



# Background Information: Meeting 3

JTC Public-Private Partnership (P3) Work Group

December 8, 2023

# Meeting roadmap

The meeting information provided below is a roadmap of the Work Group’s progress. The last meeting scheduled before legislative session is Meeting 3 on December 8, 2023.

## MEETING 1

September 21, 2023  
1 – 3 pm, Virtual



### Establish common understanding

- Introductions by Work Group members, overview of the P3 study directive, Work Group meeting schedule, deliberation process, and ground rules.
- Overview of the fundamentals of P3s and key issues for Work Group consideration.
- *Washington’s experience with P3s, including a higher-level overview of RCW 47.29, Washington’s current P3 law (moved to Meeting 2).*

## MEETING 2

October 20, 2023  
9 am – Noon, In-Person



### Review of P3 challenges and opportunities

- Washington’s experience with P3s
- Washington’s ability to deliver large, complicated or innovative transportation projects under current laws and processes.
- Essential elements of a successful P3 enabling statute.
- Challenges and barriers to broader uses of P3s in Washington.

## MEETING 3

December 8, 2023  
9:30 am – 1:30 pm, In-Person



### P3 statutory provisions and deliberation

- Review of P3 statutory framework and draft legislative language.
- Discussion of key issues to be resolved.
- Process and schedule for implementation plan development, viability of select transportation projects under draft P3 enabling statute, and final report (2024).

# How to use this Briefing Book



- This briefing book is provided to Work Group members as read-ahead background information for the **December 8, 2023**, meeting. These materials are aligned with the agenda for the meeting and provide background information on several of the topics to be reviewed and discussed.
- During the meeting, slide presentations may summarize some of these topics (but will not repeat everything), so it will be helpful to read the content of this briefing book prior to the meeting.
- The project team is happy to answer any questions that arise prior to the meeting.



# Contents

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**Role of the Legislature and DOT in Other State P3 Laws** (p. 5-7) Overview of P3 approval processes in Pennsylvania, Virginia, and Colorado.

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**Legislative Framework for a New P3 Program** (p. 8-9)  
Graphic of suggested legislative framework for a new P3 program in Washington.

3

**Key Elements of P3 Authorization** (p. 10-17)  
Detailed overview of key elements needed for new P3 authorization.

Section 2



# Role of the Legislature and DOT in Other State P3 Laws

# P3 approval process by state agencies and legislatures

## ■ Pennsylvania

- A P3 Transportation Board is responsible for evaluating solicited and unsolicited P3 proposals. The Board comprises appointees by the Governor, the General Assembly, and PennDOT. If a project is approved, the Board sends a resolution certifying its approval to the Legislature. The Legislature may, within a prescribed time, reject the resolution by majority vote. If the Assembly does not reject the resolution, the project is deemed approved. The resolution does not require gubernatorial approval.

[See Penn. Conso. Stat. 74 Sec. 9101.](#)

## ■ Virginia

- Virginia DOT (VDOT) is considered a "responsible public entity" and may receive solicited and unsolicited P3 proposals. Upon receipt of a proposal, VDOT must make a determination if the project is in the best interest of the public. If VDOT makes an affirmative determination, the Chief Executive Officer of VDOT must submit formal findings of public interest to the Governor and General Assembly before proceeding. No action by the Assembly or Governor is required upon submission of findings of public interest.

[See Va. Code Sec. 33.2-1800.](#)

# P3 approval process by state agencies and legislatures

## ■ Colorado

- Colorado DOT (CDOT) may receive solicited and unsolicited P3 proposals. The Colorado Transportation Commission\* is responsible for establishing rules and processes for the evaluation of these proposals; however, the final decision to proceed rests with CDOT. There is no formal role the Legislature plays in the evaluation and approval of P3 projects.

[See Colo. Rev. Stat. Secs. 43-1-1201 to 1209](#)

\*Like some state transportation commissions in the U.S., the Colorado Transportation Commission acts as the governing board for the Colorado DOT, setting policy direction and overseeing the DOT's operations.

Section 3



# Legislative Framework for a New P3 Program



# High-level legal framework for new P3 program

## Legislature

### Legislation: P3 program legal authorization (RCW)

- Objectives (findings and legislative intent)
- Essential policy parameters that must be detailed in law
- Delegation of authority to agencies and offices implementing the law

### Budget: P3 program funding (biennial)

- Funding amounts and direction
- Limitations on program activities
- Expires at end of biennium

**Green:** Legislative authorization (informed by the current phase of this JTC study, due December 2023).

**Blue:** Implementation plan (informed by next phase of this JTC study, beginning January 2024).

## Agency

### Administrative rules: promulgated by the agency (WAC)

- Legal requirements for implementing P3 projects

### Policies: agency priorities and practices

- Agency's business practices and current priorities, within their discretion

## Agency + P3 developer

### P3 Contract: project-specific terms and conditions

- Mutually-agreed contract for delivery of P3 project
- Must comply with RCWs and WACs

Section 4



# Key Elements of P3 Authorization

# Context for this section (read me first)

- This section contains the only essential elements, not all provisions, needed for new P3 legislative authorization in Washington.
- To aid in JTC P3 Work Group discussions, this section summarizes key provisions; it does not reflect proposed bill language.
- The four main issues deliberated by the Work Group (financing, governance, operations, and maintenance) have been addressed in this framework. See the next page for a summary of their disposition.
- Not included are provisions that are administrative in nature, exist in current law, and have not presented significant impediments to P3 development. *Example:* confidentiality requirements ([RCW 47.29.190](#)).
- The overall legislative framework for a new P3 program also relies on administrative rules (WACs), WSDOT policies, budget appropriations, and ultimately the P3 contract to effectuate a P3 fully. The next phase of this JTC study will examine WACs, policies, and contractual provisions.

