

RCW 39.10.500 – Definitions for RCW 39.10.510 through RCW 39.10.580

As used in RCW 39.10.510 through RCW 39.10.580, inclusive, the following words have the following meanings:

- a) “Affected Jurisdiction” means any Public Body within the State of Washington in which all or part of a project implemented by another Public Body under RCW 39.10.510 through RCW 39.10.580 is located or which is directly affected by a Public-Private Facility or Public-Private Agreement.
- b) “Capital Maintenance” means maintenance or rehabilitation performed either (i) to extend the useful life of a facility, system, or component, or (ii) to restore a Public-Private Facility to the condition required upon expiration of the Public-Private Agreement.
- c) “Construction” means the process of building, altering, retrofitting, improving or demolishing any Public-Private Facility, including any structure, building or other improvements of any kind to real property. “Construction” does not include the routine operation, routine repair, routine maintenance, or Capital Maintenance of any existing Public-Private Facility, including structures, buildings or real property.
- d) “Concessionaire” means any Private Entity that has entered into a Public-Private Agreement with a Public Body under RCW 39.10.510 through .580.
- e) “Design-Build-Finance-Operate-Maintain” means a project delivery method in which a Public Body enters into a single contract for design, construction, finance, maintenance and operation of a Public-Private Facility over a contractually defined term. No public funds shall be appropriated to pay for any part of the services provided by the Concessionaire during the Agreement period except as provided in the Request for Proposals and Public-Private Agreement.
- f) “Design-Build-Finance” means a project delivery method in which a Public Body enters into a single contract for design, construction, and full or partial private financing of a Public-Private Facility over a contractually defined term. No public funds shall be appropriated to pay for any part of the services provided by the Concessionaire during the Agreement period except as provided in the Request for Proposals and Public-Private Agreement.
- g) “Design-Build-Operate-Maintain” means a project delivery method in which a Public Body enters into a single contract for the design and construction, and the maintenance and/or operation of a Public-Private Facility over a contractually defined term, and for which public funds are appropriated.
- h) “Maintenance” means includes routine maintenance, routine repair, rehabilitation, Capital Maintenance, maintenance replacement, and any other categories of physical maintenance or upkeep of a Public-Private Facility that may be designated by the Public Body.
- i) “Offeror” means a Private Entity who submits a statement or qualifications or a proposal in response to a Request for Qualifications or Request for Proposals for a Public-Private Agreement.
- j) “Operate” means any action other than Maintenance to operate or facilitate the use of a Public-Private Facility for its intended purpose.

- k) “Private Entity” means a person, corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public benefit corporation, non-profit entity or other business entity.
- l) “Public Body” has the meaning set forth in RCW 39.10.210, and for purposes of RCW 39.10.510 through .580 specifically includes the State of Washington and the Washington State Department of Transportation. In the event of conflict with the provisions of RCW Ch. 47.29, the provisions of RCW 39.10.500 through .580 shall control.
- m) “Public-Private Agreement Public-Private Agreement” means a contract between a Public Body and a Private Entity that relates to the development, financing, Maintenance and/or Operation of a Public-Private Facility. The Public-Private Agreement Public-Private Agreement may implement a Design-Build-Operate-Maintain, Design-Build-Finance-Operate-Maintain, Design-Build-Finance, or other project delivery method.
- n) “Public-Private Facility” means a new or existing property, facility, or improvement that meets a public purpose, is developed for a Public Body, and is subject to a Public-Private Agreement Public-Private Agreement, including but not limited to civic or education facilities, roads, bridges, public transit systems, ferry facilities, port facilities, airports, intermodal systems, other transportation facilities, cultural or recreational facilities, medical facilities, utility facilities, and telecommunications facilities.
- o) “Request for Proposals” means all documents, whether attached to or incorporated by reference, utilized for soliciting proposals for a Public-Private Facility under RCW 39.10.510 through .580.
- p) “Request for Qualifications” means a solicitation issued by a Public Body under RCW 39.10.510(d)(i).
- q) “Responsible Offeror” means a Private Entity meeting all criteria stated in RCW 39.04.350, has the capability in all respects to fully perform the requirements of the Public-Private Agreement, and the integrity and reliability to assure good faith performance.
- r) “Responsive Offeror” means a Private Entity who has submitted a statement of qualifications or a proposal which conforms in all material respects to the applicable Request for Qualifications or Request for Proposals.
- s) “User Fees” means any rates, tolls, fares, fees, or other charges imposed for use of all or part of a Public-Private Facility.

