Washington State Transportation Commission

Report on the Transportation Innovative Partnership Program

For calendar year ending 2006

Presented to Governor Gregoire and the Washington State Legislature
January, 2007

Report of the
Washington State Transportation Commission

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1. Introduction

The Washington State Transportation Commission is statutorily responsible for reviewing and approving public-private partnership project agreements developed under the Transportation Innovative Partnership (TIP) Program, chapter 47.29 RCW. The Commission is also charged with adopting administrative rules to carry out the program. We are pleased to report that TIP administrative rules were formally adopted by the Commission in December, 2006 as WAC 468-600.

This past year was marked by increased interest and recognition of the potential for public-private partnership (PPP) projects to help address Washington's transportation challenges. Notably, much of this interest was expressed by the state's own appointed experts:

- The Expert Review Panel (ERP), created in state law and convened to critically review the financial plans for the Alaskan Way Viaduct and SR 520 Bridge Replacement projects, found that for both projects, "the state should aggressively pursue other sources of funding, such as regional tolling and public-private partnerships, particularly for SR 520"[1];

- The Regional Transportation Commission, a bipartisan commission created in state law to evaluate how transportation is governed and financed in the greater Puget Sound region, has recommended in a draft report that "Privatization of select facilities – through long-term concessions, franchises, or construction and operation by "63-20" nonprofit entities – should be looked at carefully by policy makers"[2];

- The Washington State Legislature's Joint Transportation Committee commissioned a Long-Term Transportation Finance Study to be conducted by Cambridge Systematics and Mercator Advisors. The draft final report notes the potential for public-private partnerships to "provide substantial benefits in terms of accelerating project development and construction, transferring construction and performance risk away from government, providing more efficient operation and superior service, and introducing new technologies. In some cases, PPPs can even attract net new investment capital that otherwise might not be available."[3]

For the first time in perhaps a decade, a serious investigation was conducted of the potential for public-private partnerships to help finance an urgently needed state project: the SR 520 Bridge Replacement. While the jury is still out on the financial viability of this particular project to be self-supporting, the analytical process and participation by internationally recognized investment firms and financial advisors has illuminated both

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[1] *Report of the Expert Review Panel,* Executive Summary, page vii, September 1, 2006.
[2] *Regional Transportation Commission Draft Report*, page 8-13, November 15, 2006.
[3] *Long-Term Transportation Finance Study,* November, 2006 Draft Report, section 4, page 15.

the upside potential – and some significant shortcomings – of Washington's current law, chapter 47.29 RCW.

Many of the conclusions and recommendations in this 2006 report are echoes from last year's report, but are now amplified and refined with a full year's experience working within the statute. The body of evidence supporting this report is drawn from numerous public hearings, specific outreach efforts by Commissioners and staff, meetings with public agencies and private firms, formal written comments and public testimony received, and specific analyses and work conducted by the Washington State Department of Transportation's (WSDOT) Public-Private Partnerships division, the entity responsible for the day-to-day administration of the Transportation Innovative Partnerships Program.

While the SR 520 Bridge Replacement project has received particular attention these past few months for its potential as a public-private partnership-financed project, there are several projects throughout the state, representing many different modes, that merit further investigation similar to the SR 520 Bridge Replacement project analysis. Such projects include the I-5 Columbia River Crossing, SR 167 Extension, I-90 Snoqualmie Pass, SR 704 Cross-base Highway, Colman Dock and other ferry terminal facilities, and freight rail capacity and transloading improvements, to name just a few.

2. Executive Summary of Recommendations

The Commission's recommendations are described in more detail in the body of this report. In summary, the Commission recommends the following:

- The TIP project review and approval process should be streamlined for efficiency and credibility. Efficiencies can be gained by the judicious use of Expert Review Panels for specific purposes, and by convening one standing Citizen Advisory Committee to advise on any toll-related project that is developed under the TIP program. Credibility would also be significantly enhanced by providing a clear, unambiguous review process containing fewer potential obstacles that partners must overcome. *See page 7, Recommendations 1, 2, and 3.*

- The Commission's authority to provide final approval of TIP projects needs statutory clarification. Recent amendments to chapter 47.29 RCW seem to thrust the Governor into the role of formally approving TIP projects. The current law also leaves open the question whether further legislative approval of an executed TIP project agreement is required. *See page 8, Recommendations 4 and 5.*

- The financing provisions in RCW 47.29.060, requiring the use of state-issued bonds for all TIP projects, should be amended to allow a comparison of alternative financing structures, and provide the ability to use alternative financing for part or all of a project if state bonds are unable to fully finance the project. *See pages 12-13, Recommendations 1, 2, 3, and 4.*

- A constitutional amendment should be proposed to allow the state to issue bonds with maturities of up to 40 years, to help improve the state's borrowing capacity for high-cost transportation infrastructure projects. *See page 13, Recommendation 5.*

- The TIP statute should make the distinction between toll projects, which are subject to the more prescriptive review process and evaluation criteria under the statute, versus non-toll projects (e.g., multimodal projects), allowing the latter type to be reviewed and evaluated according to carefully drafted criteria appropriate to the specific type of project. *See page 14, Recommendations 1, 2, and 3.*

- Funding adequate to facilitate the TIP program should be provided to proceed with the next phase – project solicitation and development. *See page 14.*

3. Significant Policy Issues Regarding the Transportation Innovative Partnership Program

The project review and approval process could benefit from statutory modifications aimed at streamlining this process while maintaining public interest safeguards.

The Legislature and Governor are rightly concerned with protecting the public's interest in any public-private partnership agreement. These agreements, and the rights and responsibilities delineated therein, are outside of the typical public sector norm for how business is conducted. By their nature, public-private partnerships seek to incorporate the best private sectors means and methods to meet important public goals. While the public sector would typically attempt to achieve these goals through specific processes designed to produce favorable outcomes (through laws, rules, regulations, executive orders, and intergovernmental agreements), the private sector is more naturally inclined to emphasize results over any particular process employed. A partnership between the public and private sectors must marry these two different approaches without sacrificing the values of either.

There is reluctance among elected officials to place full responsibility for these public-private partnerships in the hands of WSDOT alone. As a result, the legislation creating the new TIP law requires the Transportation Commission to act as the final authority for reviewing and approving any negotiated project agreements. We believe it is both appropriate and valuable to separate program promotion, administration, and contract negotiation functions from critical review and approval functions. Assigning WSDOT and the Commission these separate and distinct functions achieves this goal. This also mirrors the approach taken in some other states with PPP enabling legislation.

However, it is possible to have too much of a good thing. Through various amendments over the past two years, additional panels, committees, and oversight responsibilities have been added to the law. Taken in their totality, the PPP review and approval process contains no fewer than six different entities that can effectively halt a potential project – not including the legislative authorization process that must necessarily occur for appropriation of project funds. *See TIPP Approval Process Chart, Appendix A.* While we endorse the intent behind these various amendments, we find this labyrinthine process likely to dissuade the participation of private partners. The multitude of panels, committees, and approvals required not only expends valuable time and money, but, more importantly, introduces *process* uncertainty because the process could be halted at any time, a risk that potential partners are unlikely to accept.

At the time of the statute's origination, WSDOT was not a cabinet agency, but was governed by the Transportation Commission, which essentially acted as a board of directors overseeing the agency's direction. As a result of this arrangement, a common perception was that WSDOT and the Commission were essentially "one entity" acting in concert and without the degree of scrutiny that would otherwise be provided by a truly

independent Commission. This governance structure has completely changed since the passage of the TIP law; WSDOT is now a full-fledged cabinet agency under the direction and control of the executive branch. In contrast, the Transportation Commission remains an independent, citizen-based body that has little (if any) direct legal authority over WSDOT. This leaves the Commission in an ideal position to exercise its independent judgment and oversight of the Transportation Innovative Partnership Program and any tentative agreements negotiated pursuant to that program.

❖ Recommendations:

We believe that the following statutory modifications could be made to the TIPP review and approval process that would streamline the process, remove unnecessary process risk, and retain the opportunity for rigorous, arms-length review and final approval of any project agreements negotiated by WSDOT:

1. **Revise the provisions for a Citizen Advisory Committee[4] to clarify that such committee be established *after* the approval of a public-private partnership agreement for the purpose of monitoring the progression of projects and for reviewing and making recommendations on toll rates and structures.** Furthermore, a single Committee should be created to advise on all toll-financed projects developed under the TIP Act, rather than numerous separate Advisory Committees for each project. Finally, it should be made clear that only toll-financed projects would be under the jurisdiction of the Citizen Advisory Committee. If adopted, these changes would bring RCW 47.29 into conformance with the current Citizen Advisory Committee that was established for the Tacoma Narrows Bridge toll project (also mandated in law for all toll projects developed under the former PPP law, chapter 47.46 RCW).[5]

2. **Make the appointment of an Expert Review Panel an option available to the Transportation Commission, rather than a mandatory requirement for all projects, regardless of type or size.** ERP's have proven to be a valuable tool to ensure that complex projects receive critical review by subject-matter experts in specific fields. However, not all projects will be of a size, nature, or complexity to substantially benefit from an ERP. Granting the Commission discretion to convene such panels – and at earlier stages in the project scoping process – would enhance the current program.

3. **When an ERP is assembled, allow the Commission to set forth specific issues for the ERP to evaluate and offer opinion.** The current statute directs the ERP to make recommendations on the entire project agreement. Since the ERP is not the final decision-maker regarding the execution of TIP

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[4] RCW 47.29.180.
[5] RCW 47.46.090.

agreements, it is inappropriate to charge the Panel with rendering judgment on the desirability of the entire project agreement. To do so places the Panel in the position of making broader public policy decisions for the state than the Panel's subject matter expertise lends itself. This provision in current law creates yet another non-elected entity with de facto final approval authority. An ERP's scope of review ought to be tailored to specific, complex issues.

4. **To reduce the risk of process uncertainty, it must be absolutely clear where final approval authority resides.** Various bills have amended the current statute. The result is a statutory accumulation of "approvals" that are required for TIP project agreement finality. The most recent amendments strongly imply (if not require) that the Governor also must grant formal approval. We believe the statutory intent of these recent amendments was to require the results of analyses to be shared with the Governor and to encourage collaboration and consultation. However, the actual language is ambiguous; it also could be read to *require* the Governor's formal approval of negotiated project agreements, to be followed by a second formal approval by the Commission. If the intent was to make analyses, information, and experts available to the executive branch and to encourage collaboration, we believe that statutory language can be clarified to accomplish this. We recommend that the Commission retain responsibility for final approval of TIP agreements with input and collaboration from the Governor.

5. **TIP project agreements should be final once approved by the Commission, with the approval framework being guided by statutory goals.** We understand the Legislature and Governor retain their powers of appropriation. The difficulty arises when each finally negotiated and approved project agreement is then subjected to the legislative approval process, where the greatest risk is not rejection, but rather inaction or indecision, leaving both the public and private sector in a suspended state, unable to move forward on the project but bound by the terms of a negotiated and executed agreement. A possible solution to this situation is for the legislature to provide explicit policy goals that must be met in any project agreement. If WSDOT is able to reach agreement that incorporates these goals, and if the Commission reviews the proposed agreement and finds that those goals have been met, the negotiated, approved agreement between the state and the private partner should be honored in the legislative process, subject only to the usual exercise of legislative powers vis-à-vis the appropriation process. Preferably, this approach would be granted for all TIPP projects, but if the Legislature desires even more caution, it could be permitted on a pilot project basis.

The financing restrictions contained in RCW 47.29.060 need modification so that the public policy goals inherent in the law can be attained in a more effective manner.

Although some portions of the TIP Act allow consideration of alternative forms of project financing, in the end RCW 47.29.060 requires that if a project is debt financed, only state debt (bonds) may be utilized for a state transportation project, limited in duration to 30 years under current law.

This provision was drafted in an attempt to ensure that the best possible financing could be achieved for all toll projects. It was patterned after the financing package provided by the legislature as a substitution for the original public-private partnership financing for the Tacoma Narrows Bridge. In that instance, it was determined that the state itself could fully finance the TNB project at a lower cost (in both issuance and interest costs) if the state acted as issuer of the bonds, secured by the state's credit and tax revenue sources. Although the proposed PPP financing (63-20 bonds) and the state Motor Fuel Tax-backed bonds were both tax-exempt issuances, the state-backed bonds were projected to have a lower interest rate, benefiting from the state's overall strong credit rating and the pledge of stable, predictable tax sources – gas taxes – rather than relying strictly on toll revenues for repayment. The end result would be lower required toll rates than under the original 63-20 financing proposal.

The current statute attempts to codify this approach, essentially requiring that all state transportation projects be financed in this manner. If it were possible to repeat the success of the Tacoma Narrows Bridge financing for every toll project, we would enthusiastically support the statute. But there are serious limitations to this approach and potentially serious consequences to the state's treasury if we attempt to duplicate this financing scheme for all future transportation toll projects.

Unlike many eastern states, Washington does not have long-standing toll facilities that are candidates for monetization (a leasing out of the toll facility – and its attendant toll revenues – in exchange for an immediate lump-sum cash payment). Our potential projects consist of new highway and bridge toll facilities ("greenfields"), which are essentially start-up enterprises, the financing of which is based entirely upon computer-generated traffic forecasts and studies. The initial capital construction costs for greenfield projects are themselves a risk factor; the uncertainty surrounding the public's acceptance and use of the new toll facility is another.

The inherent speculative nature of new toll facilities is reflected in how the infrastructure finance markets value these projects. The interest rates charged to borrow funds to construct new toll facilities (where the source of repayment is from toll revenues) is significantly higher than for new facilities where the source of repayment is guaranteed from the state's general tax collections. It's obvious that state-issued debt, backed by gas tax revenues and the state's strong credit rating and general tax sources, will always be the least-expensive debt available. On this there is little debate.

A primary aim of the TIP law is to identify those facilities that will generate their own source of repayment (i.e., toll revenues), which justifies the pursuit of these projects. Yet if a tax subsidy (or potential tax subsidy) is required in order to comply with the mandate for state-issued bonds, the original rationale for pursuing the TIP project in the first place is undermined. If in all instances we knew with certainty that toll revenues would be sufficient to pay off the bonds, the Commission would have no concerns about the current law. But this is clearly not the case. Consider the following:

> "...A review of 23 new turnpikes nationwide shows that a clear majority are failing to meet revenue projections to justify their costs.
>
> Even with adjustments for the break-in period in the opening years, 86 percent of new toll roads in states failed to meet expectations in their first full year.
>
> By year three, 75 percent – 15 of the 20 that have been open that long – remained poor performers."

These findings are from a three-part investigative series by the Denver Post on the topic of start-up toll facilities.[6] They are reported in the aggregate, but examples of specific projects that have suffered from poor traffic forecasting are abundant. For example:

- The Camino Columbia Toll Road in Laredo, Texas was constructed for $90 million and opened to traffic in 2000. With the advent of NAFTA, the road was projected to carry tremendous amounts of freight trucks to and from Mexico. One year after it's opening, the road reached only 10 percent of its projected traffic. Two years after opening, the toll authority defaulted on its loan and went bankrupt.

- Virginia's Route 895, the Pocahontas Parkway, began construction in 1998 for $381 million, and opened to traffic in 2002. The project was primarily financed through 63-20 tax-exempt bonds. The tollway struggled to meet its debt payments and was ultimately forced to restructure its debt by agreeing to lease the facility to a private operator for 99 years.

If these two toll facilities had been financed under Washington's current RCW 47.29.060, the state's Motor Vehicle Fund (MVF) would be saddled with making the debt payments on these under-performing start-up toll facilities. In fact, this is the exact scenario the state currently faces regarding the Tacoma Narrows Bridge project. If traffic does not materialize as forecasted, the state's Motor Vehicle Fund is legally obligated to make bond payments, meaning that funding for other projects or activities from the MVF will be at risk.

