROELECTRIC PROJECT APPEAL**

This matter is an appeal by the Columbia River Bioregional Education Project (Columbiana) from the decision by the Project Review Committee (PRC) approving the use of the design-build alternative public works contracting method for the Okanogan Public Utility District No. 1 (OPUD) Enloe Dam Hydroelectric Project. On June 6, 2017, the Capitol Projects Advisory Review Board (CPARB) convened a special meeting under the Open Public Meetings Act to consider Columbiana's appeal. At the conclusion of the special meeting, CPARB unanimously affirmed the PRC. This letter is CPARB's "written determination" under RCW 39.10.290, and is intended to summarize and supplement the reasons for the board's decision expressed during the special meeting.

**A. BACKGROUND**

This matter has, for a CPARB appeal, an unusually complicated procedural history which was discussed in detail in the Chair's Preliminary Ruling issued on May 30, 2017 and will not be repeated here except as necessary to explain our decision.

**1. Overview of the Design-Build Contracting Approval Process**

The Capitol Projects Review Board and the Project Review Committee are bodies created by the Alternative Public Works Act. "Alternative public works contracting procedure" means the design-build, general contractor/construction manager, and job order contracting procedures. RCW 39.10.010(1). "Design-build procedure", the contracting method at issue in this case, "means a contract between a public body and another party in which the party agrees to both design and build of the facility, portion of the facility, or other item specified in the contract". RCW 39.10.010(5). The requirements for the design-build contracting method are set out in RCW 39.10.300 - .330.

Design-build is a project delivery system used in the construction industry in which the design and construction services are contracted by a single entity known as the Design-Builder (or Contractor). Design-build is used to minimize risks for the project owner and reduce the delivery schedule by overlapping the design phase and construction phase of a project. In contrast, Design-Bid-Build is a project delivery method in which the agency or owner contracts with separate entities for the design and construction of a project. Design-Bid-Build is the traditional method for project delivery and consists of three main phases: a) The Design Phase; b) The Bidding Phase; and c) The Construction Phase. *See <http://www.des.wa.gov/services/facilities-leasing/public-works-design-construction/state-agencies-and-educational-facilities/project-delivery-systems>.*

CPARB “is created in the Department of Enterprise Services to provide an evaluation of Public Capital Projects construction processes, including the impact of contracting methods on project outcomes, and to advise the Legislature on policies related to public works delivery methods”. RCW 39.10.220(1). Its duties primarily include review and recommendation of public works contracting policy to the Legislature. RCW 39.10.230. No direct statutory authority is given to either CPARB or the PRC to adopt rules, grant licenses, or to conduct adjudications.

CPARB is also directed to “establish a project review committee to review and approve public works projects using the design-build and general contractor/construction manager contracting procedures . . . and to certify public bodies” to use these procedures. RCW 39.10.240(1). CPARB must “appoint persons to the committee who are knowledgeable in the use of the design-build and general contractor/construction manager contracting procedures”. RCW 39.10.240(2). Appointments must represent a balance among the industries and public owners. The Chair of the committee, in consultation with the vice Chair, may appoint one or more panels of at least six committee members to carry out the duties of the committee. Each panel shall have balanced representation of the private and public sector representatives serving on the committee. RCW 39.10.240(3). The PRC is charged to “certify, or renew certification for, public bodies to use design-build or general contractor/construction manager contracting procedures, or both” and “review and approve the use of the design-build or general contractor/construction manager contracting procedures on a project by project basis for public bodies that are not certified under RCW 39.10.270”. RCW 39.10.250.

The Legislature has adopted very specific procedures for the PRC to follow when carrying out these duties. “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 [Open Public Meetings Act]”. RCW 39.10.260(1). The PRC “shall publish notice of its public meetings at least twenty days before the meeting in a legal newspaper circulated in the area” where the public body or the project is located, and post the notice on its website. RCW 39.10.260(2). The PRC “must allow for public comment on the appropriateness of certification of a public body or on the appropriateness of the use of the proposed contracting procedure and the qualifications of a public body to use the contracting procedure. The committee shall receive and record both written and oral comments at the public meeting”. RCW 39.10.260(4). When approving design-build

contracting methods for a project, the PRC “shall, if practicable, make its determination at the public meeting during which a submittal is reviewed. Public comments must be considered before a determination is made”. RCW 39.10.280(3).