# Summary of four key issues deliberated by the Work Group

## ■ Finance

- If the state's credit capacity or rating is implicated, review/approval of the State Finance Committee is required.
- Equity investments and availability payments are allowed, subject to the above limitation.

## ■ Governance

- Streamlined to mirror the process for other mega (or tolled projects).
- No expert review/approval panels are required.
- Legislature's role: decide on continued appropriations (e.g., for availability payments) and whether to toll a facility.
- WSTC to retain role as toll authority to set/adjust rates

## ■ Operations

- Requires adherence to state wage laws and collective bargaining agreements.
- Clarifies that Washington State Patrol must be funded to provide patrolling and law enforcement on facilities.
- Removes confusing language about funding other enforcement activities (e.g., toll enforcement).

## ■ Maintenance

- Specifically allows availability payments and "ongoing legislative appropriations" to cover P3 agreement for maintenance.
- Defers to WSDOT to set the services standard and state of good repair for the assets.

# Legislation: P3 program authorization

## 1. Purpose [former: RCW [47.29.010](#); RCW [47.29.040](#)]

### A new P3 law is needed to:

- Deliver better value to taxpayers
- Transparently demonstrate value for the state's investment
- Provide an additional method for delivering more complex transportation projects
- Incorporate outside expertise into transportation project delivery
- Allocate project risks to those parties best able to manage those risks
- Allow new sources of private capital
- Increase access to federal grant funding
- Better align laws and approval processes with those utilized by the department of transportation for other large or complex projects.

## 2. Definitions [former: RCW [47.29.020](#)]

- “Department” means the Washington State Department of Transportation.
- “Commission” means the Washington State Transportation Commission.
- [additional definitions as needed]

## 3. Department of transportation authorized to undertake public-private partnership projects. [former: [RCW 47.29.030](#), [RCW 47.29.090](#)]

- WSDOT is empowered to procure and contract with private parties to develop eligible transportation projects as a public-private partnership.
- WSDOT may select one or a combination of projects to be procured and delivered as a public-private partnership.
- After formally adopting WACs governing the review process, WSDOT may accept unsolicited proposals from non-state entities to develop eligible projects as public-private partnerships.
- Prior to initiating a public-private partnership project, WSDOT must adopt administrative rules (WACs) specifying procedures for the proper solicitation, acceptance, review, evaluation, selection, and negotiation of project agreements. The rules must include:
  - A process and methodology for determining whether a public-private partnership delivery model will be in the public's interest [see next section]; and whether a negotiated partnership agreement will result in greater public value to the state than if the project is delivered using other procurement and contracting methods.

# Legislation: P3 program authorization, cont.

## 4. Finding of public interest before procuring an eligible project

- WSDOT may procure an eligible project as a public-private partnership only upon issuing formal findings that such a partnership is in the public's interest.
- The department must adopt rules detailing the criteria and process for making such findings. At minimum, the criteria must include findings that:
  - Public ownership of the asset will be retained;
  - Transparency during the negotiation of a public-private partnership agreement will be provided;
  - Public oversight of the private entity's management of the asset can be retained.
  - [Source: [ESHB 1125, Section 204, subsection \(2\)\(c\)\(i\)\(A through C\), Laws of 2023](#)]
- The finding of public interest must also include criteria that reflects the legislative purpose for this Act (see [Section 1, Purpose](#)).
  - [Source: JTC P3 Work Group Mtg 2]

## 5. Eligible projects

### Eligible projects include:

- Transportation projects, whether capital or operating, where the state's primary purpose for the project is to facilitate the safe transport of people or goods via any mode of travel, and
- Facilities, structures, operations, properties, vehicles, vessels, or the like that are capable of generating revenue for other transportation projects.
- For any project involving tolls on a state facility, the legislature must approve the imposition of such tolls (per current law).
  - [Source: [RCW 47.29.050](#); JTC P3 Work Group Mtg 2]

# Legislation: P3 program authorization, cont.

## 6. Eligible funding and financing

- WSDOT may accept any lawful source of funding for the project, including but not limited to appropriations or grants made by public entities, and contributions made by private entities.
- Any project agreement that proposes to utilize toll revenue must conform to current law requiring legislative approval to toll a state facility, and review and approval by the Washington State Transportation Commission of proposed toll rates.
- Subject to conditions, WSDOT may enter into financing agreements with the private party that require either or both parties to issue debt, equity, or other securities or obligations; enter into leases, concessions, and grant and loan agreements; or secure any financing with a pledge of revenue, continuing appropriations, or a lien or exchange of property, including but not limited to a property interest in the qualifying facility.
- Conditions:
  - WSDOT shall not enter into an agreement that could impact the state's debt capacity or the state's credit rating without review and approval of those provisions by the State Finance Committee (Treasurer, Governor, Lt. Governor).
  - [Source: [RCW 47.29.060](#); JTC P3 Work Group Mtg 2]