This illustrates the hidden cost of state-issued debt on toll facilities: while the interest rate on the bonds is marginally lower, it carries with it a contingent liability on the state's

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[6] *Denver Post*, June 1, 2006.

motor vehicle fund, and ultimately, the state's general fund. If the toll revenues fall short – as has been the case with 75 percent of the new start-up toll facilities across the nation – other beneficiaries of the state's MVF will effectively subsidize the early-year losses on these facilities.

Not all start-up toll facilities have the same risk profile, of course. The lack of a viable alternative route is perhaps the best pre-condition for meeting traffic projections. This is one reason why the Tacoma Narrows Bridge financing will likely be successful, yet difficult to duplicate. There are no real competing routes that would divert traffic from the tolled bridge, which greatly increases the likelihood of achieving the necessary revenues to cover the debt.

However, most of the potential toll projects in Washington represent a greater risk of traffic diversion than the TNB presents. The critical policy issue is whether the mandate contained in RCW 47.29.060 is sustainable, given the revenue risk exposure of start-up toll facilities. A contingent liability upon the state's MVF is created with each TIP project financed as required under RCW 47.29.060. We don't believe these risks were known during the legislative policy debates over the TNB or subsequent TIP Act; the debates and resulting statute were focused solely on the TNB financing structure with the belief that this financing approach could be similarly replicated.

If the first assumption imbedded in the statutory scheme is that state issued debt is always the best public policy choice, the second assumption underlying the finance restrictions is that state-issued debt is always able to fully-finance these transportation projects, just as it was for the Tacoma Narrows Bridge toll project. As recently as 1998, the capital construction cost estimate for the TNB was about $360 million, not including financing costs. At the time the project finally went to financial close (about five years later), cost escalation pushed the project cost to well over $600 million, not including $49 million of state funds that had already been spent. Construction cost inflation has grown even more since 2002, a trend that has been well-documented. As project cost escalation grows, the revenues required to finance these projects must keep pace.

In order to generate enough revenue to pay for these costly projects, rates must be adjusted upward or the repayment period extended over a longer period. The situation is similar to both higher education (where the cost of education has greatly outstripped new grads' ability to repay education loans) and escalating housing markets (the cost of homes overruns a family's ability to pay the mortgage with wages that can't keep pace). And in both of these industries, public financing policy has been modernized to help address the situation: a multitude of financing options – most of them governmentally-sanctioned in some form – now exist to help match the cost of the good with the average person's ability to pay.

In contrast to these sectors, laws governing state-issued transportation debt have not been altered in at least 40 years, perhaps longer. Because the state is constitutionally restricted to bond maturities of not more than 30 years, as capital project costs continue to escalate, the only alternative to fully finance a transportation project through tolls is to increase the

toll rates. Flexible financing options, particularly longer repayment periods, are one of the current advantages of PPP financing.

Yet toll rates are constrained by drivers' willingness and ability to pay. The toll rates required to fully fund the more significant state highway projects would be considered unacceptably high. The Governor's Office, with assistance from WSDOT, has recently witnessed this financing dilemma with regard to potential funding for the SR 520 Bridge replacement project. After receiving input from several private investment firms and financial advisors, the conclusion was that in order to fully finance the SR 520 Bridge project with toll revenues under the provisions of RCW 47.29.060 (i.e., state-issued 30-year debt), the average round-trip toll on the bridge would need to be about $18.

While the SR 520 Bridge project is probably the most expensive transportation highway project in the state, there are several other projects that are less than the projected $4.38 billion for SR 520, but that would be similarly constrained by the 30-year bond limit under state law. Even if one decides that using state-issued debt is always the optimal public policy choice, the more practical problem of not being able to borrow enough construction funding for repayment in the 30-year time limit will prevent projects from being constructed under the TIP Act.

After studying this issue for more than a year and taking under advisement the opinions of potential private partners and public agencies, we believe that the public policy goals that were intended by RCW 47.29.060 can be attained and protected, while allowing more flexibility in project financing *where clearly in the public's interest.*

❖ Recommendations:

We make the observation that the legislative assumption underlying the requirement for state debt issuance is that it will yield the lowest borrowing costs, which will, in turn, result in the best deal for the taxpayers through lower tolls. Yet if some of these projects cannot be financed within the constraints of state-issued debt, then these important projects will likely not be constructed at all. We recognize that the Legislature will likely want to keep statutory protections for their intended policy goals. Accordingly, we make the following recommendations for statutory change in the financing restrictions:

1. **The financing for projects developed under the TIP program should utilize debt in any structure or combination that would result in the lowest cost of capital that is commercially available while still presenting a fully-financed project that meets legislatively established goals.** If the proposed finance plan includes project debt consisting of non-state issued debt, in whole or in part, the proposed plan must be analyzed and a formal comparison made against a plan that would use only state-issued debt.

2. **All implications of the proposed financing plan and the purely state-issued debt financial comparison must be publicly disclosed,** including any possible impacts such financing plans could have on toll payers, statewide tax

payers, state fund sources, and projects or programs that are beneficiaries of such fund sources, etc.

3. **The Commission should be authorized to provide final approval of a TIP project agreement, including a plan of project finance that utilizes non-state issued debt, in whole or in part, so long as such financing plan has conformed to these legislatively sanctioned requirements** (Recommendations 1 and 2 above).

4. **The statute should also allow the Legislature to *pre*-authorize certain types of financing for either certain categories of projects or on a project-by-project basis.** The key feature of this provision is the attainment of legislative approval of alternate forms of financing *in advance* of contract negotiations with a private partner. This feature would be a second method under a revised statute for allowing consideration of alternative financing for TIPP projects (the first – and preferred method – is contained in Recommendation 3 above).

5. **The Legislature and Governor should propose a constitutional amendment for transportation infrastructure projects to allow state-issued bond maturities of up to 40 years**, which matches the maximum allowable repayment periods for local government issued bonds under the state constitution.

The statute does not distinguish toll-financed projects from other potential forms of public-private partnerships, subjecting the latter to ill-suited processes and evaluation criteria.

Most of the public-private partnership laws in the country are clearly aimed at constructing and financing toll roads – and nothing else. Washington's statute is unique in that it anticipates the state's participation in all transportation modes – ferry terminal developments, park-and-ride facilities, rail improvements, improvements to state-owned airports, intelligent transportation systems, etc. By defining these projects as eligible for development, the statute captures the potential for public-private partnerships in a manner not fully realized by other states.

Unfortunately, the specific TIP administrative review and approval processes – and the mandatory evaluation criteria itself – are clearly aimed at highway-related toll projects and completely ill-suited for other types of projects. For example, a potential TIP project that would allow the installation of high-tech traveler information systems at highway safety rest areas, in exchange for, say, limited advertising rights at the rest areas, would be required to be contained in the Washington Transportation Plan or otherwise identified by the Commission as a "priority need of the state" under RCW 47.29.030(2)(a). Such provisions are ill-suited for non-toll road projects.

This misapplication extends to the review and approval processes themselves. For example, the appointment of a Citizen Advisory Committee for a project that proposes

Intelligent Transportation System technology is unnecessary; the Citizen Advisory Committees mandated in RCW 47.29.180 were patterned after the current one for the Tacoma Narrows Bridge toll project.

❖ Recommendations:

We believe that statutory clarification is needed to deliver multi-modal transportation projects under the TIP program. To that end, we recommend the following:

1. **For projects that do not propose state highway or bridge tolls, the establishment of Citizen Advisory Committees ought to be eliminated.**

2. **Only projects that would ordinarily depend on state-issued bonds should be subject to the financing provisions in RCW 47.29.060**, now or as hereafter amended.

3. **Non-toll projects should be subject to more unique evaluation criteria** that is developed by WSDOT, and approved by the Transportation Commission, and made available to the public and potential private partners as part of the project solicitation documents (Request for Proposals).

4. Resource Issues

There is inadequate funding available to carry out a viable TIP program

While both the Commission and WSDOT have utilized existing funding to provide necessary staff support, the overwhelming need is for consulting assistance, which provides the exact expertise needed to develop a public-private partnership project. Funding has been requested for the 2007-09 biennial budget. Without adequate funding, neither WSDOT nor the Commission is able to advance much farther in developing a TIP project.

❖ Recommendation:

We recommend that the Governor and Legislature provide adequate funding in the 2007 legislative session, which is reflected in the budget requests submitted by the Commission and WSDOT.[7]

[7] The Commission's budget request is attached as Appendix B. WSDOT's budget request for their Program K, Public-Private Partnerships (which carries out the TIP program) is contained in Appendix C.

5. Status Report on TIPP Administrative Rules

RCW 47.29.030 requires the Transportation Commission to draft administrative rules to implement the Transportation Innovative Partnership Program. Preliminary draft rules were presented to the legislature in January, 2006, as required under the statute. We are pleased to report that the final rules were adopted by the Commission in December, 2006. A description of the rulemaking process and the major features of the new rules follow.

Procedural History

Pursuant to RCW 47.29, the Transportation Commission began drafting administrative rules to implement the Transportation Innovative Partnership Program (TIPP) in fall, 2005. A TIPP working group, comprised of commissioners Forner, Stedman, and Barnes, held public work sessions to consider various provisions to include in the draft rules. Comments were encouraged and offered by the public during the work sessions. A first working draft of the TIPP rules was proposed in January, 2006, and was posted to the Commission's website as an informational item for public viewing and comment.

The Commission filed its notice of intent to adopt rules under an expedited rulemaking process (CR 103, published as WSR 06-08-060). It was subsequently pointed out by legal counsel that a new state public disclosure law had recently been enacted and that the draft rules pending before the Commission contained provisions that were contradictory to the new public disclosure law. As a result, the Commission moved out of the expedited rulemaking process, corrected the public disclosure portions of the draft rules, commenced the regular rulemaking process by filing a CR 102 (legal paperwork), and published the second version of the draft rules in the Washington State Register as WSR 06-20-069.

Written comments were received. At its November 15, 2006 meeting, the Commission accepted into the record additional written comments that arrived just after the formal deadline. The required public hearing on the proposed rules was held during the Commission's November 15, 2006 meeting. Public testimony was received and taken under consideration. At that same hearing, staff presented an errata sheet that made several technical corrections to the draft rules, none of which contained any substantive changes to the rules or policies imbedded therein. A motion was made and duly adopted to incorporate the technical corrections contained in the errata sheet into a revised draft of the TIPP rules.

Prior to reopening deliberations on the draft rules, the Commission directed staff to compile all comments received and provide an agency (WSDOT) response, which would be posted to the website, made available to the public, and circulated to the Commission for consideration at their December 16, 2006 regular meeting. After reviewing and discussing the rules, the Commission passed a resolution that formally adopted the rules as WAC 468-600.[8]

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[8] The final rules are attached as Appendix D.

Overview of Major Provisions of the New TIP Program Rules, WAC 468-600

There are a couple key features of the TIPP rules that we would like to highlight. First, the rules seek to create a stable, predictable approach toward the development of potential public-private partnership projects. This is accomplished through the use of a TIPP project registry. WSDOT is required to screen and select projects it believes merit further investigation for development as a public-private partnership. Projects identified by WSDOT will be placed on the registry, with an estimated date when the Department expects to solicit proposals. The registry is published and made available for all to see which projects might make good PPP candidates. This not only helps keep the public and private sector informed of the state's intentions, but also acts to regulate the flow of projects through WSDOT and the Commission, helping to ensure that each project undertaken receives the full attention and resources available, rather than attempting to procure multiple projects at the exact same time.

A second feature of these rules we wish to highlight is the requirement that if the Commission receives an unsolicited proposal (one that is not on the project registry and scheduled for solicitation), and if the unsolicited proposal merits further review and development, the Commission requires that other firms be allowed to compete for the same project. This feature is designed to introduce competition into the unsolicited proposal process and, in so doing, hopefully result in the best terms possible for the public if the Commission decides to move forward with the project. It must be noted, however, that unsolicited proposals are not currently permitted under law (a moratorium is in effect through June 30, 2007). This moratorium was put in place to ensure that the state has sufficient resources to handle both a solicited program through its project registry and an unsolicited proposal process, which is by its nature unpredictable in both project scope and timing.

Summary of Comments Received on TIPP Rules

Several comments were received, both formally and informally, throughout the rulemaking process. The Commission reviewed, considered, and discussed all comments over the course of two meetings (November and December, 2006). A full description of the comments received and WSDOT's response to these comments was also presented to the Commission to help focus the policy discussion that ensued.[9]

In brief, the three primary issues raised during the comment period were:

1. The financing restrictions in RCW 47.29.060 act to preclude private sector financial participation, and, as a result, private firms are unlikely to participate in Washington projects because there is no opportunity to recover a

[9] Appendix E, *Comments received on TIP Program Rules (with WSDOT responses),* distributed to Commission on December 6, 2006 and presented at the December 16, 2006 public meeting.

reasonable profit consistent with the risks associated with these type of projects;

2. The review and approval process created under the statute and under the rules contains far too many avenues for the state to terminate a project; no private firms will spend the millions of dollars to participate in the TIP program if these numerous "trap doors" remain in place; and

3. The creation of a project registry lacks a requirement that WSDOT actually conduct a solicitation for the identified projects. The Department could decide not to solicit any TIP projects, since there is nothing in the rules or statute that requires action. The implication of this is that those projects on the registry are essentially frozen from further exploration, most notably off-limits for the unsolicited proposal process.

Other points were raised, which have been included in the summary attached as Appendix E, but these were the three issues raised most often by commentors.

6. 2007 Outlook for Transportation Innovative Partnerships

We expect the TIP program to reach several key milestones during 2007. The new administrative rules take effect in January, 2007. This signals the state's readiness to actively seek public-private partnerships to help improve the transportation system.

The 2007 Legislative session is also a key milestone. This session is the first opportunity the Legislature and Governor will have to decide the appropriate level of funding for the program's biennial budget. As previously noted, current funding for the Commission and WSDOT has not included specific appropriations for the TIP program. We also present the Legislature with some clear recommendations for statutory revisions that would greatly enhance the attractiveness of the TIP program for potential partnerships.

WSDOT's development of a project registry during the first half of 2007 is another important milestone. The agency will identify those projects that merit further analysis for their PPP potential. Those that appear to be strong candidates will be placed on the project registry, with an anticipated timeline for issuing Requests for Proposals from the private sector.

In order to advance the TIP program, specialized expertise in the areas of traffic and revenue forecasting, finance, law, and program development are required. Assuming funding is made available, WSDOT will procure the services of these experts through several Requests for Qualification (RFQ), which will developing a deep reservoir of expertise upon which to draw to advance the TIP program. We expect this milestone to be reached in 2007.

Finally, it is possible that by the end of 2007, the TIP program will begin a solicitation to the private sector for the development of a public-private partnership project that is chosen from the project registry. This would mark 2007 as a year with tremendous advancements in the development of the program.