In RCW 39.10.280(2), the Legislature lays out a specific list of criteria that the PRC must determine before approving a project for the design-build contracting method.

The statutory scheme for approval of alternative public works contracting methods is intended to be speedy, streamlined, and involve minimal delay. Once an application is filed, the PRC must meet to consider it within sixty days or it is deemed approved. The PRC “shall, if practicable, make its determination at the public meeting during which a submittal is reviewed” and a written determination must be provided “within ten business days”. RCW 39.10.280(3), (4), (5). An appeal from a PRC final determination must be filed within seven days and the appeal resolved within forty-five days. RCW 39.10.290.

## **2. OPUD Request and PRC Approval**

On October 31, 2016, (OPUD) submitted an application under RCW 39.10.280, for approval of the use of the design-build alternative public works contracting procedure for the proposed Enloe Dam Hydroelectric Project. The project was originally approved by a panel of the PRC at a public meeting on December 1, 2016, but approval was withdrawn after concerns over the adequacy of the required public notice. A second panel of the PRC met on April 27, 2017 and approved OPUD’s use of the design-build contracting method for the Project and confirmed this action in a letter dated May 3, 2017.

## **3. Columbiana’s Appeal**

On May 3, 2017, Columbiana appealed. Columbiana states that “this appeal constitutes an application for an adjudicative proceeding pursuant to RCW 34.05.413(2) and includes a request for an adjudicative hearing”. In addition, the appeal alleges that OPUD has not demonstrated that it has the necessary experience or a qualified team and will not provide a substantial fiscal benefit as required by RCW 39.10.280, and that the PRC’s approval was not supported by an adequate environmental review under the State Environmental Procedures Act (SEPA), RCW 43.21C. Columbiana seeks to have CPARB reverse the design-build approval for the Enloe Dam Hydroelectric Project and remand to the PRC to re-open consideration of OPUD’s application as an adjudicative process, and to suspend the PRC’s approval, pending the outcome of the Columbiana appeal to CPARB.

## **4. Proceedings Before CPARB**

As described in more detail in the Chair’s Preliminary Ruling on Motions, Columbiana requested preliminary rulings from the CPARB Chair on two preliminary motions: (1) Petitioner’s [Columbiana] Motion to Convert Proceedings, filed April 25, 2017; and (2) Columbiana’s Request for a Preliminary Stay of the PRC’s Approval. The CPARB Chair

declined to grant either motion for the reasons set forth in the May 30, 2017 Preliminary Ruling.

On June 6, 2017, CPARB convened a special meeting under the Open Public Meetings Act to consider Columbiana's appeal. Appearing at the special meeting were the parties to the appeal: Appellant, Columbia River Bioregional Education Project (Columbiana), represented by attorney Alyssa Englebrecht, of Smith & Lowney, PLLC (who appeared by telephone); Respondent, Okanogan Public Utility District No. 1 (OPUD), represented by attorney Colm Nelson, of Foster Pepper, PLLC; and Robynne Parkinson, of Thaxton Parkinson, PLLC; and the Respondent, Project Review Committee (PRC), represented by attorney Dawn Cortez, Assistant Attorney General. CPARB was assisted by its attorney, Mark S. Lyon, Assistant Attorney General.

In addition to the oral presentations of the parties, CPARB considered the record made before the PRC supporting its April 27, 2017 decision, May 3, 2017 letter, the motions and briefs of the parties, the notices and preliminary rulings of the Chair, and a handout submitted without objection by OPUD summarizing the various administrative and court litigation challenging the project and its permits.

At the conclusion of the special meeting, CPARB unanimously approved the preliminary actions of the Chair and affirmed the approval by the PRC.

## **B. DECISIONS OF THE BOARD**

This appeal is brought under RCW 39.10.290 which provides that "an interested party" may "appeal" a final determination of the PRC and "the board shall resolve an appeal within forty-five days . . . and shall send a written determination of its decision to the party making the appeal and to the appropriate public body, as applicable". Columbiana asserts that it is an "interested party" because it has the right to submit public comment before the PRC. No other party has challenged this assertion.