RCW 39.10.510

- (a) Notwithstanding any provision of law to the contrary, a Public Body may, subject to the requirements of RCW 39.60.500 through 39.10.580, issue a Request for Qualifications or Request for Proposals, and enter into Public-Private Agreements with that Responsible and Responsive Offeror who submits the proposal receiving the highest evaluation score using the procurement method described in this section with regard to the development, financing, design, Construction, lease, Operation, and/or Maintenance of a Public-Private Facility; provided, however, that such proposal shall be in full compliance with all applicable requirements of federal, state and local law, including RCW Chapters 39.08, 39.12, 39.19. A Public-Private Agreement procured in compliance with RCW 39.10.500 through .580 shall not be

subject to the competitive bid requirements set forth in RCW Chapter 39.04, and shall not be subject to the requirements, restrictions, or limits in this Chapter regarding design-build, general contractor/construction manager, or job order contract procedures.

- (b) No provision of RCW 39.10.500 through .580 applies unless the Public Body expressly elects to procure the project as a Public-Private Agreement, and nothing in RCW 39.10.500 through .580 limits a Public Body's ability to procure, execute, or administer any lease or other form of contract to improve public property or operate a public facility under existing law.
- (c) In order to use the alternative selection process provided in RCW 39.10.500 through .580, the public body must, prior to applying for approval pursuant to RCW 39.10.580, determine that it is in the best interest of the public. In making this determination the public body must:
 - i. Publish a notice of intent to use this alternative selection process in a legal newspaper published in or as near as possible to that part of the county where the public work will be constructed. Notice must be published at least fourteen calendar days before conducting a public hearing. The notice must include the date, time, and location of the hearing; a statement justifying the basis for the alternative selection process; how interested parties may, prior to the hearing, obtain additional information;
 - ii. Conduct a hearing and provide an opportunity for any interested party to submit written and verbal comments regarding the justification for using this selection process;
 - iii. After the public hearing, consider the written and verbal comments received and determine if using this alternative selection process is in the best interests of the public; and
 - iv. Issue a written final determination to all interested parties. All protests of the decision to use the alternative selection process must be in writing and submitted to the public body within seven calendar days of the final determination. Any modifications to the criteria, weights, and protest procedures based on comments received during the public hearing process must be included in the final determination.
- (d) A Public-Private Agreement shall be awarded through competitive public procurement set forth in this section using either the RFQ-RFP process or the Request for Proposals process. A Private Entity may submit, and a Public Body may receive and consider, an unsolicited proposal regarding a potential Public-Private Agreement or Public-Private Facility; however, the public body may not enter into a Public-Private Agreement in connection with such unsolicited proposal without first complying with the competitive public RFQ-RFP process or Request for Proposal Process set forth in this section.
- (e) The Public Body shall provide adequate public notice of its Request for Qualifications or Request for Proposals, which shall at a minimum include publishing at least once in a legal newspaper of general circulation published in, or as near as possible to, that part of the State in which the public work will be done, a notice of its Request for Qualifications or Request for Proposals, and the availability and location of the Request for Qualifications or Request for Proposals. Prior to issuing a Request for Qualifications, or Request for Proposals, the Public Body may, by direct contact or otherwise, seek input from potential applicants who may have an interest or expertise relevant to the project through a request for expression of interest, registration of interest, or otherwise.