Appendices

Appendix A: TIPP Approval Process chart

Appendix B: Transportation Commission Budget Request in support of Transportation Innovative Partnership Program

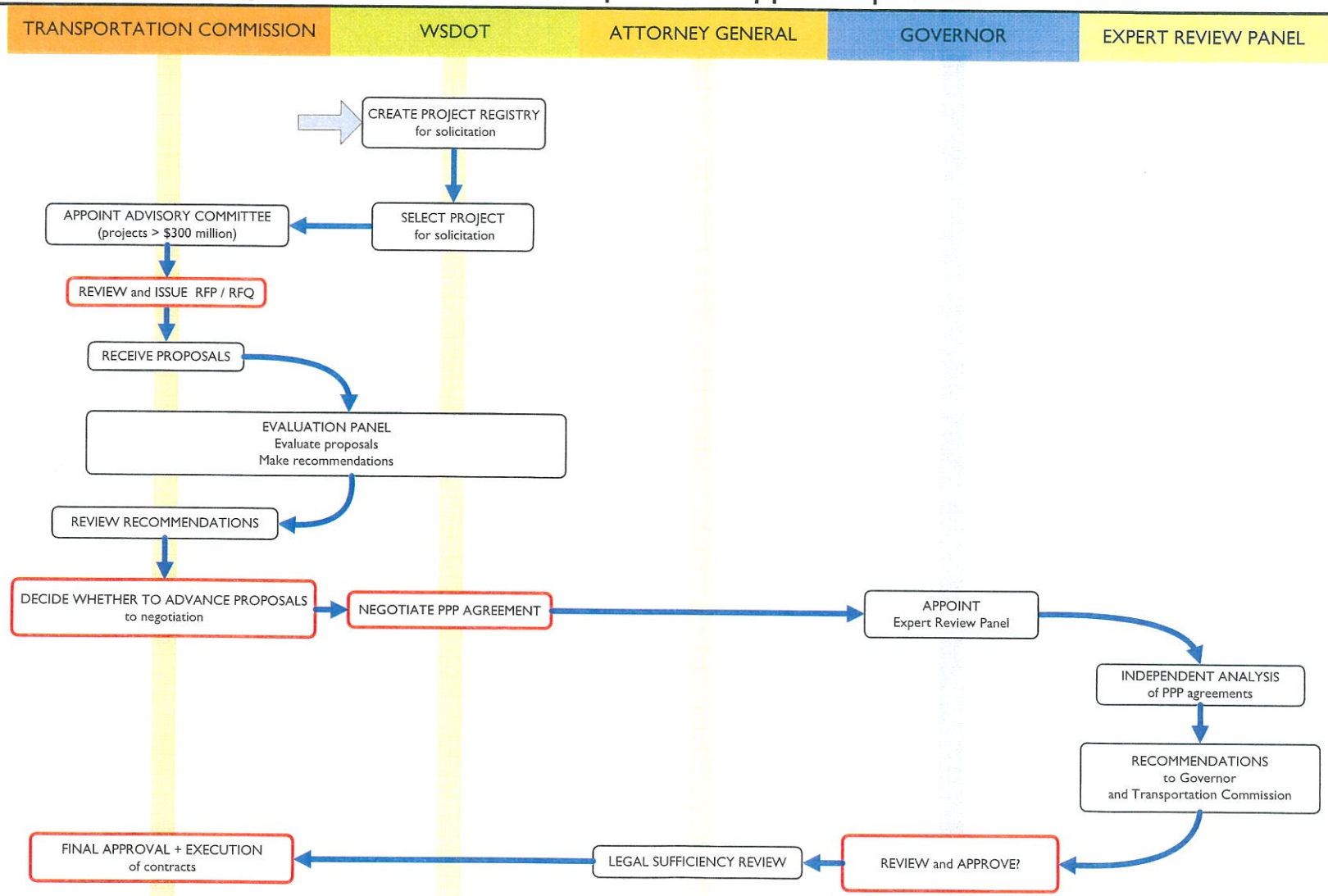
Appendix C: WSDOT Biennial Budget Request for Program K, Public-Private Partnerships

Appendix D: Administrative Rules for Transportation Innovative Partnership Program (WAC 468-600)

Appendix E: All written comments received on draft Administrative Rules with WSDOT responses to comments

APPENDIX
A

TIPP Project Agreements: Critical stops in the approval process



Washington State Department of Transportation

LEGEND

= CRITICAL STOP in the TIPP project approval process

APPENDIX
B

State of Washington
Recommendation Summary

Agency: 410 Transportation Commission

2:11:23PM
8/25/2006

Dollars in Thousands	Annual Average FTEs	General Fund State	Other Funds	Total Funds
2005-07 Current Biennium Total	**8.7**		**5,206**	**5,206**
CL 2B Central Service Agency Charges			(2)	(2)
CL 2I Pension Rate Biennialization			6	6
CL 2L Non-represented Salary COLA			(2)	(2)
CL 2M Non-represented Health Benefits			3	3
CL 5A Statewide Tolling Study			(1,500)	(1,500)
CL 5B Rail Studies			(1,150)	(1,150)
CL 5C Reduction to Certain TPAB Functions	(2.2)		(1,362)	(1,362)
CL 5D Commission Reorganization	0.5		150	150
CL 5E Commission Moving Costs (one time)			(120)	(120)
CL 5F Commission Moving Costs (ongoing)			140	140
Total Carry Forward Level	**7.0**		**1,369**	**1,369**
Percent Change from Current Biennium	(19.5)%		(73.7)%	(73.7)%
Carry Forward plus Workload Changes	**7.0**		**1,369**	**1,369**
Percent Change from Current Biennium	(19.5)%		(73.7)%	(73.7)%
M2 9T Transfers				
Total Maintenance Level	**7.0**		**1,369**	**1,369**
Percent Change from Current Biennium	(19.5)%		(73.7)%	(73.7)%
PL 1C Compensation and Travel	1.7		197	197
PL 2C Consultant Support Services			1,000	1,000
PL 3C Fiscal Analyst	1.0		196	196
Subtotal - Performance Level Changes	**2.7**		**1,393**	**1,393**
2007-09 Total Proposed Budget	**9.7**		**2,762**	**2,762**
Percent Change from Current Biennium	11.5%		(46.9)%	(46.9)%

PL 1C Compensation and Travel

Funding is provided to address the statutory increase in the number of allowable days the members of the Transportation Commission can be compensated for. In 2006, the allowable number of days per year a Commissioner could receive compensation for was increased from 120 days each (150 days for the Chairman), to a shared amount of 1,230 days per year. The funding needed to implement this statutory change was not provided for in the 2006 Supplemental Transportation Budget. This statutory change resulted in a net increase of 360 days per year in which Commission members could be compensated for collectively and this package will fund that incremental increase.

PL 2C Consultant Support Services

Provides funding for consultant services to ensure that the Transportation Commission fully and independently accomplishes its responsibilities related to outreach and accountability as mandated in statute. Specific consultant services this package funds include: conducting two performance measure reviews of transportation-related agencies; conducting a biennial survey assessment of public attitudes on transportation including such topics as tolling, program delivery, overall funding levels and investment priorities, etc.; hosting a regional forum/ state transportation conference to gather public input on transportation policy and fiscal matters; facilitation and production of the next Washington Transportation Plan (WTP) update to commence in late 2007; and production of an annual policy guidance report and a biennial statewide multi-modal progress report

PL 3C Fiscal Analyst

Funding is provided for one fiscal position that will be an integral part of the Transportation Commission's ability to independently meet its fiscal and performance accountability responsibilities that include: toll and ferry fare setting; oversight, review, and approval of all financial agreements executed by the Department of Transportation's Innovative Partnerships program; development of the State's 10 year investment plan; and conducting and managing performance measure reviews. This position will allow the Commission to accomplish these, and other responsibilities, in a more independent manner than the current staffing structure which calls for the Department of Transportation to provide this staff support.

APPENDIX
C

Program K, Public-Private Partnerships

Program Description

This program explores opportunities to create public-private partnerships for the financing and development of transportation projects. This is accomplished through the following activities: researching alternative financing and project delivery methods employed in other states and countries; identifying potential projects and soliciting proposals from the private sector for financing and/or development; investigating proposals made by the private sector; and providing technical staff support for the Transportation Innovative Partnership Program, described in RCW 47.29.

2005-07 Budget

The Public-Private Initiatives (PPI) program was substantially altered during the 2005 legislative session with the passage of SHB 1541 (Transportation Innovative Partnerships Act). This legislation phases out RCW 47.46 (PPI Act) to coincide with the completion of the Tacoma Narrows Bridge and enables the department to enter into partnerships with private entities for the development of transportation facilities. The Transportation Commission was required to enact rules for the proper acceptance, review, evaluation, and selection of projects. Funding was adjusted for compensation increases and Governor-directed middle management reductions.

The 2006 Supplemental Budget provided funding for a contribution toward the unfunded actuarial accrued liabilities of PERS 1.

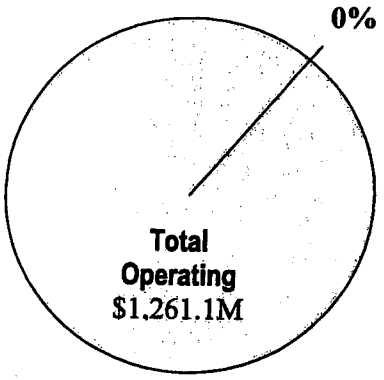
2007-09 Budget

Funding is provided to implement the Transportation Innovative Partnerships program that was enacted during the 2005 legislative session. The department would establish a program capable of developing up to two Public-Private Partnership (PPP) projects. Additionally, funds provided would enable the state to accept, review and investigate the merits of an unsolicited proposal from the private sector.

The budget includes these program structure changes to better align the funding with management responsibility and organizational reporting structures:

- Transfer funding from Transportation Economic Partnerships (Program K) to Strategic Planning & Programming (Program T) to align with the assignment of one additional FTE to the development services function in Strategic Planning and Programming.
- Transfer the funding for the Attorney General to Charges from Other Agencies (Program U).

2007-09 Budget Request



Program K
$3.8M

FTEs
5.5

Program K, Public/Private Partnerships (continued)

Budget Summary (In millions of dollars)	2005-07 Budget	2007-09 Request	2007-2017 Plan
Program K, Public/Private Partnerships	$1.072	$3.847	$32.9

2007-09 Budget Request Detail (in millions of dollars)		
Budget Items	**Dollars**	**FTE**
2005-07 Budget with 2006 Supplemental	**$1.072**	**5.7**
Carry Forward Adjustments		
Middle Management Reduction	-0.029	-0.2
Super Coalition Health Benefits	-0.001	
Pension Rate Biennialization	0.016	
Represented Salary COLA	-0.001	
Non-represented Salary COLA	-0.004	
Non-represented Health Benefits	0.004	
Sum of Carry Forward Adjustments	-0.015	-0.2
Carry Forward Level	**1.057**	**5.5**
Program Structure Changes		
Staffing Adjustments	-0.210	-1.0
Decision Packages		
Public-Private Partnerships Program	3.000	1.0
Sum of Program Structure Changes and Decision Packages	2.790	0.0
2007-09 Request	**$3.847**	**5.5**
% Change from 2005-07	258.9%	-3.5%

APPENDIX
D

Chapter 468-600 WAC

TRANSPORTATION INNOVATIVE PARTNERSHIP PROGRAM

NEW SECTION

WAC 468-600-010 Intent. The Transportation Innovative Partnership Act was created to encourage the innovative delivery and funding of important transportation-related projects and services by leveraging resources more readily available in the private sector.

The legislature has articulated the policy goals and objectives of the act, found in chapter 47.29 RCW. These rules are intended to prescribe the processes that will be used to implement a successful transportation innovative partnership program in the state of Washington.

NEW SECTION

WAC 468-600-015 Definitions. As used in these rules:

(1) "Commission" means the Washington state transportation commission;

(2) "Competing proposal" means a written submission to the department that a proposer submits in response to a notice issued by the department under WAC 468-600-320;

(3) "Department" means the Washington state department of transportation;

(4) "Eligible project" as defined in RCW 47.29.050 includes:

(a) 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. However, this does not include projects that are primarily for recreational purposes, such as parks, hiking trails, off-road vehicle trails, etc.; and

(b) Facilities, structures, operations, properties, vehicles, vessels, or the like that are developed concurrently

with an eligible transportation project and that are capable of providing revenues to support financing of an eligible transportation project, or that are public projects that advance public purposes unrelated to transportation;

(5) "Eligible public works project" means only a project that meets the criteria of either RCW 47.29.060 (3) or (4);

(6) "Governor" means the governor of the state of Washington;

(7) "Key persons" means individuals or personnel employed by or affiliated with a proposer or team of proposers, and who, because of that person's responsibilities and participation in a proposed project, the department has formally designated as key to the proposer's ability to successfully develop or deliver the project;

(8) "Major partner" means, with respect to a limited liability company or joint venture, each firm, business organization or person that has an ownership interest therein in excess of five percent, unless the department has provided an alternate definition that applies only to a specific project or series of projects;

(9) "Major subcontractor" means any subcontractor designated in the proposal to perform ten percent or more of the scope of work for a proposed project, unless the department has provided an alternate definition that applies only to a specific project or series of projects;

(10) "Private sector partner" and "private partner" means a person, entity or organization that is not the federal government, a state, or a political subdivision of the state and that proposes to enter into an agreement with the state to participate in any or all portions of the design, development, construction, improvement, expansion, extension, delivery, operation, maintenance or financing of a project eligible under the act;

(11) "Proposal" means a written submission to the department satisfying the requirements of WAC 468-600-240 or 468-600-250;

(12) "Proposer" means a person, business entity, a consortium of business entities or a public sector entity that submit a proposal for review and evaluation under these rules, whether the proposal was solicited or unsolicited by the department;

(13) "Public facility" means a building, structure, vehicle, vessel or the like where ownership is retained by the public sector and where the facility is available for use by the general public. This does not include any facilities that are owned by the private sector;

(14) "Public funds" means all moneys derived from a public imposition of taxes, fees, charges and tolls, including those imposed by a private entity for the privilege to use a publicly

owned facility;

(15) "Public-private partnership" and "PPP" mean a nontraditional arrangement between the department and one or more public or private entities for the implementation of an eligible project as defined in subsection (12) of this section;

(16) "Public project" means a project that is owned by the state or any of its political subdivisions;

(17) "Secretary" means the secretary of the Washington state department of transportation;

(18) "State" means the government of the state of Washington, including all agencies, organizations, boards, commissions, elected or appointed officials, who are empowered to act on behalf of the state of Washington;

(19) "Transportation Innovative Partnership Act" and "act" means the law enacted and codified in chapter 47.29 RCW, and any amendments thereto;

(20) "Transportation innovative partnership program" and "TIPP" means that portion of the department of transportation responsible for implementing and carrying out the duties prescribed in chapter 47.29 RCW, these rules, and under the powers conferred upon the department to implement the executive branch functions of state government;

(21) "WSDOT" means the Washington state department of transportation.

CONFLICT OF INTEREST, PROPOSER CONDUCT AND APPEARANCE OF FAIRNESS

NEW SECTION

WAC 468-600-030 Conflict of interest. (1) When submitting a proposal, the proposer's representative must certify that he or she is unaware of any information that might be pertinent in determining whether an organizational conflict of interest exists. If the proposer is aware of information that might be pertinent to this issue, the proposer must provide, as an exception to the certification, a disclosure statement fully describing this information in a form approved by the commission as part of its proposal. For purposes of this section, "organizational conflict of interest" means that because of other activities or relationships with other persons, a proposer, a principal officer of a proposer, or a prime contractor who is proposed to perform construction or design work on an eligible project, is unable or potentially unable to render impartial assistance or advice to the state; or the person's objectivity in performing the proposed contract work is or might be otherwise impaired; or a person has an unfair competitive advantage.

(2) After review and approval by the commission, the department shall publish and make available conflict of interest guidelines and policies that encompass the standards of conduct required by federal and state law, and as further required in these administrative rules. The conflict of interest guidelines and policies may be modified as necessary to meet the particular objectives of individual projects, whether those projects emanate from solicited or unsolicited proposals.

NEW SECTION

WAC 468-600-035 Proposer conduct. (1) Proposers are prohibited from influencing or attempting to influence the evaluation of, or the decision to select a specific project proposal that has been submitted, or may be submitted under these rules, except as specifically allowed under these rules or as specifically allowed by the state in any RFP document. This includes, but is not limited to, attempts to influence officers or employees of the state or elected or appointed officials of the local, state or federal level of government.

(2) For those activities not prohibited by subsection (1)

of this section, but which attempt to influence decision making in any legislative branch, proposers must fully disclose all lobbying activities undertaken by any of its contractors, officers, employees or agents that are subject to public disclosure under chapter 42.17 RCW or federal law. For lobbying activities subject to chapter 42.17 RCW, copies of all required disclosure forms for the previous two years' reporting cycles must be submitted.