This letter is CPARB's "written determination". Under the CPARB Bylaws adopted November 15, 2015, the CPARB Chair "will be the primary spokesperson for the board" and under the CPARB Appeals Policy "the Chair shall sign the written determination on behalf of the board". CPARB Bylaws, Article II, § 2; Interim Policy on Appeals under RCW 39.10.290 adopted May 11, 2017.

In resolving this appeal, the Board considered the issues raised by Columbiana through three separate motions.

### **1. Motion to Convert or Remand to PRC to Conduct an Adjudicatory Proceeding**

On April 25, 2017 – two days before the second PRC hearing – Columbiana filed their Petitioner's Motion to Convert Proceedings, requesting CPARB and the PRC "to convert the upcoming April 27, 2017 meeting of the [PRC] . . . to an adjudicative proceeding pursuant to RCW 34.05.070". The motion argues that "an adjudicative proceeding is

necessary, in the public interest, and is the more appropriate procedure to resolve the issues affecting the participants in this Project” and “to ensure that the PRC has all the relevant information available before making its decision on this highly controversial Project”. Specifically, Columbiana seeks the right to call witnesses under oath, conduct cross examination of witnesses, submit briefs, and conduct “discovery” on various issues. Also, Columbiana’s May 3, 2017 appeal states that “this appeal constitutes an application for an adjudicative proceeding pursuant to RCW 34.05.413(2) and includes a request for an adjudicative hearing”. Columbiana requests CPARB to remand to the PRC to re-open consideration of OPUD’s application as an adjudicative process.

In his Preliminary Ruling, the Chair declined to grant an adjudicatory hearing on a preliminary basis. CPARB affirms this preliminary ruling and denies the request for remand for an adjudicatory hearing.

Columbiana “does not argue that *every* meeting of the PRC in which it is considering a design-build application should be conducted as an adjudicative proceeding, or even that one was *required* in this case”. (Emphasis in original.) Pet. Opening Br. at 3-4. Rather, Columbiana argues that an adjudicatory proceeding is necessary in this case in order to create a proper record, accommodate the public interest in the project, and is more appropriate because of the “controversial” nature of the project. Columbiana cites to the Washington Administrative Procedures Act (WAPA), and specifically RCW 34.05.070 (conversion of proceedings) and RCW 34.05.413(2) (“When required by law or constitutional right, and upon the timely application of any person, an agency shall commence an adjudicative hearing.”) for CPARB’s authority to convert and remand. Columbiana argues that both CPARB and the PRC meet the definition of “agency” and therefore the WAPA must at least in part apply to the approval of alternative public works contracting procedures under RCW 39.10.280. Pet. Resp. Br. at 1-2.

These legal arguments under the WAPA and the United States Constitution are matters for courts and are beyond the expertise of either CPARB or the PRC. Nonetheless, CPARB has considered these arguments on their merits and rejects them.

**a. Does the WAPA apply to project approval for design-build contracting?**

First, while neither CPARB or the PRC is expressly exempt from the WAPA (see RCW 34.05.030), CPARB is not convinced that the WAPA controls here. Neither CPARB nor the PRC are affirmatively granted either authority for rulemaking or to conduct adjudicatory proceedings. The nature and purpose of project approval is to provide policy review and oversight mechanisms providing for an open and fair contracting method based upon objective and equitable criteria. RCW 39.10.200. Thus, it is doubtful that either body meets the definition of an “agency” subject to the WAPA. RCW 34.05.010(2).

But even if the WAPA does generally apply to CPARB, the Board does not believe that it applies to the subject matter of alternative public works contracting method approval; an exception exists where there is legislation that expressly directs a

different procedure. RCW 34.05.020 (“Every agency is granted all authority necessary to comply with the requirements of this chapter through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this chapter or its applicability to any agency *except to the extent that such legislation shall do so expressly*”). (Emphasis added). The alternative public works statutes are such special subsequent legislation. Moreover, an “adjudicative proceeding” means “a proceeding before an agency in which an opportunity for hearing before that agency is required by statute or constitutional right,” including licensing and ratemaking proceedings or where “the granting of an application is contested by a person having standing to contest under the law”. RCW 34.05.010(1). As noted in an influential article by Professor William R. Anderson, one of the drafters of the current law, the WAPA does not itself require adjudicatory hearings with the exception of the identified ratemaking and licensing proceedings. William R. Anderson, *The 1988 Washington Administrative Procedures Act – An Introduction*, 64 Wash. L. Rev. 781, 789 (1989). Beyond those proceedings, whether a hearing is required will be determined either by the Legislature in authorizing the action, or by determination that the constitution requires a hearing.