- (f) The “RFQ-RFP” process means the following:
- i. The Public Body shall issue a Request for Qualifications including at least the following:
 1. A general description of the project that provides sufficient information for offerors to submit qualifications;
 2. A description of the intended project delivery method, the reasons for using such method, and the Public Body’s anticipated sources of funding;
 3. A description of the qualifications required of Offerors including, but not limited to, technical competence and experience, financial capacity, capability to perform, any team structure, past performance of the offeror’s team and/or team members, demonstrated ability to meet time and budget requirements, ability to meet performance and payment bond requirements, firm workloads, location, safety records, and other qualifications as determined by the Public Body;
 4. Public bodies are encouraged to include as evaluation factors the offeror's past performance and specific plans to include participation by small business entities, disadvantaged business entities, veteran-owned businesses, minority and women-owned businesses, and any other underutilized businesses as the offeror or Public Body may designate;
 5. The honorarium, if any, to be paid to finalists who submit responsive proposals and who are not awarded a Contract. Honorarium payments, if any, shall be sufficient to generate meaningful competition among potential proposers and the amount of the honorarium shall consider the level of effort required to meet the selection criteria. The RFQ shall include a statement indicating whether any portion of the honorarium will be paid if the solicitation is canceled before proposals are submitted, and the Public Body’s rights, if any, to utilize intellectual property including documents, concepts, designs, or information submitted by finalists who are not awarded a Contract.;
 6. The anticipated schedule for the procurement process and the project;
 7. A description of the process the Public Body will use to evaluate qualifications, including evaluation factors, the relative weights of factors, and any specific forms to be used by offerors; and
 8. Protest procedures
 - ii. The Public Body shall establish an evaluation committee to evaluate responses to the Request for Qualifications based solely on the factors, weighting, and process identified in the Request for Qualifications and any addenda issued by the Public Body. Based on the evaluation committee's findings, the Public Body shall select not more than four Responsive and Responsible Offerors as finalists to submit proposals. The Public Body may, in its sole discretion, reject all qualification submissions and shall provide its reasons for rejection in writing to all Offerors.
 - iii. The Public Body must notify all Offerors of the list of finalists selected to move to the next phase of the selection process. At the request of an Offeror not selected as a finalist, the public body must

provide the requesting Offeror a scoring summary of the evaluation factors for its proposal. The process may not proceed to the next phase until two business days after all Offerors are notified of the committee's selection decision. Offerors filing a protest on the selection of the finalists must file the protest in accordance with published protest procedures and applicable law. The selection process may not advance to the next phase of selection until two business days after the final protest decision is transmitted to the Offeror.

- iv. Upon selection of the finalists, the Public Body shall proceed with the Request for Proposals process with the finalists.
- v. Upon completion of the Request for Proposals process, the Public Body shall make, or cause to be made, the honorarium payments specified in the Request for Qualifications to finalists who submit responsive proposals and who are not awarded a Contract.

(g) The “Request for Proposals” process means the following:

- i. The Public Body shall issue a Request for Proposals including at least the following:
 - 1. A detailed description of the project, including but not limited to:
 - a. The Public Body’s design requirements regarding project features, functions, characteristics, qualities, properties, and parameters;
 - b. Requirements and constraints pertaining to the construction, financing, operation, and maintenance of the Public-Private Facility;
 - c. Programmatic, performance, and technical requirements and specifications;
 - d. Any facility performance goals and validation requirements;
 - e. Financial requirements, constraints, incentives, and objectives, including term of agreement; and
 - f. Target budgets, as applicable;
 - 2. A description of the intended project delivery method, and the reasons for using such method;
 - 3. A description of any required proposal development documents, including drawings and other design-related documents that describe the size and character of a Public-Private Facility as to architectural, structural, mechanical and electrical systems, materials, any Maintenance and Operation Requirements, and such other elements as may be appropriate to the applicable project delivery method;
 - 4. A description of the process the Public Body will use to evaluate offerors’ qualifications and proposals, including evaluation factors and the relative weight of factors, and any specific forms to be used.
 - a. Evaluation factors shall include, but are not limited to: (1) the offeror’s qualifications, including technical competence and experience, financial capacity, capability to perform, past

performance of the offeror's team, demonstrated ability to meet time and budget requirements, ability to meet performance and payment bond requirements, firm workloads, location, safety records, and accident prevention plan; (2) compliance with the Public Body's design and other requirements set forth in the Request for Proposals; (3) cost or other price related considerations, which may include short and long term costs to the Public Body, the impact on public debt, the anticipated cost savings to the public body by selecting the Offeror, and the Offeror's fees; (4) technical and operational feasibility and merit (5) schedule; (6) anticipated User Fees, charges, or price over the term of the Public-Private Agreement; and (7) other appropriate factors, if any.