NEW SECTION

WAC 468-600-038 Conflict of interest by state officials--Appearance of fairness. (1) Any person elected, appointed or employed by the state, who has a conflict of interest or potential conflict of interest, must disclose such actual or potential conflict of interest and abstain from consideration, discussion, debate, and decision making concerning any project proposal submitted under these rules.

(2) During the pendency of any solicitation, negotiation or selection of a proposal, no member of the commission may engage in ex parte communications with proponents or opponents with respect to the proposal, unless that person:

(a) Places on the record the substance of any written or oral ex parte communications concerning the decision of action; and

(b) Provides that a public announcement of the content of the communication and of the parties' rights to rebut the substance of the communication shall be made at each meeting where action is considered or taken on the subject to which the communication related. This prohibition does not preclude a member of the commission from seeking in a public meeting specific information or data from such parties relative to the decision if both the request and the results are a part of the public record.

NEW SECTION

WAC 468-600-040 Release of rights and indemnification of state. By submitting a proposal, a proposer thereby waives and relinquishes any claim, right, or expectation to occupy, use, profit from, or otherwise exercise any prerogative with respect to any route, corridor, rights of way, public property or public facility identified in the proposal as being necessary for or part of the proposed project. A proposer may not obtain any claim, right or expectation to use any such route, corridor, rights of way, public property or public facility by virtue of having submitted a proposal that proposes to use it or otherwise involves or affects it.

By submitting such a proposal, a proposer thereby waives and relinquishes any right, claim, copyright, proprietary interest or other right in any proposed location, site, route, corridor, rights of way, alignment, or transportation mode or configuration identified in the proposal as being involved in or related to the proposed project, and proposer agrees to indemnify and hold the state harmless against any such claim made by any of its contractors, subcontractors, agents, employees and assigns.

The waiver and release of rights in this section do not apply to a proposer's rights in any documents, designs and other information and records that constitute "sensitive business, commercial or financial information" as that term is defined and used in WAC 468-600-605.

SOLICITED PROPOSALS

NEW SECTION

WAC 468-600-100 Department to establish programmatic approach to solicitation of TIP projects. (1) The department shall establish a programmatic approach, or plan, for the selection and solicitation of TIP projects. The plan will include maintaining a registry of projects eligible for development under a competitive solicitation process. The projects must meet all eligibility requirements of WAC 468-600-015(4). The projects should be reasonably described, including the status of any preliminary development or construction, and any public or private funds committed for any phase of the project, whether expended, appropriated, earmarked or otherwise identified as available for use.

(2) The department shall periodically update the information in the registry, and shall review and consider additions or deletions to the registry at least every two years. When considering additional projects for the registry, or removal of the projects on the registry, the department must publish a request for information that seeks comments and suggestions from the public and private sectors.

(3) At least once every two years, the department must develop a plan for conducting a solicitation of proposals under the TIP program. The purpose of this plan is to:

(a) Encourage sound programming and budgeting practices, which are the basis for submittals required under chapter 43.88 RCW;

(b) Ensure that the department does not issue a request for proposals that exceeds the resources available to properly evaluate, select and enter into development agreements;

(c) Ensure that development of projects under the TIP program would not run contrary to any legislatively enacted direction or express executive policies or directions; and

(d) Provide potential proposers an anticipated schedule for the solicitation and development of certain projects on the registry.

In selecting projects for competitive solicitation, the department should endeavor to follow the published plan for soliciting proposals for projects on the registry. However, the department is not required to solicit only those projects contained on the registry, nor is it required to conduct a solicitation for a predetermined number of projects each year or biennium, nor is it required to undertake projects in the exact order of consideration as published in the *Register*.

NEW SECTION

WAC 468-600-102 Selection of projects for solicitation. The department may select projects for development that it believes would benefit from the formation of a public-private partnership under the TIP program, and present a draft request for proposals for the selected project or projects to the commission for review and approval to proceed with a solicitation. In making its recommendation of projects for solicitation, the department should seek those that offer the greatest potential to accelerate cost-effective delivery of the project, promote innovative approaches to delivering the project, provide a means of financing for the project that might not otherwise be readily available under a traditional project delivery process, or otherwise meet the policy goals established in RCW 47.29.040. Before approving any projects proposed for solicitation, the commission must ensure that the projects are included in the Washington transportation plan or otherwise identified by the commission as being a priority need for the state.

NEW SECTION

WAC 468-600-103 Alternative process for soliciting projects authorized. When the department in its sole discretion deems it appropriate to do so given the nature of the proposal, the department may specify requirements for proposal content, and for criteria and procedures under which the proposals will be evaluated and selected, that are in addition to or in lieu of those provided for in WAC 468-600-105 through 468-600-110 and 468-600-300 through 468-600-350. Any alternative process or processes so specified must comply with the requirements of RCW 47.29.010 through 47.29.290. Examples of possible alternative processes include:

(1) Issuing a request for qualifications, where proposers are ranked and selected based on the qualifications of the major partners, major subcontractors and key persons, which would result in a predevelopment agreement being entered into that authorizes the proposer to fully develop a detailed proposal that would be evaluated pursuant to WAC 468-600-350;

(2) Issuing a request for proposals that invites the

private sector to make proposals to develop eligible projects that are contained in the department's registry of projects under WAC 468-600-100.

These examples are offered for illustrative purposes only, and should not be construed to limit the scope of the state's discretion or authority to develop proposal and evaluation criteria and processes for any project as long as those criteria and processes comply with the requirements of RCW 47.29.010 et seq.

NEW SECTION

WAC 468-600-105 Issuance of requests for proposals. The department shall draft and issue requests for proposals at the direction or on behalf of the commission pursuant to WAC 468-600-102. When drafting requests for proposals (RFP), the department must specify requirements for proposal content, and may identify criteria and procedures under which proposals will be evaluated and selected. If the commission approves the projects and the RFP proposed for solicitation, the department shall issue the RFP and publish notice as provided in WAC 468-600-106. The department may set the deadline for responses as it sees fit to encourage full knowledge, opportunity and competition among private entities. At a minimum, the request for proposals for each transportation project must include the following:

(1) **General information.**

(a) Notice of any preproposal conference as follows:

(i) The time, date and location of any preproposal conference;

(ii) Whether attendance at the conference will be mandatory or voluntary; and

(iii) A disclaimer that statements made by the department's representatives at the conference are not binding upon the state unless confirmed by written addendum.

(b) The name and title of the person authorized and designated by the department to receive the proposals and contact person (if different).

(c) Instructions and information concerning submission requirements including the address of the office to which proposals must be delivered and any other special information, e.g., whether proposals may be submitted by facsimile or electronic data interchange (secured e-mail).

(d) The time and date of closing after which the department will not accept proposals.

(e) The form and submission of proposals and any information required therein.

(f) If the agreement resulting from a solicitation will be a contract for a public work subject to chapter 39.12 RCW or the Davis-Bacon Act (40 U.S.C. section 3141 to 3148), a statement that no proposals will be considered by the state unless the proposal contains a statement by the proposer, as part of its proposal, that proposer agrees to be bound by and will comply with the provisions of chapter 39.12 RCW and 40 U.S.C. section 3141 to 3148.

(g) Contractor's certification of nondiscrimination in obtaining required subcontractors in accordance with state law.

(h) How the state will notify proposers of addenda and how the state will make addenda available.

(2) **Project description.** A description of the eligible project for which the department is requesting proposals for a public-private partnership in such detail as the department considers appropriate or feasible under the circumstance.

(3) **Evaluation process.** A description of the process by which the proposals will be evaluated, including:

(a) A statement that the commission and/or department may reject any proposal not in compliance with all prescribed procedures and requirements and other applicable laws, and that the state reserves its rights under WAC 468-600-810;

(b) The anticipated solicitation schedule, deadlines, protest process, and evaluation process, if any; and

(c) Evaluation criteria that the state will use to select a proposal(s) from among those submitted in response to the request for proposals.

(4) **Desired contract terms.** The department shall provide an outline or draft term sheet of those contract terms and conditions, including warranties and bonding requirements, that the department considers necessary.

(5) **Federal funds.** If federal funds are involved, the federal laws, rules and regulations applicable to the fund requirements shall govern in the event they conflict with a provision required by state law.

NEW SECTION

WAC 468-600-110 Public notice of solicitation. (1) **Notice and distribution fee.** The commission, or the department acting on behalf of the commission, shall furnish notice to a sufficient number of entities for the purpose of fostering and promoting competition. The notice shall indicate where, when, how, and for how long the solicitation document may be obtained and generally describe the work. The notice may contain any other appropriate information. The department may charge a fee or require a deposit for the solicitation document. The department may furnish notice using any method determined to foster and promote competition, including:

(a) Mail notice of the availability of solicitation documents ("notice") to entities that have expressed an interest in department procurements;

(b) Place notice on the state of Washington's electronic procurement system; or

(c) Place notice on the department's and the commission's internet web site.

(2) **Method of publication.** The department shall furnish notice for every solicitation for proposals by any method that meets the requirements of law, including:

(a) Mail notice of the availability of solicitation documents ("notice") to entities that have expressed an interest in department procurements;

(b) Place notice on the state of Washington's electronic procurement system;

(c) Place notice on the department and commission's internet web site;

(d) Advertising - the department shall publish the advertisement for proposals at least once in at least one newspaper of general circulation in the area where the contract is to be performed, in at least one trade newspaper or publication of general statewide circulation and in as many additional issues and publications as the department may determine to be necessary or desirable to foster and promote competition.

(3) **Publication contents.** All advertisements for proposals shall set forth:

(a) The scheduled closing, that shall not be less than five days after the date of the last publication of the advertisement;

(b) The date that entities must file applications for

prequalification if prequalification is a requirement and the class or classes of work for which entities must be prequalified;

(c) The nature of the work to be performed or the goods to be purchased;

(d) The office where any documents related to the solicitation may be reviewed;

(e) The name, title and address of the department employee authorized to receive proposals; and

(f) If applicable, that the contract is for a public work subject to chapter 39.12 RCW or the Davis-Bacon Act (40 U.S.C. sections 3141 to 3148).

(4) **Posting advertisement for proposals.** The department shall post a copy of each advertisement for proposals at the principal business office of the department. A proposer may obtain a copy of the advertisement for proposals upon request from the transportation innovative partnership program office, or on the internet at www.wsdot.wa.gov.

(5) **Notice to state office of minority and women's business enterprises (OMWBE).** The department shall provide timely notice of all solicitations to the state office of minority and women's business enterprises.

UNSOLICITED PROPOSALS

NEW SECTION

WAC 468-600-200 Authority for the state to accept unsolicited proposals--Moratorium. The commission may not accept or consider any unsolicited proposals before July 1, 2007.

NEW SECTION

WAC 468-600-210 Projects eligible for unsolicited proposals. Projects that are the subject of an unsolicited proposal must meet the following minimum criteria:

(1) The project must meet the definition of an "eligible

project" under WAC 468-600-015(4);

(2) The project must not be listed in the registry of projects intended for a competitive solicitation, under WAC 468-600-100;

(3) The project must be included in the Washington transportation plan or otherwise identified by the commission as being a priority need of the state.

NEW SECTION

WAC 468-600-215 Department's management of unsolicited proposals. (1) The department may, at any time, select any class, category or description of proposal or an eligible project, including any individual proposal or project, for the purpose of giving priority to the processing and consideration of unsolicited proposals by issuing a written order that declares that the department will give priority to the processing and consideration of unsolicited proposals for certain types of projects (or to a particular proposal), and describes the class or character of the proposals or projects (or the particular proposal or project) that are given priority. The priority order may either specify the term of the priority order, identify the submitted proposals (or proposal) that are subject to the priority order, or provide that the priority order will continue in effect until recalled by a subsequent order of the department.

(2) Commencing on the effective date of the order giving priority, the department may undertake expedited processing and consideration of unsolicited proposals (or a particular unsolicited proposal) for transportation projects of the class, category or description contained in the order. The limited resources of the department, in such cases, will require either the postponement of, or delay in, the processing and consideration of unsolicited proposals for projects that are not within a class, category or description that is subject to a priority order.

(3) By submitting an unsolicited proposal, each proposer thereby waives and relinquishes every claim of right, entitlement or expectation that:

(a) Its proposal will enjoy the benefit of a priority order; and

(b) The processing and consideration of its proposal will not be subject to postponement or delay arising out of the department's issuance of an order that gives priority to another proposal or to proposals for different classes, categories or

descriptions of projects.

(4) The department may, by written order, suspend the acceptance and consideration of proposals based on the types, classes, cost ranges, geographic areas of projects, or other factors as determined by the department. The order will specify either the term of the suspension or that the suspension will continue until recalled by a subsequent order of the department.

(5) Commencing on the effective date of the suspension order, the department will refuse to accept unsolicited proposals or unsolicited proposals for projects of the class, category or description contained in the order, and may, as stated in the order, cease further processing and consideration of any such unsolicited proposals then currently under consideration by the department.

(6) By submitting an unsolicited proposal, each proposer thereby waives and relinquishes every claim of right, entitlement or expectation that the processing and consideration of its proposal will not be subject to suspension under this rule.

(7) The state of Washington, the department of transportation, the Washington transportation commission, and their officers and employees, shall have no responsibility or liability of any nature for the preservation, confidentiality or safekeeping of any proposal that is subject to a suspension order under this rule and is submitted to the department while that suspension order is in effect.

NEW SECTION

WAC 468-600-220 Submission of unsolicited conceptual proposals. (1) Subject to WAC 468-600-210 through 468-600-215, any private entity or unit of government may submit an unsolicited conceptual proposal for a project to the department for consideration under the transportation innovative partnership program.

(2) A proposal review fee in the amount prescribed by WAC 468-600-230 must accompany any unsolicited conceptual proposal submitted by a private entity or unit of government.

(3) The proposer shall submit twenty copies, individually identified, of any unsolicited conceptual proposal in addition to the proposal bearing the signature of the authorized representative. The original proposal, required copies and processing fee shall be delivered to the department.

(4) The department will consider an unsolicited conceptual proposal only if:

(a) The proposed project is unique or innovative in comparison with, and is not substantially duplicative of, other transportation system projects included in the state transportation improvement program within the department or, if it is similar to a project in the state transportation improvement program, the proposed project has not been fully funded by the state or any other public entity as of the date the proposal is submitted, or the proposal offers an opportunity to materially advance or accelerate the implementation of the project. Unique or innovative features that may be considered by the department in evaluating such a proposal may include but are not limited to unique or innovative financing, construction, design, schedule or other project components as compared with other projects or as otherwise defined by state rules or regulations; and

(b) The conceptual phase includes all information required by and is presented in the format set out in WAC 468-600-240. Such information shall include a list of any proprietary information included in the proposal that the proposer considers protected trade secrets or other information exempted from disclosure under either WAC 468-600-605 or RCW 47.29.190.

(5) The department will not consider an unsolicited proposal for a project involving another state or local government unit of another state unless the department and the appropriate representative of the other state or of the local government unit of the other state have entered into an agreement that permits the acceptance of unsolicited proposals for such a project.

NEW SECTION

WAC 468-600-230 Fees to accompany unsolicited proposals. (Reserved.)

NEW SECTION

WAC 468-600-232 Alternative process authorized. When the commission in its sole discretion deems it appropriate to do so given the nature of the proposal, the commission may specify requirements for proposal content, and for criteria and procedures under which the proposals will be evaluated and selected, that are in addition to or in lieu of those provided for in WAC 468-600-240 through 468-600-370. Any alternative process or processes so specified must comply with the requirements of RCW 47.29.010 through 47.29.290. Examples of possible alternative processes include:

(1) Selecting a proposal for development into a final agreement based on a unitary proposal instead of a two-step conceptual/detailed proposal process; and

(2) Proposers are ranked and selected based on the qualifications of the major partners, major subcontractors and key persons, which would result in a predevelopment agreement being entered into that authorizes the proposer to fully develop a detailed proposal that would be evaluated pursuant to WAC 468-600-350.

(3) Nothing in this section, nor in these WAC rules, shall be construed to allow proposer conduct or participation in a project that would be prohibited under the Federal Highway Administration's *Conflict of Interest Guidelines*.