Here, the procedures for approving the design-build contracting method for a project are set out in detail in RCW 39.10.260 and RCW 39.10.280. The statute provides that the PRC is to conduct a public meeting, and vote at the meeting after public comment. This procedure, expressly provided for by the Legislature, is not an adjudication, and Columbian admits as much. Pet. Opening Br. at 4 (“Columbian acknowledges that the PRC’s contemplated procedures are not adjudicative . . .”). At the special meeting, Columbian argued that PRC approval is instead a rulemaking procedure, but this is also incorrect. See RCW 34.05.010(16) (Rule means an agency order, directive, or regulation of *general applicability*).

Also, under the WAPA an “adjudicatory proceeding” or “rulemaking” proceeding generally results in an “agency action” which is then subject to statutory judicial review. RCW 34.05.010(1), (3), (18). However, not all agency decisions constitute an “agency action”. “Agency action does not include an agency decision regarding (a) contracting or procurement of goods, services, public works, . . . as well as all activities necessarily related to those functions, . . .”. RCW 34.05.010(3). The approval of alternative public works contracting methods is an activity necessarily related to the contracting for public works, and is the type of decision generally exempt from the requirements of the WAPA.

**b. Does Due Process under the 14<sup>TH</sup> Amendment apply to design-build contracting approval?**

Perhaps for this reason, Columbian makes a belated argument that it has a constitutional property interest which requires adjudication. Columbian argues that the statutory approval procedures set out in Chapter 39.10 create a constitutionally protected “property interest” on behalf of Columbian which cannot be infringed without “Due Process” (i.e., an adjudicatory proceeding) under the 14<sup>TH</sup> Amendment

to the United States Constitution. Pet. Resp. Br. at 2-3. This constitutional argument, asserted in Columbiana's final response brief, is confusing because it conflicts with its position that an adjudicatory hearing is discretionary. Columbiana concedes in fact, that an adjudication is not required. Pet. Opening Br., at 3-4.

The declaration of constitutional rights is beyond the authority of CPARB or the PRC. However, CPARB is not persuaded by the authorities cited that the requirements of RCW 39.10 create the kind of rights in favor of Columbiana that are subject to constitutional protection and thus require an adjudicatory hearing. "Only if the governing statute compels a result upon compliance with certain criteria, none of which involve the exercise of discretion by the reviewing body, does it create a constitutionally protected property interest." *Shanks v. Dressel*, 540 F.3d 1082, 1091 (9th Cir. 2008). Review of an application to use design-build contracting involves considerable discretion and professional judgment.

**c. Is conversion to an adjudication appropriate?**

Columbiana's primary argument is that CPARB should "convert" the approval of the Enloe Dam Hydroelectric Project contracting process to an adjudicatory hearing under the WAPA, claiming that conversion is authorized by RCW 34.05.070. But as already noted, design-build contracting approval by the PRC is neither an adjudicatory nor a rulemaking proceeding under the WAPA. Columbiana concedes as much: "In fact, Columbiana acknowledges that the PRC's contemplated procedures are not adjudicative, which is why CPARB needed to *convert* these procedures in this case . . .". (emphasis in original) Pet. Opening Br. at 4. If WAPA does not apply, then RCW 34.05.070 cannot authorize conversion.

Also, RCW 34.05.070(1) requires that conversion be within the power of the official. CPARB rejects the assertion that on appeal it has authority either to remand to the PRC or to direct that the PRC follow a different process than that directed by the Legislature. RCW 39.10.290 provides little detail as to how CPARB is to conduct an appeal, but plainly no such authority is expressly granted. CPARB interprets its proper role as approving or not approving an application after reviewing the PRC's actions to determine whether the statutory process was followed and the application and public record supports the statutory factors for design-build contracting. If CPARB finds a decision of the PRC falls short of these statutory requirements it will resolve the appeal by disapproving the application, and the public body is then free to submit a new application to the PRC.