- b. Public bodies are encouraged to include as evaluation factors (a) the offeror's specific plans to include participation by small business entities, disadvantaged business entities, veteran-owned businesses, minority and women-owned businesses, and any other underutilized businesses as the offeror or Public Body may designate, and (b) the offeror's plans for labor harmony for the entire term of the Public-Private Agreement, including construction, reconstruction, operation, and capital and routine maintenance.

5. Protest procedures;

6. The form of the Public-Private Agreement to be awarded;

7. The anticipated schedule for the procurement process and the project;

8. The Public Body's intellectual property or other rights, if any, to utilize documents, concepts, designs, or information submitted by Offerors who are not awarded a Contract; and

9. Other information relevant to the project.

- ii. The Public Body shall establish an evaluation committee to evaluate offerors' proposals. The proposals shall be evaluated and scored based solely on the factors, weighting, and process identified in the Request for Proposals and in any addenda published by the Public Body. Discussions may be conducted with Responsible Offerors who submit proposals determined to be reasonably susceptible of being selected for award, for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and such revisions may be permitted after submission and prior to award for the purpose of obtaining best and final offers. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors. Public bodies may request best and final proposals from offerors.
- iii. The Public Body may initiate negotiations with the Offeror submitting the highest scored proposal. If the Public Body is unable to successfully negotiate and execute an Agreement with the Offeror submitting the highest scored proposal, negotiations with that Offeror may be suspended or terminated and the Public Body may proceed to negotiate with the next highest scored proposer. Public bodies may continue in accordance with this procedure until an Agreement is reached or the selection process is terminated.

- iv. The Public Body shall notify all Offerors of the selection decision and make a selection summary of the final proposals available to all Offerors within two business days of such notification. If the Public Body receives a timely written protest, the Public Body may not execute an Agreement until two business days after the final protest decision is transmitted to the protestor. The protestor must submit its protest in accordance with the published protest procedures.
 - v. The Private Entity awarded the Agreement shall provide a payment bond for the contracted amount. The Public Body may require the Private Entity to provide a performance bond and may review relevant financial and other information submitted during the solicitation process in deciding whether to require such performance bond.
- (h) The public disclosure and inspection requirements set forth in RCW 39.10.470 shall apply to procurements under RCW 39.10.500 through .580, and statements of qualifications, proposals, and other documents and information submitted as part of the RFQ-RFP process shall be treated in the same manner as proposals by design build finalists pursuant to RCW 39.10.470(3).

RCW 39.10.520

- (a) The Request for Proposals regarding a Public-Private Agreement shall contain a draft form of Agreement to be executed between the successful Offeror and the Public Body upon award, and shall indicate any terms that are not subject to negotiation.
- (b) After selecting an Offeror's proposal and completing negotiations with the Offeror, the Public Body may enter into the Public-Private Agreement with the selected Private Entity. An Affected Jurisdiction may be a party to a Public-Private Agreement entered into by another Public Body.
- (c) All Public-Private Agreements procured under RCW 39.10.500 through .580 shall include provisions expressly addressing each of the following:
- (1) the planning, acquisition, engineering, financing, development, design, construction, reconstruction, replacement, improvement, maintenance, management, repair, or operation of a Public-Private Facility, including provisions for the replacement and relocation of utility facilities;
 - (2) the term of the Public-Private Agreement, which shall not exceed 50 years unless authorized in the review process described in RCW 39.10.580;
 - (3) the type of interest, if any, the Concessionaire shall have in the Public-Private Facility, and the means of compensation to the Concessionaire, whether through direct payment by the Public Body, User Fees, grants, credits, or otherwise, and any incentives or deductions based on performance, safety, or other criteria;
 - (4) whether User Fees will be collected on the Public-Private Facility, and the basis by which such User Fees shall be determined and modified;
 - (5) grounds for termination of the Public-Private Agreement by the Public Body or Concessionaire, and the procedures and compensation, if any, upon termination;