These examples are offered for illustrative purposes only, and should not be construed to limit the scope of the state's discretion or authority to develop proposal and evaluation criteria and processes for any project as long as those criteria and processes comply with the requirements of RCW 47.29.010 et seq.

NEW SECTION

WAC 468-600-240 Contents and format of conceptual proposals. Pursuant to RCW 47.29.170, unsolicited proposals are subject to a two-step process. The first step is to submit the conceptual proposal. If the concept is approved, the commission or department may ask for further information in the form of a fully detailed proposal, which constitutes the second step. An unsolicited or competing conceptual proposal shall include at least the following information, unless waived by the department, separated by tabs as herein described:

(1) **TAB 1: Qualifications and experience.**

(a) Identify the legal structure of the private entity or consortium of private entities or of private and public entities (the "team") submitting the proposal. Identify the organizational structure of the team for the project, the team's management approach and how each major partner and major subcontractor identified as being a part of the team as of the date of submission of the proposal fits into the overall team.

(b) Describe the experience of each private entity involved in the proposed project. Describe the length of time in business, business experience, public sector transportation experience, PPP experience, development experience, design-build experience and other similarly sized engagements of each major partner and major subcontractor. The lead entity must be identified.

(c) Provide the names, addresses and telephone numbers of persons within the team who may be contacted for further information.

(d) Include the address, telephone number, and the name of a specific contact person at a public entity for which the private entity or the team or the primary members of the team have completed a development project, public-private partnership project or design-build project.

(e) Include the resumes for those managerial persons within the team that will likely be associated in a significant way with the project development and implementation.

(f) Provide financial information regarding the private entity or team and each major partner that includes, if available, the most recent independently audited financial statement of the private entity or team and of each major partner, and which demonstrates their ability to perform the work and project as set forth in the proposal, including ability to obtain appropriate payment and performance bonds.

(g) Submit executed disclosure forms, prescribed by the department, for the team, each major partner and any major subcontractor.

(2) **TAB 2: Project characteristics.**

(a) Provide a topographical map (1:2,000 or other appropriate scale) depicting the location of the proposed project.

(b) Provide a description of the eligible project or projects, including all proposed interconnections with other existing transportation facilities or known publicly identified projects.

(c) Describe the project in sufficient detail so the type and intent of the project, the general location of the project, and the communities that may be affected by the project are clearly identified. Describe the assumptions used in developing the project.

(d) List the critical factors for the project's success.

(e) If the proposed project does not conform with the state and regional transportation plans or regional plans, outline the proposer's approach for securing the project's conformity with, or indicate the steps required for, acceptance into such plans.

(f) When a proposed project is sited, in whole or in part, within the jurisdiction of a metropolitan planning organization or area commission on transportation, identify applicable regional and local approvals required for the project.

(g) Provide an explanation of how the proposed transportation project would impact local transportation plans of each affected locality.

(h) Provide a list of public transportation facilities and major apparent public utility facilities that will be crossed or affected by the transportation project and a statement of the proposer's plans to accommodate such facilities.

(i) Describe the role the proposer anticipates the department will have in the development, construction, operation, maintenance, financing, or any other aspect of the eligible project.

(3) **TAB 3: Project financing.**

(a) Provide a projected budget for the project or scope of work based on proposer's prior experience on other scopes of work and projects or other cost projection factors and information.

(b) Include a list and discussion of assumptions (e.g., user fees, toll rates and usage of the facility) underlying all major elements of the plan for the project.

(c) Identify the proposed risk factors relating to the proposed project financing and methods for dealing with these factors.

(d) Identify any significant local, state or federal resources that the proposer contemplates requesting for the

project. Describe the total commitment (financial, services, property, etc.), if any, expected from governmental sources; the timing of any anticipated commitment; and its impact on project delivery.

(e) Identify any aspect of the financial model for the project that implicates or potentially implicates restrictions on the use of highway-related revenues under Article II, section 40 of the Washington Constitution (commonly known as the Motor Vehicle Trust Fund), and explain how the financial model avoids conflicting with those restrictions.

(f) Provide a conceptual estimate of the total cost of the transportation project.

(4) **TAB 4: Public support/project benefit/compatibility.**

(a) Identify who will benefit from the project, how they will benefit and how the project will benefit the overall transportation system.

(b) Identify any anticipated government support or opposition, or general public support or opposition, for the project.

(c) Explain the strategy and plans that will be carried out to involve and inform the agencies and the public in areas affected by the project.

(d) Describe the significant social and economic benefits of the project to the community, region or state and identify who will benefit from the project and how they will benefit. Identify any state benefits resulting from the project including the achievement of state transportation policies or other state goals.

(5) All pages of a conceptual proposal shall be numbered. Each copy of the proposal will be bound or otherwise contained in a single volume where practicable. All documentation submitted with the proposal will be contained in that single volume.

(6) A conceptual proposal submitted by a private sector partner must be signed by an authorized representative of the private sector partner submitting the unsolicited conceptual proposal.

(7) The proposer shall include a list of any proprietary information included in the proposal which the proposer considers protected trade secrets or other information exempted from disclosure under WAC 468-600-605.

NEW SECTION

WAC 468-600-250 Contents and format of detailed proposals. If the preliminary conceptual proposal is accepted, the commission or the department may request a detailed proposal. A detailed proposal shall include all information required in the conceptual proposal under WAC 468-600-240, with additional discussion, description and details, and with updates and refinements as necessary to keep the document most current. In addition, the following information must be included, unless waived by the department:

(1) **TAB 2: Project characteristics.**

(a) Provide a detailed description of the eligible project or projects, including all proposed interconnections with other existing transportation facilities or known publicly identified projects. Describe the project in sufficient detail so the type and intent of the project, the general location of the project, and the communities that may be affected by the project are clearly identified. Describe the assumptions used in developing the project.

(b) Identify any significant local, state or federal services or practical assistance that the proposer contemplates requesting for the project. In particular, identify and describe any significant services that will need to be performed by the department such as right of way acquisition or operation and maintenance of the completed project.

(c) Include a preliminary list of all significant federal, state, regional and local permits and approvals required for the project. Identify which, if any, permits or approvals are planned to be obtained by the department.

(d) List the critical factors for the project's success.

(e) Identify the proposed preliminary schedule for implementation of the project.

(f) Describe the assumptions related to ownership, law enforcement and operation of the project and any facility that is part of the project.

(g) Describe the payment and performance bonds, guarantees, letters of credit and other performance security, if any, that the proposer will provide for the project.

(h) Identify any public improvements that will be part of the proposed project that will constitute "public works" under RCW 47.29.020(5), the workers on which must be paid in accordance with Washington's prevailing rate of wage law, chapter 39.12 RCW, and any public improvements the workers on

which must be paid in accordance with the federal Davis-Bacon Act, 40 U.S.C. sections 3141 to 3148.

(2) **TAB 3: Project financing.**

(a) Identify the form and amount of any private capital contribution and the entities that will make such capital contributions. If other forms of contribution are proposed, describe the nature of the contributions, the fair market value (if applicable), and whether compensation for such contributions will be sought.

(b) If the proposal would provide for a state-granted franchise to a private concessionaire in exchange for financial consideration, provide the proposer's financial model and all capital costs, operating and maintenance costs (including reconstruction, resurfacing, restoration, and rehabilitation costs), revenues and other data and assumptions that comprise the base case financial model.

(c) Provide an explanation of how funds for the project will be segregated, accounted for and expended in a manner that ensures that any moneys protected under Article II, section 40 of the Washington Constitution be expended exclusively for the purposes authorized under that provision.

(d) Identify, to the extent possible, proposed financing team members, including banks, investment banks, equity investors, credit enhancement providers, bond trustees and legal counsel to the same.

(3) **TAB 5: Special deliverables.**

(a) Provide a statement setting out the plan for securing all necessary real property, including proposed timeline for any necessary acquisitions.

(b) Provide proposed design, construction and completion guarantees and warranties.

(c) Include traffic studies and/or forecasts and related materials that establish project revenue assumptions, including, if any, user fees or toll rates, and usage of the facility.

(d) Provide such additional material and information as the department may reasonably request.

(4) All pages of a proposal shall be numbered. Each copy of the proposal shall be bound or otherwise contained in a single volume where practicable. All documentation submitted with the proposal will be contained in that single volume.

(5) A proposal submitted by a private sector partner must be signed by an authorized representative of the private sector partner submitting the proposal.

(6) The proposer shall clearly mark any proprietary information included in the proposal which the proposer considers protected trade secrets or other information exempted from disclosure under RCW 47.29.190 and WAC 468-600-605. Any individual page containing material that the proposer considers proprietary must be stamped "proprietary."

REVIEW, EVALUATION AND SELECTION OF PROPOSALS

NEW SECTION

WAC 468-600-300 Additional disclosure requirements for proposers of solicited and unsolicited proposals. (1) In addition to the disclosure requirements of WAC 468-600-600, the department may impose, after the submission of a proposal, any other special disclosure requirements the department determines to be reasonably necessary to evaluate the expertise, experience, financial backing, integrity, ownership and control of any proposer.

(2) All proposers must provide all the information required by this rule and by the department. All proposers and key persons must complete and submit the required disclosure form within the deadlines set by the department. All proposers and key persons must provide any documents required in the disclosure process, or other documents as determined by the department, or their proposals may be rejected by the department.

(3) The department may reject, or require the supplementation of, a proposal if the proposer has not provided all information required in the disclosure form or if any information provided is not accurate, current or truthful. The failure or refusal of any proposer to properly execute, fully complete, or accurately report any information required by the required disclosure shall be sufficient grounds for rejection of the proposal.

(4) Any change in the status of the proposer, in the identity of any of the key persons, or the addition of any key persons must be reported to the department within thirty days of the known change, and those whose status has changed or who have been added as key persons will be required to submit the required disclosure information. For purposes of this section, a "change in the status of a proposer" means a reorganization of the business structure or corporate structure of the proposer or a major partner, or a change in ownership of the proposer or a major partner amounting to a transfer of over twenty percent of the entity's ownership.

(5) The burden of satisfying the department's disclosure requirements, both in terms of producing the disclosures and

assuring their accuracy and completeness, resides with each proposer.

(6) Each proposer, by submitting a proposal, thereby accepts all risk of adverse public notice, damages, financial loss, criticism, harm to reputation or embarrassment that may result from any disclosure or publication of any material or information required or requested by the state in connection with the proposer's submission of a proposal. In submitting a proposal, the proposer expressly waives, on behalf of itself, its partners, joint venturers, officers, employees and agents, any claim against the secretary, the state of Washington, the commission, the department and their officers and employees, for any damages that may arise therefrom.

(7) A public entity that submits a proposal may, prior to submission, request the department to waive the disclosure requirements of this rule with respect to the corporate public entity and its officers. However, if the public entity proposes to enter into or establish a partnership or joint venture with a private sector partner to perform any substantial portion of the proposed project (as opposed to the engagement of only a prime contractor or subcontractors), then disclosure of the private party must be made as if the private party is a proposer, in accordance with this rule.

NEW SECTION

WAC 468-600-305 Appointment of evaluation panel. The commission shall appoint and direct an evaluation panel to commence a review and evaluation process as directed in this section. At a minimum, the evaluation panel must consist of:

(1) Department staff;

(2) An independent representative of a consulting or contracting firm with no interests in the project, whose firm would be precluded from participating in any part of the project;

(3) An observer from the state auditor's office or the joint legislative audit and review committee;

(4) A person appointed by the commission; and

(5) A financial expert.

NEW SECTION

WAC 468-600-310 Preliminary review of proposals. (1) For solicited proposals, after the close of the proposal period, the department will conduct a preliminary review and certify receipt of those submitted proposals that have met the following criteria:

(a) The proposal is complete;

(b) The proposal is responsive; and

(c) The proposal meets any additional procedural or process requirements prescribed by the state.

Solicited proposals certified by the department under this subsection will be forwarded to the evaluation panel under WAC 468-600-305.

(2) Unsolicited conceptual proposals submitted under WAC 468-600-220 will be reviewed by the evaluation panel, as created and assembled under WAC 468-600-305. The evaluation panel will initially determine whether the conceptual proposal is eligible for evaluation pursuant to WAC 468-600-200 (state's authority to accept unsolicited proposals--Moratorium); WAC 468-600-210 (Projects eligible for unsolicited proposals) and WAC 468-600-215 (department's management of unsolicited proposals). If not, the evaluation panel will not proceed further with its evaluation and the department may return the proposal to the proposer. If the conceptual proposal is eligible for evaluation, the evaluation panel will assess:

(a) Whether the proposal is complete;

(b) Whether the proposer appears qualified;

(c) Whether the proposal appears to satisfy the requirements of WAC 468-600-240;

(d) Whether the project as proposed appears to be technically and financially feasible;

(e) Whether the project as proposed appears to have the potential of enhancing the state transportation system; and

(f) Whether the project as proposed appears to be in the public interest.

(3) The evaluation panel will report the results of its evaluation and its recommendation to the commission. The recommendation will not include sensitive business, commercial or financial information or trade secrets as described in WAC 468-600-605.

NEW SECTION

WAC 468-600-315 Commission review of unsolicited conceptual proposals. Following an assessment by the evaluation panel that an unsolicited conceptual proposal merits further review, the commission will review the recommendation and approve or disapprove the proposal for further evaluation and action by the state. If approved for further review, the commission shall direct the proposer to prepare a detailed proposal pursuant to WAC 468-600-250.

NEW SECTION

WAC 468-600-320 Competing proposals. (1) If the commission grants approval of a conceptual proposal for further evaluation and review, within thirty days of the commission's approval the department shall provide public notice of the proposed project. This notice shall:

(a) Be published in a newspaper of general circulation and upon such electronic web site providing for general public access as the department may develop for such purpose;

(b) Be provided to any county, city, metropolitan service district, or transportation district in which the project will be located;

(c) Be provided to any person or entity that expresses in writing to the department an interest in the subject matter of the unsolicited conceptual proposal and to any member of the legislature whose house or senate district would be affected by such proposal;

(d) Outline the general nature and scope of the unsolicited conceptual proposal, including the location of the transportation project and the work to be performed on the project; and

(e) Specify the address to which any competing conceptual proposal must be submitted.

(2) The department may also elect to deliver such notice directly to any person or entity the department believes may have an interest in submitting a competing conceptual proposal.

(3) Any entity that elects to submit a competing conceptual proposal for the proposed project shall submit a written letter of intent to do so not later than thirty calendar days after the

department's initial publication of notice. Any letter of intent received by the department after the expiration of the thirty-day period shall not be valid and any competing conceptual proposal submitted thereafter by a private or governmental entity that has not submitted a timely letter of intent shall not be considered by the department.

(4) An entity that has submitted a timely letter of intent must submit its competing conceptual proposal to the department not later than one hundred twenty calendar days after the department's initial publication of notice under subsection (1) of this section, or such other time as the department provides in the notice. The competing conceptual proposal must:

(a) Be signed by an authorized representative of the proposer;

(b) Be accompanied by the processing fee for conceptual proposals required under WAC 468-600-230; and

(c) Include the information and be organized in the manner required of an unsolicited conceptual proposal under WAC 468-600-240.

(5) Any competing conceptual proposal that is received within the time provided in subsection (4) of this section must be forwarded to the evaluation panel as provided in WAC 468-600-310. The panel must:

(a) Evaluate the competing conceptual proposal under the criteria specified in WAC 468-600-310; and

(b) Determine whether the competing proposal(s) differ from the original unsolicited conceptual proposal in such a significant and meaningful manner that they should be treated as an original unsolicited conceptual proposal. If the evaluation panel believes that a proposal submitted as a competing proposal should be treated as an original unsolicited conceptual proposal and that it satisfies the requirements of WAC 468-600-240, the evaluation panel shall forward the proposal to the commission for preliminary review and approval under WAC 468-600-315, and the proposal shall thereafter be processed under these rules in the same manner as an unsolicited conceptual proposal. If the competing conceptual proposal is not to be treated as an original unsolicited conceptual proposal, the competing conceptual proposal will be reviewed by the evaluation panel as provided in WAC 468-600-330 through 468-600-350.