## 7. Proposer stipends and administrative fees

- Subject to appropriations made for this purpose, WSDOT may offer stipends to respondents of a solicitation for public-private partnerships. Stipends are intended to help encourage competition and innovation by helping partially defray respondent's cost to develop proposals. WSDOT may establish policies governing the qualifications, amount, and other terms of such stipends on a project-by-project basis.
- WSDOT may charge a reasonable administrative fee for the evaluation of unsolicited proposals.
  - [Source: JTC P3 Work Group Mtg 2; [RCW 47.29.100](#);

## 8. WSDOT authorized to consult with subject matter experts

- From appropriated funds or revenues from administrative fees, WSDOT may hire and consult with outside experts on any or all elements of a public private partnership project or proposal, from initial consideration of the appropriate delivery model, through contract execution and any required ongoing oversight or reporting.
  - [Source: JTC P3 Work Group Mtg 2; [RCW 47.29.110](#);

# Legislation: P3 program authorization, cont.

## 9. Requirements of partnership agreements.

### Must include:

- Conformance with all state laws related to wages and recognition of collective bargaining agreements.
- Provisions requiring performance bonds or similar guarantees to secure the payment of laborers, subcontractors, and suppliers.
- Provisions requiring funding for appropriating patrolling and law enforcement by the Washington State Patrol on state facilities.
- Provisions for public communication and participation with respect to the development of the project.
  - [Source: [RCW 47.29.140](#); [RCW 47.29.200](#)]

### Must account for:

- Compensation method and amount for the private partner, establishing a maximum rate of return, and identifying how project revenue (if any) in excess of the maximum rate of return will be distributed.
- The standard of service and state of good repair that must be adhered to by the private partner.
- Provisions and remedies for default by either party, and provisions for termination of the agreement (for cause or without cause).
  - [Source: JTC P3 Work Group Mtg 2]

## 10. Finding that a negotiated agreement provides positive value for the public

- Prior to the execution of a P3 agreement, WSDOT must issue a formal finding that the tentative partnership agreement is expected to result in positive value for the public.
- The department must adopt rules detailing the process and criteria for measuring, determining, and transparently reporting positive value.
- At minimum, the criteria must include:
  - Comparison of the total costs to deliver the project as a public-private partnership compared to traditional or alternative delivery methods available to the department [Source: JTC P3 Work Group Mtg 2];
  - Comparison with the department's current plan, resources, capacity, and schedule to complete the project that documents the advantages of completing the project as a partnership versus solely as a public venture; and
  - Factors such as, but not limited to: Priority, cost, risk sharing, scheduling, and management conditions.
    - [Source: [RCW 47.29.030\(2\)\(f\)\(i-ii\)](#)]



# Legislation: P3 program authorization, cont.

## 11. Review and approval by the State Finance Committee

- After WSDOT has made a finding of positive public value (see section 10), if the proposed agreement contains any financing provisions that could materially impact the state's credit rating or impact the state's debt limit, the State Finance Committee (Treasurer, Governor, Lt. Governor) must review and approve of those provisions before a public-private partnership agreement can be executed.
  - [Source: JTC P3 Work Group Mtg 2]

## 12. Public notice and involvement

- Prior to execution of a partnership agreement, and after any such agreement has been approved by the State Finance Committee (if applicable), [agency to be determined] is directed to take public comment on the proposed partnership agreement. A record of public comments received must be forwarded to the WSDOT Secretary for consideration prior to executing the proposed agreement.
  - [Source: JTC P3 Work Group Mtg 2; RCW [47.29.150](#); RCW [47.29.160](#)]

## 13. Office of Innovative Partnerships

- WSDOT's Office of Innovative Partnerships must adopt all administrative rules identified in [this proposed legislation] to carry out WSDOT's powers and duties as prescribed.
- WSDOT's Office of Innovative Partnerships must adopt policies that allow the Office to periodically conduct an evaluation of the agency's planned projects that are eligible for development as public-private partnerships to determine which projects should be proposed for advancement as a P3.
- The Office may conduct studies, research, analysis, and investigations of laws, administrative rules, policies, and projects from other jurisdictions in developing its own administrative rules and policies.
- Subject to available funding, the Office must develop a consistent framework for operations, including standardized procedures, procurement documents, procurement approaches, contract types, and other relevant materials and processes.
- The Office may contract with subject matter experts to carry out its duties, including but not limited to specialized financial, engineering, legal, and program management skills.
  - [Source: JTC P3 Work Group Mtg 2]

# JTC Public-Private Partnership (P3) Work Group

Background Information Materials  
Meeting 3  
December 8, 2023