Conversion "shall not be undertaken if the rights of any party will be substantially prejudiced". RCW 34.05.070(3). OPUD convincingly argues that with the imminent expiration of the Federal Energy Regulatory Commission ("FERC") permit, requiring an adjudicative proceeding will substantially prejudice the project. As OPUD notes in its brief in opposition to the motion to convert, it must start work on the project by July 9, 2017 or its FERC permit to proceed with the project will expire. CPARB rejects Columbiana's claim that this is a problem of OPUD's own making. The

statutory scheme for approval of alternative public works contracting methods is intended to be speedy, streamlined, and involve minimal delay. In this case, OPUD's application was originally filed on October 31, 2016, and more than seven months have now passed without a complete resolution. Further delay will prejudice OPUD. Also, CPARB shares the concern expressed by the Chair in his preliminary ruling that the filing of this motion to convert only two days before the second PRC public meeting and six months after the original application is untimely.

Finally, any authority that CPARB may have to convert to an adjudicatory proceeding, under the WAPA or otherwise, is addressed to the sound discretion of the Board "and not subject to judicial review". RCW 39.10.070(1). CPARB is not convinced that converting this matter to an adjudicatory proceeding will materially improve the record. While Columbiana desires to cross examine witnesses under oath and conduct "discovery", it has not identified specific facts or evidence missing from the record necessary for the resolution of this case.

## **2. Motion for a Preliminary Stay of the PRC Approval Pending Appeal to CPARB**

In a second motion, CPARB affirmed the Chair's preliminary ruling denying the motion to stay the PRC approval pending resolution of this appeal. In making his preliminary ruling, the Chair proceeded on the assumption, without deciding, that he had authority to make such a preliminary ruling. While affirming the reasoning of the Chair that a stay is not appropriate here, the Board further decides that nothing in Chapter 39.10 RCW expressly grants CPARB such power. Given the short time frame for resolving an appeal, the Board struggles to see any value to a stay. Once a public body has an approval from the PRC, it may proceed with its design-build contracting activities, with the understanding that its actions (and ultimately its authority to execute and be bound by a design-build contract) are contingent upon the results of a timely appeal to CPARB. The Board concludes that the Chair has no authority to grant preliminary stays and that CPARB itself likely lacks such authority. Certainly, a preliminary stay was not appropriate in this case.

## **3. Motion to Uphold the PRC Decision Approving the Design-Build Alternative Public Works Contracting Method for the OPUD Enloe Dam Hydroelectric Project**

Finally, CPARB affirmed the decision of the PRC approving OPUD's application to use the design-build alternative public works contracting method on the Enloe Dam Hydroelectric Project. CPARB considered and rejected Columbiana's arguments that, (a) the PRC failed to comply with mandatory requirements of the SEPA before it approved OPUD's design-build contracting approach, and (b) the facts, materials and public comments submitted to the PRC fail to establish the required statutory criteria for approval under RCW 39.10.280(2).

At the outset, CPARB notes that the issue before the Board is a narrow one: Did the PRC err in approving the use of the design-build contracting method under the statutory criteria? Columbiana agrees. ("Columbiana is fully aware and understanding of the



narrow scope of the issue for the PRC: whether design-build is appropriate in this case.”) Pet. Opening Br. at 1. The merits of the project and the adequacy of environmental review in other proceedings are not relevant. The outcome of an approval is that OPUD can use design-build contracting, as opposed to more traditional public works methods (e.g., design/bid/build). Approval does not determine whether a project may move forward; it simply determines how the contractors to perform the work will be selected and the nature of the contractual commitments that will be entered into to perform the work.

**a. Application of SEPA to approval of design-build contracting**

SEPA is a comprehensive environmental regulation of government agencies “in planning and in decision making which may have an impact on the environment”. RCW 43.21C.030(a). Both Columbiana and OPUD cite to the administrative rules of the Department of Ecology, which further define when the act applies. Pet. Opening Br. at 8-9; OPUD Resp. Br. at 10-11; Pet. Resp. Br. at 4. Specifically, WAC 197-11-704 provides in relevant part:

(1) Actions fall within one of two categories:

(a) **Project actions.** A project action involves a decision on a specific project, such as a construction or management activity located in a defined geographic area. Projects include and are limited to agency decisions to:

(i) License, fund, or undertake any activity that will directly modify the environment, whether the activity will be conducted by the agency, an applicant, or under contract. . .