NEW SECTION

WAC 468-600-330 Proposal evaluation factors and criteria. For solicited proposals, the evaluation panel shall assess the certified proposals based on the unique project-specific evaluation criteria identified in the solicitation documents, including any written amendments or clarifications thereto, and upon any other factors the panel believes is necessary to ensure a successful project that benefits the public interest.

For unsolicited and competing proposals, the evaluation panel must consider the following factors:

(1) **Qualifications and experience.** Has the proposer created a team that is qualified, managed, and structured in a manner that will enable the team to complete the proposed project and perform the proposed scope of work?

(a) **Experience with similar infrastructure projects.** Have members of this team previously worked together or in a substantially similar consortium or partnership arrangement constructing, improving, operating, maintaining or managing transportation infrastructure? Has the lead firm managed, or any of the member firms worked on, a similar public-private partnership project?

(b) **Demonstration of ability to perform work.** Does the team possess the necessary financial, staffing, equipment, and technical resources to successfully complete the project and perform the proposed scope of work? Do the team and/or member firms have competing financial or workforce commitments that may inhibit success and follow-through on this project?

(c) **Leadership structure.** Is one firm designated as lead on the project? Does the organization of the team indicate a well thought out approach to managing the project? Is there an agreement/document in place between members?

(d) **Project manager's experience.** Is a project manager identified, and does this person work for the principal firm? If not, is there a clear definition of the role and responsibility of the project manager relative to the member firms? Does the project manager have experience leading this type and magnitude of project?

(e) **Management approach.** Have the primary functions and responsibilities of the management team been identified? Have the members of the team developed an approach to facilitate communication among the project participants? Has the firm adequately described its approach to communicating with and meeting the expectations of the state?

(f) **Financial condition.** Is the financial information submitted on the forms sufficient to determine the firms' capability to fulfill its obligations described in the project proposal, and is that capability demonstrated by the submitted information?

(g) **Project ownership.** Does the proposal identify the proposed ownership arrangements for each phase of the project and clearly state assumptions on legal liabilities and responsibilities during each phase of the project?

(h) **Competitive subcontracting.** To what extent have adequate procurement policies been adopted by the proposer to ensure opportunities for competitive procurement of work, services, materials and supplies that the proposer will subcontract?

(2) **Project characteristics.** Is the proposed project technically feasible?

(a) **Project definition.** Is the project described in sufficient detail to determine the type and size of the project, the location, all proposed interconnections with other transportation facilities, the communities that may be affected, and alternatives (e.g., alignments) that may need to be evaluated?

(b) **Proposed project schedule.** Is the time frame for project completion clearly outlined? Is the proposed schedule reasonable given the scope and complexity of the project?

(c) **Quality management.** Does the proposer present a quality management plan, including quality control and quality assurance processes, that are good industry practice and are likely to result in delivery of a project and services that meet the department's standards and comply with contract requirements?

(d) **Operation.** Does the proposer present a reasonable statement setting forth plans for operation of the project or facilities that are included in the project?

(e) **Technology.** Is the proposal based on proven technology? What is the degree of technical innovation associated with the proposal? Will the knowledge or technology gained from the project benefit other areas of the state or nation? Does the technology proposed maximize interoperability with relevant local and statewide transportation technology? Can the proposed project upgrade relevant local technology?

(f) **Conforms to laws, regulations, and standards.** Is the proposed project consistent with applicable state and federal statutes and regulations, or reasonably anticipated modifications of state or federal statutes, regulations or standards? Does the proposed design meet applicable state and federal standards?

(g) **Federal permits.** Is the project outside the purview of federal oversight, or will it require some level of federal

involvement due to its location on the National Highway System or Federal Interstate System or because federal permits are required? Does the proposal identify the primary federal permits and agencies that will be involved in review and oversight of the project?

(h) **Meets/exceeds environmental standards.** Is the proposed project consistent with applicable state and federal environmental statutes and regulations? Does the proposed design meet applicable state environmental standards? Does the proposal adequately address air quality issues?

(i) **State and local permits.** Does the proposal list the required permits and provide a schedule for obtaining them? Are there known or foreseeable negative impacts arising from the project? If so, does the proposal outline a plan to address those negative impacts? Are alternatives to standards or regulations needed to avoid those impacts that cannot be addressed?

(j) **Right of way.** Does the proposal set forth a method or plan to secure all property interests required for the transportation project?

(k) **Maintenance.** Does the proposer have a plan to maintain any facilities that are part of the proposed transportation project in conformance with department standards? Does the proposal clearly define assumptions or responsibilities during the operational phase including law enforcement, toll collection and maintenance? Under the proposal, will maintenance and operation of any new facilities be consistent with standards applied throughout the highway system and use the same work forces and methods?

(3) **Project financing.** Has the proposer provided a financial plan that allows access to the necessary capital to make a substantial contribution of nonstate, private sector, or other innovative financing resources to the financing of the facility or project?

(a) **Financing.** Did the proposer demonstrate evidence of its experience, ability and commitment to provide a sufficient private-sector contribution or other innovative financing contribution of funds or resources to the project as well as the ability to obtain the other necessary financing?

(b) **Conformance with RCW 47.29.060.** Does the proposed financing plan conform to any requirements of state-issued debt under RCW 47.29.060? If the proposed financing plan is not in conformance, has the proposer committed to seeking any necessary legislative or other state approvals in order to proceed with the financing plan as proposed?

(c) **Financial plan.** Does the financial plan demonstrate a reasonable basis for funding project development and operations? Are the assumptions on which the plan is based well defined and reasonable in nature? Are the plan's risk factors identified

and dealt with sufficiently? Are the planned sources of funding and financing realistic? Is the proposer willing to place private capital at risk in order to successfully deliver the project? Does the proposer adequately identify sources of nonstate funding that it anticipates including in the project financing, and does the proposer provide adequate assurance of the availability of those funds and the reliability of the funding sources?

(d) **Estimated cost.** Is the estimated cost of the project reasonable in relation to the cost of similar projects?

(e) **Life-cycle cost analysis.** Does the proposal include an appropriately conducted life-cycle cost estimate of the proposed project and/or facility? How does the life-cycle cost impact the projected rate of return?

(f) **Financial model.** If the procurement is for a concession agreement, does the proposal present a sound base case financial model? Are the assumptions in the financial model reasonable and realistic?

(g) **Business objective.** Does the proposer clearly articulate its reasons for pursuing this project? Do its assumptions appear reasonable?

(4) **Public support.** Has the proposer demonstrated sufficient public support for the proposed project or proposed a reasonable plan for garnering that support?

(a) **Community benefits.** Will this project bring a significant transportation and economic benefit to the community, the region, and/or the state? Are there ancillary benefits to the communities because of the project?

(b) **Community support.** What is the extent of known support or opposition for the project? Does the project proposal demonstrate an understanding of the national and regional transportation issues and needs, as well as the impacts this project may have on those needs? Is there a demonstrated ability to work with the community? Have affected local jurisdictions expressed support for the project?

(c) **Public involvement strategy.** What strategies are proposed to involve local and state elected officials in developing this project? What level of community involvement is contemplated for the project? Has the proposer articulated a clear strategy for informing and educating the public and for obtaining community input throughout the development and life of the project?

(5) **Project compatibility.** Is the proposed project compatible with, or can it be made compatible with state and local comprehensive transportation plans?

(a) **Compatibility with the existing transportation system.** Does this project propose improvements that are compatible with, or that can be made compatible with, the present and planned transportation system? Does the project provide continuity with

existing and planned state and local facilities?

(b) **Fulfills policies and goals.** Does the proposed project help achieve performance, safety, mobility or transportation demand management goals? Does the project improve connections among the transportation modes?

(c) **Conformity with local, regional and state transportation plans.** Does the project conform with, or can it achieve conformity with, city and county comprehensive plans and regional transportation plans? Does the project conform with, or can it achieve conformity with, plans developed by the commission and any applicable regional transportation plans or local transportation programs? If not, are the steps proposed in the proposal to achieve conformity with such plans adequate and appropriate to provide a high likelihood that the project and the applicable plans can be brought into conformity?

(d) **Economic development.** Will the proposed project enhance the state's economic development efforts? Is the project critical to attracting or maintaining competitive industries and businesses to the region, consistent with stated objectives?

NEW SECTION

WAC 468-600-331 Factors for proposals that include tolling. If the project financing component of a proposal includes a plan to impose tolls, the evaluation panel shall specifically consider:

(1) The opinions and interests of units of government encompassing or adjacent to the path of the proposed tollway project in having the tollway installed;

(2) The potential impact of the proposed tollway project on local environmental, aesthetic and economic conditions and on the economy of the state in general;

(3) The extent to which funding other than state funding is available for the proposed tollway project and the extent to which resources other than tolls would be required to be established and/or maintained as necessary security to support such a financing;

(4) The likelihood that the estimated use of the tollway project will provide sufficient revenues to independently finance the costs related to the construction and future maintenance, repair and reconstruction of the tollway project, including the repayment of any loans to be made from moneys in the transportation innovative partnerships account created under RCW 47.29.230 or other accounts;

(5) With respect to tollway projects, any portion of which will be financed with state funds or department loans or grants:

(a) The relative importance of the proposed tollway project compared to other proposed tollways; and

(b) Traffic congestion and economic conditions in the communities that will be affected by competing tollway projects; and

(6) The effects of tollway implementation on other major highways in the state system and on community and local street traffic.

NEW SECTION

WAC 468-600-340 Proposer presentations. At any time during the evaluation process, the evaluation panel may request proposers to make presentations to the panel. Proposers shall be afforded not less than ten business days following written notification from the panel to prepare such presentations. The format of these presentations will include a formal presentation by the proposer, followed by any questions the evaluation panel may have pertaining to the project proposal or the presentation. These meetings will allow the evaluation panel to seek clarification of project elements and complete deliverable requirements, and provide proposers with the opportunity to further explain their proposed projects. If there is an issue to which the proposer is unable to respond during the formal presentation, the evaluation panel may, at its discretion, grant the proposer a reasonable period of time in which to submit a written response.

NEW SECTION

WAC 468-600-345 Required supplements or refinements to proposals. (1) The department reserves the right to require or to permit proposers to submit, at any time, revisions, clarifications to, or supplements of their previously submitted proposals. The department may, in the exercise of this authority, require proposers to add features, concepts, elements, information or explanations that were not included in their initial proposals, and may require them to delete features, concepts, elements, information or explanations that were included in their initial proposals. A proposer will not be legally bound to accept a request to add to or delete from a proposal any feature, concept, element or information, but its refusal to do so in response to a request by the department shall constitute sufficient grounds for the department to elect to terminate consideration of its proposal.

(2) After the department's opening and review of proposals, the department may issue or electronically post an addendum to the request for proposals that:

(a) Requires proposers to address or add physical features or elements, and information or explanations that were not included in their initial proposals; or

(b) Requires proposers to delete physical features or elements that were included in their initial proposals; or

(c) Change the method by which the department will send any such addendum that it issues by a method other than electronic posting to all proposers to continue in the proposal process; or

(d) Any addendum issued will contain a deadline by which the proposers must submit to the department any additions to, modifications of or deletions from their proposals.

NEW SECTION

WAC 468-600-350 Evaluation panel recommendation to commission. (1) After reviewing the proposals and hearing presentations from proposers, the evaluation panel will prepare a written determination, based on facts and circumstances presented in the proposals and the presentations, that one or more proposals merit selection and advancement into a contract negotiation phase or to contract execution. In its written determination regarding any proposal, the evaluation panel may specify conditions that it recommends the proposer be required to satisfy before proceeding to contract negotiations. By way of example, such conditions may include, but are not limited to:

(a) Requiring the proposer to provide additional information or clarification concerning elements or parts of its proposal;

(b) Requiring the proposer to develop and submit additional information confirming the technical feasibility of the proposed project;

(c) Requiring the proposer to develop and submit additional information confirming that the proposed project complies with or can be brought into compliance with relevant local and state transportation plans, restrictions on property use, and environmental laws, or that the project and the applicable plans, restrictions and environmental laws can otherwise be brought into conformity;

(d) Requiring the proposer to commit in writing to the department to undertake good faith efforts to modify or adjust the proposal in specific ways, or to incorporate steps, characteristics or features that the department identifies as necessary or desirable to enhance the feasibility, public acceptance, transportation efficiency, or economy in execution or operation, of the project;

(e) Otherwise requiring the proposer to develop and present revisions to, or alternatives within, the proposal that will permit the department to obtain best value based on the requirements and evaluation criteria set forth in the notice or request for proposals and based on knowledge obtained by the department by virtue of its review and evaluation of the proposals; and

(f) Requiring the proposer to enter into an interim agreement, on terms satisfactory to the proposer and the state, under which the proposer will provide services to the department in connection with the development of the proposal or further

development of the project, including assistance to the department in obtaining any necessary regulatory approvals.

(2) The evaluation panel will report its assessments and recommendations to the commission.

NEW SECTION

WAC 468-600-355 Commission review and selection of proposals. The commission shall review the proposals, the assessments and the recommendations of the evaluation panel. Based on that review, the commission may:

(1) Select one proposal to advance to execution of a contract or development agreement; or

(2) Select one proposal to advance to negotiations of a contract or development agreement; or

(3) Select one proposal to advance to execution or negotiations of a contract or development agreement, subject to the proposer's willingness and ability to satisfy specified conditions; or

(4) Pursuant to WAC 468-600-360, select more than one proposal from which to conduct competitive negotiations; or to continue competitive negotiations for a specified period of time; or

(5) Reject all proposals. For purposes of this section, competitive negotiations means negotiations authorized under WAC 468-600-360, for the purposes of refining and arriving at a final selection of a proposer. This term does not refer to negotiations for a contract or development agreement as provided in WAC 468-600-710.

NEW SECTION

WAC 468-600-360 Commission's authority to elect competitive negotiations. (1) In addition to the commission's ability to exercise any alternative process permitted under WAC 468-600-232, the commission may authorize, at its option, competitive negotiations with more than a single proposer as a means of selecting from among competing proposals submitted under these rules. Negotiations under this section are part of the proposal evaluation process and do not constitute the negotiation of a project agreement.

(2) The commission may announce its election to conduct

competitive negotiations:

(a) In any notice issued for solicited proposals under WAC 468-600-105; or

(b) By written notice, by mail or by electronic means, to the proposers, issued at any time following the state's receipt of proposals under WAC 468-600-220.

(3) In any communication under subsection (2) of this section, or by notice to the proposers issued by mail or by electronic means at any time after the receipt of proposals, the commission may announce that it will initiate competitive negotiations with all proposers who submitted responsive proposals, or only with proposers who qualify to negotiate because the state has determined that their proposals fall within a competitive range.

(4) When the commission elects to negotiate only with proposers within a competitive range, then after the evaluation panel's evaluation of proposals in accordance with the criteria set forth in the notice or request for proposals, the commission will determine the proposers in the competitive range.

(a) For purposes of this subsection (4), the proposers in the competitive range consist of those proposers whose proposals, as determined by the commission in its discretion, have a reasonable chance of being determined the best proposal as the result of the evaluations conducted by the evaluation panel under WAC 468-600-350. In determining which proposals fall within the competitive range, the commission may consider whether its preliminary evaluation of proposals establishes a natural break in the preliminary scores of the proposals that suggests those proposals that are sufficiently competitive to be included in the competitive range.

(b) The department will provide written notice to all proposers, by mail or by electronic means, of the proposals the commission determines to fall within the competitive range. A proposer whose proposal is not within the competitive range may submit a written protest of the commission's evaluation and determination of the competitive range within fourteen calendar days after the date of the department's notice. A proposer's written protest must state facts and argument that demonstrate how the competitive range determination was flawed or how the commission's determination constituted an abuse of discretion. If the department receives no written protest concerning the proposed selection listing within the fourteen calendar day period, then the department will proceed with negotiations with the proposers whose proposals fell within the competitive range.