- (6) filing by the Concessionaire, on a periodic basis, of performance, service, utilization, efficiency, financial, and other reports identified by the Public Body, in a form acceptable to the Public Body;
- (7) the rights and duties of the Concessionaire, the Public Body, and other state and local governmental entities with respect to use of the Public-Private Facility;
- (8) provisions requiring the Concessionaire to:
 - (i) obtain bonds required by RCW Chapter 39.08, covering all construction, reconstruction or maintenance, including capital maintenance, work of the project;
 - (ii) require the payment of prevailing wages for labor performed on the project in accordance with RCW Chapter 39.12; and
 - (iii) include, to the extent specified by the Public Body, participation by small business entities, disadvantaged business entities, veteran-owned businesses, minority and women-owned businesses, and any other underutilized businesses as the Concessionaire or Public Body may designate.
- (9) the Concessionaire's plans for labor harmony for the entire term of the agreement, including construction, reconstruction and capital and routine maintenance and adequate remedies to address the Concessionaire's failure to maintain labor harmony which shall include, but not be limited to, assessment of liquidated damages and contract termination;
- (10) the condition of physical quality, maintenance, and repair in which the Concessionaire must provide the Public-Private Facility to the Public Body upon expiration of the Public-Private Agreement;
- (11) any restrictions or terms regarding the procurement or development of other projects that may compete with or otherwise impact the revenues, cost, or operation of the Public-Private Facility, and
- (12) other terms and conditions as the Public Body may deem appropriate.

RCW 39.10.530

Unless otherwise provided, upon the end of the term of the Public-Private Agreement or in the event of termination of the Public-Private Agreement, the Public Body and duties of the Concessionaire shall cease, except any duties and obligations that extend beyond the termination as provided in the Public-Private Agreement, and all the rights, title and interest in such Public-Private Facility and all property involved therein shall revert to the Public Body to the extent owned by the Public Body before the Public-Private Agreement or acquired by the Public Body for the Public-Private Agreement and shall be dedicated to the Public Body for public use.

RCW 39.10.540

(a) Upon the occurrence and during the continuation of a material default of the Public-Private Agreement by a Concessionaire, after notice and opportunity for the Concessionaire or its financing institution to cure, the Public Body may:

(1) elect to take over the Public-Private Facility, including the succession of all right, title and interest in the Public-Private Facility; and

(2) terminate the Public-Private Agreement and exercise any other rights and remedies available.

(b) In the event that the Public Body elects to take over a Public-Private Facility under subsection (a), the Public Body:

(1) shall make interim payments, on behalf of the Concessionaire and for the Concessionaire's account, of any amounts subject to a mechanics lien or bond claim pursuant to RCW Chapter 39.08 or 60.04;

(2) may develop and operate the Public-Private Facility, impose User Fees for the use of the Public-Private Facility and comply with any service contracts; and

(3) may solicit new proposals for the maintenance and operation of the Public-Private Facility.

RCW 39.10.550

(a) The Public Body may issue and sell bonds or notes of the Public Body for the purpose of providing funds to carry out RCW 39.10.510 through .580, with respect to the development, financing, or operation of a Public-Private Facility or the refunding of any bonds or notes, together with any costs associated with the transaction.

(b)(1) For the purpose of financing a Public-Private Facility, the Public Body and Concessionaire may apply for, obtain, issue and use private activity bonds available under any Federal law or program.

(c) Nothing in this section shall limit a Public Body or any authority of the State of Washington to issue bonds for public works projects.

RCW 39.10.560

(a)(1) The Public Body may accept from the United States, the State of Washington, or any of their agencies funds for developing a Public-Private Facility or carrying out a Public-Private Agreement, whether the funds are made available by grant, loan or other financial assistance.

(2) The Public Body may enter into agreements or other arrangements with the United States, the State of Washington, or any of their agencies to facilitate for development, execution, or administration of a Public-Private Facility or Public-Private Agreement.

(b) The Public Body may accept from any source any grant, donation, gift or other form of conveyance of land, money, other real or personal property or other item of value made to the Public Body for developing a Public-Private Facility or carrying out a Public-Private Agreement.

(c) Any Public-Private Facility or Public-Private Agreement may be financed in whole or in part by contribution of any funds or property made by any public body, Private Entity, or Affected Jurisdiction.

(d) The Public Body may combine Federal, state, local and private funds to finance a Public-Private Agreement or facility.