(2) Actions do not include the activities listed above when an agency is not involved. . . .

In addition, Ecology identifies various categorical exemptions, including “administrative, fiscal and personnel activities” involving the “procurement and distribution of general supplies, equipment and services authorized or necessitated by previously approved functions or programs”, and “procedural actions . . . relating solely to governmental procedures, and containing no substantive standards respecting use or modification of the environment”. WAC 197-11-800(14)(a) and (19)(a).

CPARB rejects application of SEPA to design-build contracting approval because the decision as to which public works contracting method to use is not one “that will directly modify the environment”. WAC 197-11-704(2)(a)(i). Rather, approval is an administrative function or governmental procedure relating to procurement for a separately approved project, and sets no substantive standards respecting use or modification of the environment. At the special meeting, Columbiana conceded that OPUD could proceed using a traditional design/bid/build approach. A decision to use traditional public works contracting is not subject to independent SEPA review. Approval of the design-build method does not have some separate environmental

impact. The planned environmental impact of the project will be the same regardless of the procurement method used to contract for the project construction.

Columbiana's real objection is with the adequacy of the extensive environmental review that has taken place in other proceedings involving the Enloe Hydroelectric Project. But the environmental impact of the underlying project was not before the PRC and is not before the CPARB. As described in OPUD's handout provided at the special meeting, and in the 2016 reported decision of the Court of Appeals in which Columbiana and OPUD were parties, the adequacy of the environmental review of the Project has been extensively litigated to a final outcome. *Ctr. for Env'tl. Law v. Dep't. of Ecology*, 196 Wn. App. 360 (Div. II, October 17, 2016).

In addition, while the Legislature provided a detailed list of criteria to consider in approving design-build contracting, compliance with SEPA is not one of them.

Because SEPA and the environmental impacts have already been litigated, SEPA compliance is not one of the statutory criteria for approval of design-build contracting, and the method of public works contracting does not directly affect the impact on the environment, we reject Columbiana's SEPA arguments.

**b. Statutory criteria for approval of design-build contracting**

The criteria that must be considered by the PRC in approving the use of design-build contracting is set out in RCW 39.10.280(2):

- (2) To approve a proposed project, the committee shall determine that:
- (a) The alternative contracting procedure will provide a *substantial fiscal benefit* or the use of *the traditional method* of awarding contracts in lump sum to the low responsive bidder *is not practical for meeting desired quality standards or delivery schedules*;
  - (b) The proposed project meets the requirements for using the alternative contracting procedure as described in RCW 39.10.300 or 39.10.340;
  - (c) *The public body has the necessary experience or qualified team to carry out the alternative contracting procedure* including, but not limited to: (i) Project delivery knowledge and experience; (ii) sufficient personnel with construction experience to administer the contract; (iii) a written management plan that shows clear and logical lines of authority; (iv) the necessary and appropriate funding and time to properly manage the job and complete the project; (v) continuity of project management team, *including personnel with experience managing projects of similar scope and size to the project being proposed*; and (vi) necessary and appropriate construction budget;
  - (d) *For design-build projects, public body personnel or consultants are knowledgeable in the design-build process and are able to oversee and administer the contract*; and
  - (e) The public body has resolved any audit findings related to previous public works projects in a manner satisfactory to the committee.

In applying these criteria to a particular project proposal, the PRC must use a certain level of professional judgment. There are multiple formats for implementing design-build projects. Each project has unique circumstances that should be considered in selecting a project delivery method, and a detailed evaluation of the project specific situation is required to determine the most effective method. Risks exist on every project regardless of delivery method, including the risk of the price changing.