(c) In response to a timely filed protest, the commission will issue a written decision that resolves the issues raised in the protest. The commission will make its written determination available, by mail or by electronic means, to the protesting proposer and to the proposers falling within the competitive

range.

(5) The object of competitive negotiations, which the department may conduct concurrently with more than one proposer or serially, is to maximize the state's ability to obtain best value and to permit proposers to develop revised proposals. Therefore, the negotiations may include, but shall not be limited to:

(a) Informing proposers of deficiencies in their proposals;

(b) Notifying proposers of parts of their proposals for which the department would like additional information; and

(c) Otherwise allowing proposers to develop revised proposals that will permit the state to obtain the best proposal based on the requirements and evaluation criteria set forth in the notice or request for proposals.

(6) The scope, manner and extent of negotiations with any proposer are subject to the discretion of the department. To prevent the disclosure of proposal information to a proposer's competitors, the department shall conduct negotiations with proposers before the nature of the proposals, information about the proposed project, or proposal information have been made public under WAC 468-600-600. In conducting negotiations, the department:

(a) Shall treat all proposers fairly and shall not engage in conduct that favors any proposer over another;

(b) Shall not reveal to another proposer a proposer's unique technology, unique or innovative approaches to project design, management or financing, or any information that would compromise the proposer's intellectual property, trade secrets or sensitive business information; or

(c) Shall not reveal to another proposer a proposer's price or pricing information, provided, however, that the department may inform a proposer that the department considers a proposer's price or pricing information to be too high or too low.

(7) The evaluation panel must further evaluate the proposals subjected to the competitive negotiation process, and recommendations to the commission for their action under WAC 468-600-355.

NEW SECTION

WAC 468-600-365 Protests of rejection of proposal/award of contract to competitor in competing proposals context. (1) At least fourteen calendar days prior to the final selection of the successful proposer in any competitive proposal selection process, the department will give, electronically or otherwise, written notice to all participating proposers of the commission's apparent selection of the successful proposer. A proposer who would be adversely affected by the selection announced in the notice may, within fourteen calendar days after the date of the department's notice, submit to the department a written protest of the selection of the apparent successful proposer.

(2) For purposes of this rule, a protesting proposer is adversely affected by a selection only if the proposer has submitted a responsive competing proposal and is next-in-line for selection. In other words, the protesting proposer must demonstrate that all higher-scoring proposers are ineligible for selection because either:

(a) The higher-scoring proposals were not responsive to the requirements stated in the department's solicitation documents; or

(b) The department committed a substantial violation of a provision in the department's notice requesting competitive negotiation, in these rules, or in chapter 47.29 RCW, or otherwise abused its discretion, in evaluating the revised proposals.

(3) A proposer's written protest must state facts and argument that demonstrate how the selection process was flawed or how the commission's selection of the apparent successful proposer constituted an abuse of the commission's discretion. If the commission receives no written protest concerning the proposed selection listing within the fourteen-day period, then the selection of the successful proposer automatically shall become effective on the fifteenth calendar day after the department first transmitted or otherwise delivered its written notice of the apparent successful proposer.

(4) In response to a proposer's timely filed protest that complies with this rule, the commission will issue a written decision that resolves the issues raised in the protest. In considering a timely protest, the commission may request further information from the protesting proposer and from the apparent successful proposer identified in the department's notice issued

under subsection (1) of this section. The commission will make its written determination available, by mail or by electronic means, to the protesting proposer and to the apparent successful proposer identified in the department's notice issued under subsection (1) of this section.

NEW SECTION

WAC 468-600-370 Notification of apparent successful proposer--Prenegotiation activities authorized. (1) Upon the commission's selection of a proposal under WAC 468-600-355 and upon expiration of the protest period, the department shall notify the proposer of its intent to execute a contract or development agreement or to enter negotiations on a contract and/or development agreement.

(2) Upon the commission's provisional selection of a proposal subject to satisfaction of conditions, and upon expiration of the protest period, the department shall notify the proposer of the conditions. The proposer shall have a period of time, set forth in the department's notice, but to be at least ten calendar days, from receipt of the department's notification to elect to proceed under specified conditions. If the proposer elects to proceed, the department shall work with the proposer to develop a plan for satisfying the conditions. If the plan entails entry into an interim agreement, the agreement will conform to all relevant requirements of chapter 47.29 RCW and these rules.

(3) After the commission's selection or provisional selection of a proposal, the department and the proposer may confer on any matter pertinent to refinement of the proposal.

NEW SECTION

WAC 468-600-600 Public records and public disclosure. (1) Upon written request and within the time required under chapter 42.56 RCW, the department shall review such requests, process and provide those records that are not otherwise exempt from disclosure. The department may charge fees as allowed by state law.

(2) On the department's receipt of a request pursuant to chapter 42.56 RCW, for the disclosure of records or information that have been submitted to the department by a proposer under

the program authorized by chapter 47.29 RCW, the department will notify the proposer of the request and provide the proposer a reasonable opportunity to demonstrate that all or part of the requested records or information are exempt from disclosure under applicable law recognizing the confidentiality of public records and information. In determining whether the information or records are exempt from disclosure, the department will consider the evidence and objections to disclosure presented by the proposer, but as custodian of the records or information, the department must make the initial determination of the records that may be withheld from disclosure.

(3) An affected proposer who seeks to demonstrate that public records pertaining to it are exempt from disclosure must respond to the department with its evidence and objections within four working days of the department's issuance of notice of the request to the proposer. After considering the proposer's evidence and objections, the department will inform the proposer of its disclosure decision, giving the proposer no fewer than three working days in which to institute appropriate proceedings in its own behalf to protect the proposer's interests in preventing the disclosure or maintaining the confidentiality of the records or information. The proposer shall be exclusively responsible for all costs, expenses and attorney fees incurred in taking any action to prevent the disclosure of information or records under this section. The department shall not make a disclosure of records or information while an action by the proposer to enjoin disclosure thereof is pending.

NEW SECTION

WAC 468-600-605 Designation of sensitive business, commercial or financial information and trade secrets. (1) The following procedure shall be followed by proposers to designate information as "sensitive business, commercial or financial information" under RCW 47.29.190: Each individual page of a proposal that contains sensitive business, commercial or financial information must be clearly marked "sensitive business, commercial or financial information."

(2) A proposer may desire that certain information be considered "trade secret" information for purposes of applying the public records exemption set out in state law. "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique or process that derives independent economic value, actual or potential, from

not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. To qualify for that exemption, trade secret information must meet the following criteria:

(a) Not be the subject of a patent;

(b) Be known only to a limited number of individuals within an organization;

(c) Be used in a business that the organization conducts;

(d) Be of potential or actual commercial value; and

(e) Be capable of providing the user with a business advantage over competitors not having the information.

(3) The following procedures shall be followed by the proposer to designate information as trade secret:

(a) Each individual page of a proposal, plan or progress report that contains trade secret information must be clearly marked trade secret;

(b) Written substantiation describing what information is considered trade secret and why, must accompany the document. The written substantiation shall address the following:

(i) Identify which portions of information are claimed trade secret;

(ii) Identify how long confidential treatment is desired for this information;

(iii) Identify any pertinent patent information;

(iv) Describe to what extent the information has been disclosed to others, who knows about the information, and what measures have been taken to guard against undesired disclosure of the information to others;

(v) Describe the nature of the use of the information in business;

(vi) Describe why the information is considered to be commercially valuable;

(vii) Describe how the information provides a business advantage over competitors;

(viii) If any of the information has been provided to other government agencies, identify which one(s); and

(ix) Include any other information that supports a claim of trade secret.

(4) Notwithstanding a proposer's designation of information as constituting "trade secret," and subject to a proposer's opportunity to object to disclosure under WAC 468-600-605, the department may independently assess whether the trade secret exemption applies when responding to a public records request.

AGREEMENTS FOR PROJECTS

NEW SECTION

WAC 468-600-700 General preconditions for entering into agreements. The following are preconditions of any agreement that will be entered into between the state and a private sector partner:

(1) The department must seek to adopt contracting techniques that represent the best practices in use by owners of facilities;

(2) To the extent permitted by law, protection must be provided for local contractors to participate in any subcontracting opportunities on projects;

(3) Projects that use tolling technology must maintain standards that are consistent with any standards adopted or widely used by the state;

(4) Provision must be made for patrolling and law enforcement on state-owned transportation facilities, as approved by the Washington state patrol for facilities within their jurisdiction;

(5) Any debt to be issued to pay for the construction of a state-owned transportation facility that is secured by public funds must conform to RCW 47.29.060, or if not in conformance, any agreements reached must be conditioned upon obtaining necessary legislative approval of alternative financing provisions;

(6) The public involvement plan must provide that all forums, workshops, open houses or public meetings be administered and attended by the public sector partner; and

(7) Any project with a capital cost in excess of three hundred million dollars must establish an advisory committee, consisting of at least five but not more than nine members, who shall be appointed by the commission.

NEW SECTION

WAC 468-600-710 Negotiation of agreement. A proposal or proposals selected by the commission for negotiation of a final agreement shall be referred to a negotiation team within the department. The team shall be responsible for negotiating the final agreement with the proposer. Each final agreement will define the rights and obligations of the state and the respective proposer with regard to the project. Agreements must contain all provisions in WAC 468-600-700 and 468-600-715, and must allocate responsibilities under WAC 468-600-720.

NEW SECTION

WAC 468-600-715 Mandatory terms of agreements. Any final agreement must include the following provisions:

(1) If public moneys are used to pay any costs of construction of public works that is part of an eligible project, the construction contract shall contain provisions that require payment of workers under the contract in accordance with chapter 39.12 RCW; and

(2) Any maintenance provisions on a public facility must be provided in a manner consistent with collective bargaining agreements, the Personnel Reform Act, and civil service laws in effect on any portion of the project that constitutes a public facility.

NEW SECTION

WAC 468-600-720 Terms to be negotiated between the parties. Any final agreement must contain terms that address at least the following issues:

(1) At what point in the transportation project public and private sector partners will enter the project and which partners will assume responsibility for specific project elements;

(2) How the partners will share management of the risks of

the project;

(3) How the partners will share the costs of development of the project;

(4) How the partners will allocate financial responsibility for cost overruns;

(5) The consequences for nonperformance;

(6) The incentives for performance;

(7) The invoicing and payment procedures and schedules to be followed to the extent that the department or state is to pay for the work, and the accounting and auditing standards to be used to evaluate work on the project; and

(8) An agreement for the construction of a public improvement as part of an eligible project shall provide and be approved for bonding, financial guarantees, deposits or the posting of other security to secure the payment of laborers, subcontractors and suppliers who perform work or provide materials as part of the project. Furthermore, the department shall determine that adequate security exists to address any default or nonperformance by the private sector partner or other contractual claims of the department against the proposer; and

(9) For projects that revert to public ownership, responsibilities for reconstruction or renovation that bring the facility up to government standards before reversion to the state.

NEW SECTION

WAC 468-600-722 State objection to subcontractors. (1) Prior to the execution of any contract with a proposer, the proposer must provide the department with a list of all major subcontractors who will perform work in the construction, operation or maintenance of the project. All subcontractors must be legally eligible to perform or work on public contracts under federal and Washington law and regulations. No subcontractor will be accepted who is ineligible to receive public works contracts in the state of Washington.

(2) If the department has reasonable objection to any proposed subcontractor, the department is authorized to require, before the execution of a contract, an apparently successful proposer to submit an acceptable substitute. In such case, the proposer must submit an acceptable substitute, and the contract may, at the department's discretion, be modified to equitably account for any difference in cost necessitated by the substitution. The department will set a maximum time period from the date of the department's written demand for

substitution within which to make an acceptable substitution. A proposer's failure to make an acceptable substitution at the end of the time period will constitute sufficient grounds for the department to refuse to execute a contract, without incurring any liability for the refusal. In setting a maximum time period, the department shall consider the scope of the subcontract, availability of other subcontractors, and whether the disapproved subcontractor is identified in the proposal as an equity contributor or source of other financial support to the project relied on by the proposer. Following such identification, the proposer shall be granted an additional maximum time period as determined by the department to conclude negotiations of acceptable terms and conditions with that substitute major subcontractor.

(3) The department may not require any proposer to engage any subcontractor, supplier, other person or organization against whom the proposer has reasonable objection.

NEW SECTION

WAC 468-600-725 Cessation of negotiations. The department must establish a maximum time period allowed for conducting negotiations on a potential project or development agreement(s). Such time period may be established in the solicitation document described in WAC 468-600-105, or as a condition of selecting a particular proposer or proposers. If the department elects to conduct competitive negotiations under WAC 468-600-360, any deadline established for conducting negotiations must be equitably applied to all proposers engaged in negotiations. The department may extend a maximum negotiating time period if it determines extension to be in the interests of the state.

NEW SECTION

WAC 468-600-730 Legal sufficiency review of final agreement. On completion of a final agreement, the attorney general will review it for legal sufficiency. The department and the transportation commission are wholly responsible for exercising business judgment, including the appropriate and desirable allocation of risk and incentive in any agreement.

NEW SECTION

WAC 468-600-735 Commission analysis required. Before any agreements are executed, the commission must:

(1) Conduct a financial analysis that fully discloses all costs and cost estimates, including the costs of any financing, and all estimated project revenues; and

(2) Compare the department's internal ability to complete the project that documents the advantages of completing the project as a public-private partnership versus solely as a public venture.

The commission may undertake this analysis at any point in the solicited or unsolicited proposal process.

NEW SECTION

WAC 468-600-740 Publication of contents of proposed agreement. If a tentative agreement has been reached, before the commission may take any action on such agreement, an executive summary describing all material elements of the agreement must be prepared and made available to the public. The department must publish notice of existence of the agreement in each county that is, or could potentially be, affected by the project. The published notice must generally describe the nature of the project, the anticipated communities that the project might impact, and how summary level information on the proposed agreement can be obtained. Such notice must be provided not less than twenty calendar days before the public hearing required under WAC 468-600-741.

NEW SECTION

WAC 468-600-741 Public hearings on proposed project and agreement. Prior to taking action on any tentative agreement, the commission must hold an informational session and public hearing in the county seat of the boundaries of the proposed project with at least twenty calendar days' advance notice. Notice of such meeting may be provided in conjunction with the publication of the notice under WAC 468-600-740.

NEW SECTION

WAC 468-600-742 Twenty-day period for consideration and evaluation of public comments. After holding the public hearing required in WAC 468-600-741, the commission must consider any testimony received, and must wait at least twenty calendar days before taking any action approving, rejecting or directing execution or continued negotiations of the agreement.

NEW SECTION

WAC 468-600-750 Commission review of final agreement. On completion of the attorney general's legal sufficiency review of the final agreement, and after considering any public comment received, the commission shall:

(1) Approve the final agreement;

(2) Reject the final agreement; or

(3) Return the final agreement to the team for further negotiation on issues the commission specifies.

TRANSPORTATION INNOVATIVE PARTNERSHIP PROGRAM ADMINISTRATION

NEW SECTION

WAC 468-600-800 Program expenses attributable to projects. The department shall confer with its internal auditor and accounting staff to adopt a methodology to properly apportion program and project development expenses to the specific projects that are the subject of an agreement executed under WAC 468-600-750. The department shall forward the methodology for properly allocating program expenses to the office of financial management for review and approval.

NEW SECTION

WAC 468-600-810 State's reservation of rights. (1) The state reserves all rights available to it by law in administering these rules, including without limitation, the right in its sole discretion to:

(a) Reject any and all proposals at any time;

(b) Terminate evaluation of any and all proposals at any time;

(c) Suspend, discontinue and/or terminate comprehensive agreement negotiations with any proposer at any time prior to the actual authorized execution of such agreement by all parties;

(d) Negotiate with a proposer without being bound by any provision in its proposal;

(e) Request or obtain additional information about any proposals;

(f) Issue addenda to and/or cancel any RFQ or RFP;

(g) In accordance with the rule-making procedures of chapter 34.05 RCW, supplement or withdraw all or any part of these rules;

(h) Decline to return any and all fees required to be paid by proposers hereunder; and

(i) Request revisions to proposals.