RCW 39.10.570

Every Public-Private Agreement shall provide for, and the Public Body shall otherwise ensure that adequate provision is made for, the following:

- (a) Payment of all subcontractors, suppliers, and laborers, which shall at a minimum include provision of a payment bond in compliance with RCW Chapter 39.08, which bond shall be required regardless of the ownership or control of any property involved in the Public-Private Agreement or the Public-Private Facility;
- (b) Payment of prevailing wages in accordance with RCW Chapter 39.12; and
- (c) Outreach to small business entities, disadvantaged business entities, veteran-owned businesses, minority and women-owned businesses, and any other underutilized businesses as the Public Body may designate, and compliance with RCW Chapter 39.19.

RCW 39.10.580

- a) The Capital Projects Advisory Review Board shall establish a Public-Private Project Review Subcommittee of the Project Review Committee to review applications regarding Public-Private Agreements. The Public-Private Project Subcommittee must include individuals with expertise in the fields of public policy, public finance, management consulting, engineering, architectural design, construction, construction management, labor, public-private partnerships, and public works law. Members of the Public-Private Project Review Subcommittee shall be nominated by the Project Review Committee and approved by the Capital Projects Advisory Review Board in sufficient numbers such that each proposed Public-Private Agreement is reviewed by a panel of members with each of the above-listed areas of expertise. The Subcommittee may include members of the Project Review Committee.
- b) A Public Body desiring to procure a Public-Private Agreement must apply for and receive approval of the project as set forth in this Section RCW 39.10.580. The Public-Private Project Review Subcommittee and the Public Body must follow the project approval process set forth in RCW 39.10.280 and apply the review standards of that section. The Public-Private Project Review Subcommittee shall provide a recommendation to the Capital Projects Advisory Review Board, which shall approve or disapprove the application. The Capital Projects Advisory Review Board may publish additional information, implementation manuals, best practices, or criteria for consideration in evaluating proposed Public-Private projects.
- c) An application regarding a Public-Private Agreement is not subject to and does not affect the number of projects or dollar values to be reviewed by the Project Review Committee pursuant to RCW 39.10.250.
- d) In its application regarding a Public-Private Agreement, the Public Body must additionally provide a Project Report in a form acceptable to the Subcommittee including, but not limited to: (1) a general description of the proposed Public-Private Facility and Public Private Agreement; (2) the policy and regulatory structure for overseeing the Public-Private Facility and its operations, including on-going governmental oversight; (3) the Public Body's business case analysis, if any, (4) a discussion of financial data, pro formas, cost and revenue allocation, taxation, profit-sharing, and anticipated public and private funding sources; (5) financial evaluation of the Public-Private Facility including, the Public Body's preliminary draft value-for-money analysis, if any, (6) advertising and marketing; (7) use of new technologies; (8) lease terms, if any, and termination clauses; (9) additional responsibilities by both the private Concessionaire and the Public Body

during the Agreement period; (10) ; (11) the anticipated advantages of entering into the anticipated Public-Private Agreement for Design-Build-Finance-Operate-Maintain or Design-Build-Operate-Maintain services, and (12) the Public Body's plans to protect subcontractors, suppliers, and laborers, and to promote participation by minority, women-owned, veteran-owned, small, disadvantaged, or underutilized businesses.

- e) Deviation from the requirements of RCW 39.10.500 through .580 provides grounds to deny approval of a project, but shall not invalidate any Public-Private Agreement after approval or award except through timely protest.
- f) The Public Body must submit annual project reports to the Project Review Committee addressing the operation and financial performance of the Public-Private Facility and Public-Private Agreement, and the project's compliance and deviation from the Project Report submitted in the Public Body's application.
- g) The Public-Private Project Review Subcommittee may authorize a maximum of four Public-Private Agreement procurements per year between the years of 2017 and 2021. If more than four applications are received in a single year during such time, the Subcommittee shall make reasonable efforts to balance the types of projects recommended for approval pursuant to subsection (b). The Capital Projects Advisory Review Board may establish processes and deadlines for submitting and reviewing applications to promote fairness and avoid unnecessary expense. The Capital Projects Advisory Review Board may additionally impose reporting requirements regarding project performance, and may propose to the Legislature modifications to improve the procurement and implementation of Public-Private Agreements.

NOTE: CPARB REVIEW IS SOLELY RE PROCUREMENT, NOT VALIDITY OF PROJECT, FINANCIALS, POLITICS, ETC.