One of CPARB's significant duties is to recruit and appoint a balanced mix of experts in alternative public works contracting from government and industry to serve on the PRC and its panels. RCW 39.10.240. It is CPARB's job to put the right people on the PRC and the Board spends considerable time and effort recruiting and vetting PRC members. When considering an appeal from a PRC decision, CPARB applies its own expertise in evaluating the proposal. But CPARB does not treat the conclusions of the experts on a PRC panel lightly. In this case, it is significant that the merits of design-build contracting for the project was approved twice by separate panels of the PRC.

Columbiana challenges on appeal OPUD's showing that its proposed use of design-build contracting meets the "substantial fiscal benefit" requirement in RCW 39.10.280(2)(a) and the necessary experience of its project team under RCW 39.10(2)(c) and (d). Columbiana does not provide specific facts or circumstances that show use of design-build contracting is wrong for the Enloe Dam Hydroelectric Project or that traditional contracting approaches are superior. As explained by counsel during the special meeting, Columbiana's argument is not that design-build contracting is inappropriate for the Project, but rather that OPUD failed to sufficiently demonstrate that it meets the statutory criteria before the PRC.

**i. Substantial fiscal benefit**

Columbiana argues that there cannot be a substantial fiscal benefit because it believes, based upon its own expert reports, that the Project itself is "fundamentally economically flawed". Pet. Opening Br. at 8. But the merits of re-electrifying the Enloe Dam is a matter for the public utility district, not the PRC or CPARB. The question before CPARB is, if the project is to proceed, should the design-build contracting method be approved?

The statute requires the PRC to determine that *design-build contracting* (not the Project itself) will either provide a "substantial fiscal benefit", or that the traditional contracting method "is not practical for meeting desired quality standards or delivery schedules". RCW 39.10.280(2)(a). In support of the use of design-build contracting, OPUD cites the complexity of the Enloe Dam Hydroelectric Project (specialized, multi-agency regulatory environment; remote location of construction site; management of operating and lifecycle costs), the need for a quick start on construction to comply with permitting, and the need for flexibility in design and construction. OPUD argues that the design build process will achieve a number of efficiencies over the traditional method, including early involvement of the contractor allowing design and construction to proceed simultaneously; a reduced number of contractual relationships, engineering

drawings and required technical specifications; reduced risks of costly change orders and disputes; and decreased staffing costs to the district. *See* OPUD Resp. Br. at 13-14. As did the PRC, CPARB finds this sufficient.

**ii. Project team experience**

Columbiana challenges the experience and make up of OPUD's proposed project team as lacking the experience required by RCW 39.10(2)(c) and (d). Specifically, Columbiana challenges OPUD's reliance on consultants to provide the required experience, the amount of time each consultant will devote to the project and the currency of the experience of two of the consultants, noting that they have not been involved in a similar project within the last five years. Pet. Opening Br. at 6.

CPARB does not agree that the showing of experience is inadequate. First, the statute contemplates that a design-build team may need to meet the required experience through consultants. RCW 39.10.280(2)(d). And Columbiana fails to provide concrete facts or reasons why the assigned consultant time to be devoted to the project is inappropriate or inadequate, or why their design-build experience is insufficient. At best, Columbiana questions what would happen if the consultants become unavailable. We agree with the PRC that this kind of speculation is not enough, and that OPUD has shown sufficient experience on its team to manage the project as a design-build contract.

**C. SUMMARY AND CONCLUSION**

In summary, CPARB concludes that: (1) conversion of this matter to an adjudicatory proceeding is neither authorized or required by the WAPA or other law; (2) to the extent CPARB has discretion to direct an adjudication, conversion to an adjudicatory proceeding is not warranted in this case and would work considerable prejudice on other parties; (3) CPARB does not have authority to stay the actions of the PRC pending appeal or to remand a matter to the PRC, and even if it does have such authority these actions are not appropriate in this case; (4) SEPA does not apply to the approval of an alternative public works contracting method for this Project; and (5) the record is sufficient to determine that the OPUD's Enloe Dam Hydroelectric Project is appropriate for use of a design-build contracting procedure and the facts demonstrate that OPUD's application for an alternative public works contracting method should be approved.

The decision of the PRC is affirmed and the appeal of Columbiana is denied.

Sincerely,



William J. Frare, Chair  
Capital Projects Advisory Review Board (CPARB)

cc: CPARB Members  
Mark Lyon, AAG