(2) Absent express written provisions contained in any solicitation document, order or written policy issued by the department, the department is not liable for, or required to, reimburse the costs incurred by proposers, whether or not selected for negotiations, in developing proposals or in negotiating agreements. Any and all information the department

makes available to proposers shall be as a convenience to the proposer and without representation or warranty of any kind.

APPENDIX
E

Proposed WAC 468-600
Transportation Innovative Partnership Program

Procedural History:
Pursuant to RCW 47.29, the Transportation Commission began drafting administrative rules to implement the Transportation Innovative Partnership Program (TIPP) in Fall, 2005. A TIPP working group, comprised of Commissioners Forner, Stedman and Barnes, held public work sessions to consider various provisions to include in the draft rules. Comments were encouraged and offered by the public during the work sessions. A first working draft of the TIPP rules was proposed in January, 2006, and posted to the Commission's website as an informational item for public viewing and comment.

The Commission filed its notice of intent to adopt rules under an expedited rulemaking process (CR 103, published as WSR 06-08-060). It was subsequently pointed out by legal counsel that a new state public disclosure law had recently been enacted, and that the draft rules pending before the Commission contained provisions that were contradictory to the new public disclosure law. As a result, the Commission moved out of the expedited rulemaking process, corrected the public disclosure portions of the draft rules, and commenced the regular rulemaking process by filing a CR 102 (legal paperwork) and publishing the second version of the draft rules in the Washington State Register as WSR 06-20-069.

Written comments were received, both before and slightly after the deadline for comments. At its November 15, 2006 meeting, the Commission waived the deadline for written comments with regard to a submission made by Mr. Don Williams in order to accept and consider them as part of the formal rulemaking record. The Commission has received a complete unabridged set of all written comments received. The required public hearing on the proposed rules was also held during the Commission's November 15, 2006 meeting. Public testimony was received and taken under consideration. At that same hearing, staff presented an errata sheet that made several technical corrections to the draft rules, none of which contained any substantive changes to the rules or policies imbedded therein. A motion was made and duly adopted to incorporate the technical corrections contained in the errata sheet into a revised draft of the TIPP rules, which remain pending before the Commission.

The Commission directed staff to compile the comments received and provide an agency (WSDOT) response, which would be posted to the website, made available to the public, and circulated to the Commission for consideration at their next regular meeting, in December, 2006. The foregoing material is in direct response to this request.

Comments received on TIP Program Rules (with WSDOT responses)

Technical Issues.
One commenter pointed out several incorrect internal references and typographical errors.

WSDOT response: Most all of the points are well taken, and have been addressed in the errata sheet adopted by the Commission on November 15, 2006 and incorporated into a revised draft version of the TIPP rules. *See Ex. 1.* The only suggestions that were not addressed in the errata sheet were:

(1) An opinion that the first paragraph of WAC 468-600-103 makes an incorrect internal reference to requirements for proposal content, identified as 468-600-300 through -350. The commenter feels that 468-600-300 through 350 is unrelated to proposal content; and

(2) An opinion that in section 605(3)(a), on the third line the term "trade secret" ought to appear in quotations, since the term is in quotations earlier in that section.

WSDOT response: WAC 468-600-103 relates to more than just proposal content; it also relates to criteria and procedures for evaluation and selection of proposals. WAC 468-600-300 includes additional disclosures that may be required of Proposers, and specifies that failure to provide these additional disclosures may result in rejection of a proposal. To the extent that section 103 references additional requirements that could be imposed under sections 300 through 350, the reference appears correct.

In section 605(3)(a), the term "trade secret" is no longer in quotations because a definition was provided earlier in section (2). Having already been defined, the term no longer requires quotations to inform the reader that it is a term of art.

Substantive Issues
Comments (and some questions) were also received on substantive elements of the draft rules. For purposes of responding to issues raised, similar topics have been grouped and restated as follows:

1. Do the draft rules or existing RCW's provide any special exceptions to allow non-state funding in certain cases?

WSDOT response: The draft rules do not establish any exceptions to the financing provisions contained in RCW 47.29.060. The referenced law does allow non-state financing in very limited situations, such as where a non-transportation public facility (e.g., a public park) is developed in conjunction with a transportation facility (see RCW

47.29.060(4)), or where a separate capital project (such as a private office building) is developed in conjunction with a transportation facility (see RCW 47.29.060(5)).

RCW 47.29 could be construed to allow the Commission to consider non-state financing and evaluate the relative costs of state financing versus alternatives. Section 160 provides:

> "Before approving an agreement under subsection (2) of this section, the commission, with the technical assistance of the department, must:
>
> (a) Prepare a financial analysis that fully discloses all project costs, direct and indirect, including costs of any financing;"

In sum, the law: (a) allows non-state financing in very limited circumstances, without any additional legislative approval; (b) does not disqualify the acceptance, consideration, evaluation or selection of any proposal that proposes alternative financing—even for state highways; and (c) requires the Commission to conduct a financial analysis on all project costs, including financing, without restriction. While the law clearly prohibits the Commission from entering any agreements contrary to the requirement for state financing on state transportation projects, it appears possible for a proposal to be forwarded to the legislature along with a recommendation to allow alternative financing for a particular negotiated project agreement.

2. Are Advisory Committees for projects costing greater than $300 million required, and if so, who controls the appointments?

WSDOT response: RCW 47.29.180 requires the appointment of Advisory Committees for projects with a cost in excess of $300 million. The Commission appoints the members, who must represent a diversity of viewpoints on the project. The Advisory Committee reviews proposals for projects and provides comments to the Commission.

3. The RCW's require the appointment of an Expert Review Panel to review and evaluate negotiated project agreements prior to their execution. Why isn't the ERP's review process outlined in the proposed rules?

WSDOT response: RCW 47.29.290 specifies that the appointments are made by the Governor, with the Panel's recommendations to be forwarded to both the Governor and the Commission. Prescribing in detail how the Expert Review Panel will operate seems unnecessary, particularly in light of the dual reporting requirements to the Commission and then to the Governor. The Governor's recent and successful deployment of an Expert Review Panel to make findings and recommendations on the Alaskan Way Viaduct Project and the SR 520 Bridge Replacement and HOV project are a model to be emulated.

4. The statute allows WSDOT to recover its costs in processing a specific project application from that project's financial proceeds, where funds are available. Why is there no similar cost-recovery for the Commission?

WSDOT response: The relevant statute, RCW 47.29.110, requires the Department to seek cost recovery for eligible expenses from a project's financing, where available. This does not preclude the recompense of eligible expenses incurred by the Commission in carrying out its responsibilities under the statute. Like all other project expenses, charges by both the Department and the Commission are subject to strict accounting rules related to the uses of capital bond proceeds and are subject to financial audit. The lack of specific direction to recover its costs does not necessarily bar the Commission from being reimbursed from bond proceeds, so long as such reimbursement is within accounting rules.

5. WAC 468-600-030 calls for the Department to publish, upon Commission approval, Conflict of Interest guidelines and policies that all Proposers must comply with. These guidelines must be available when these rules become effective or else potential applicants will be held to a standard that presently does not exist.

WSDOT response: This is a good observation, but applies only in the unsolicited proposal context, where the private sector (rather than the state) selects projects and submits proposals without invitation. It is the Department's intention to develop general Conflict of Interest guidelines and policies to apply to the unsolicited proposal process. At the time of this writing, unsolicited proposals can be submitted beginning July 1, 2007, so the Department has until that date to propose COI guidelines for Commission adoption.

COI guidelines for specific projects will be developed and proposed by the Department for the Commission's consideration and issuance with any project solicitation. This is consistent with current practices of the state (e.g., current design/build contracting solicitations on projects in the greater Puget Sound area).

6. There are no deadlines for the Department to develop the project registry described in section 100, nor is there any requirement for the Department to actually carry out a project solicitation as published in the registry. This lack of imperative could discourage potential private sector partners from participating in this program.

WSDOT response: As to the need for a deadline to develop the project registry, a critical lesson learned from the first experience with public-private partnerships is to make sure that a project is sufficiently analyzed and appropriate to develop via a public-private partnership before any public pronouncements. A deadline mandated in rule for establishing a registry may prove counter-productive in the long run.

The commenter is correct that there is no requirement that the Department implement any of the planned PPP projects identified on the registry. Project solicitations require substantial funding and commitment of agency personnel. If the Department lacks adequate resources to vigorously pursue a TIPP project, it would be prudent to wait until funding and staff resources are made available, thereby increasing the likelihood that any negotiated agreement will provide substantial value for the state. Absolute mandates to

conduct solicitations may not be in the public's best interest if resources are inadequate to carry out the task.

7. 468-600-100(3)(d) allows the Department to solicit proposals that are not contained on the registry. If there is no requirement for the state to solicit the proposals on the registry, and no requirement that the Department only select projects on the registry, then what is the point of having a registry?

WSDOT response: A few of the reasons for the Department not moving forward with projects on the registry were discussed in #6 above. The reason to allow the Department to deviate from the registry is this: sometimes opportunity knocks. Projects that have no known potential partners, or projects that are unusual in nature (such as many high-tech or ITS projects) may never be conceived of and subjected to the Department's internal review process for registry consideration. But circumstances can change quickly, and the Department wants to retain some flexibility to pursue unique or time-sensitive opportunities. An example may help to illustrate the point: around 1999, the telecommunications industry had a sudden interest in leasing state DOT rights-of-way. This market developed quickly, in response to the demand for expanded fiber-optic networks spawned by the dot.com boom. By the time legislation was passed to allow a PPP-type approach to granting franchises on the state rights-of-way, and by the time WSDOT enacted rules to carry out the new law around 2001, the dot.com boom turned to bust, and the demand for new fiber optic lines fell through the floor. Wireless communications were clearly on the horizon. Allowing the Department to deviate from the registry from time to time for good cause shown is makes good business sense, and makes WSDOT a more viable partner.

8. WAC 468-600-210 requires that a project be contained within the Washington Transportation Plan, or identified by the Commission as a "priority need of the state." This provision appears to allow the Commission to induce (if not instigate) unsolicited proposals on projects that it deems a "priority need of the state." What is the procedure for the Commission to make this designation? Does a Proposer first seek designation from the Commission, and then submit an unsolicited proposal, or would the order reverse? The rules should lay out a process for this.

WSDOT response: This ambiguity is noted; it originates in statute (RCW 47.29.030(2)(a)). The Commission could clearly pass a resolution finding that a particular project is a "priority need of the state." Although the draft rules do not specify whether the Commission must first designate the project as a priority need before an unsolicited proposal is received, or alternatively, receive an unsolicited proposal and subsequently decide whether the project is a priority need, both paths lead to the same place, and the legislative intent of having the Commission render judgment on the necessity of the project is met.

9. Considering that WAC 468-600-215 allows the Department to postpone or delay the review of unsolicited proposals, wouldn't it be better to just repeal the

unsolicited proposal process in its entirety, rather than maintain an appearance of an unsolicited proposal process but accord it low priority? WAC 468-600-215 is not workable in its current form.

WSDOT response: Leaving some public sector discretion in how to prioritize the expenditure of funds and staff resources to review unsolicited proposals is the aim of this rule. The rule also allows the Department to expedite processing of certain proposals over others, all by written order. This allows judgment to be exercised in how internal resources will be directed, rather than falling into a simple "first come, first served" process. Otherwise, the allocation of resources to carry out the TIP program is guided by, and dependent entirely upon, whoever happens to submit a proposal first, regardless of the class, category or characteristics of the project. If the "first come, first served" process were in place, an unsolicited proposal to construct moving sidewalks from a parking facility to an employment center would have priority over, say, a proposal to construct and finance improvements to an at-risk structure like the SR 520 Bridge, if the latter were submitted a day after the sidewalk proposal. With the very limited resources available to review such proposals, an entire biennium's appropriation could conceivably be expended on a moving sidewalk proposal to the exclusion of an urgently-needed project like SR 520 bridge replacement. Having said that, the Department endeavors to give every proposal submitted a fair and thorough review, even if not in the order the proposal is received. Proposers are free to establish expiration dates for their proposals, if time is of the essence.

Whether the unsolicited proposal process itself will result in private sector interest in submitting proposals is the paramount question raised by the commenter. Only time and experience will tell whether this process is a valuable component of the TIP program. For now, it remains in state law and the Department has every intention of testing it and reporting the results to the Commission and other policymakers.

10. WAC 468-600-230 references a fee schedule that would be used to determine administrative fees levied by the Department to review unsolicited proposals, yet no actual fee schedule is indicated. Wouldn't it be best to adopt a fee schedule now, in advance of the unsolicited proposal process taking effect?

WSDOT response: Ideally, yes. The continued development and review of these rules has stretched longer than originally anticipated. The plan was to establish the TIP program and review processes first, and then conduct research of other states and current pricing on necessary consultant expertise in order to develop an accurate fee schedule. As it now stands, there likely will be only a few months between the final adoption of these rules, and a second rulemaking process to establish a fee schedule.

11. WAC 468-600-310, which lays out the preliminary review process for proposals, contains no timelines for Departmental or Evaluation Panel action. A reasonable time limit should be established.

WSDOT response: We interpret this rule, and all other rules contained in WAC chapter 468-600, to contain an inherent "reasonable time limit"-- just not expressed in specific days, weeks or months. The nature and complexity of potential proposals makes it very difficult to predict how much time is the proper amount of time for Departmental (or Panel) review and action. The lack of deadlines fixed in administrative rule does not preclude the Department or Panel (or Commission) from issuing an estimated timeline for reviewing a particular proposal received. We believe such timelines should be established on a project-by-project basis, after a preliminary review of the submitted proposal in order to accurately gauge the complexity of the proposal and assess the type of expertise needed to grant proper review.

12. WAC 468-600-315 directs the Commission to review unsolicited conceptual proposals, but does not indicate the criteria to be used, the forum for making such decisions or the time limits placed on its decision-making.

WSDOT response: The issue of time limits has been addressed above. The Commission ought to be granted discretion to determine whether a conceptual proposal is unique and intriguing enough to warrant further development and exploration. WAC section 310 already requires the Evaluation Panel to convene, review and assess an unsolicited conceptual proposal according to very specific criteria (See WAC 468-600-310(2)(a) through (f)). Based on that process and those evaluative criteria, the Panel makes a recommendation to the Commission on whether to advance the proposal to the next phase of development and review. The commenter suggests the Commission ought to have similarly-detailed criteria. But we believe the rules as drafted allow greater Commission discretion, an overlay of judgment on top of the Evaluation Panel's analytical review. Finally, on the issue of the proper forum for making its decision, the Commission remains subject to current state laws related to open public meetings, and any decisions to be made are still subject to the procedural requirements of those laws. Additional requirements about time, process or venue for that decision seems unnecessarily burdensome.

13. Under WAC 468-600-320, is the Commission or Department required to do anything with competing conceptual proposals that are submitted, other than forwarding them to the Evaluation Panel?

WSDOT response: No preliminary review of competing conceptual proposals are needed, because the Commission has already considered the proposed project under the original conceptual proposal submittal, with the project deemed worthy of further review and development into a detailed proposal.

14. WAC 468-600-355 directs the Commission to review proposals and make a determination whether to select one or more proposals for negotiation, but the rule does not specify the exact process the Commission will use, the information it will consider in making its determination, who the Commission will rely upon for advice in addition to the Department and the Evaluation Panel, etc. These details should be included in the rule.

WSDOT response: The commenter desires to see more detail and structure in the rules governing the Commission's deliberations. The proposed rules do not adopt this approach, but rather reflect the philosophy that discretion, flexibility, and informed judgment are what distinguishes a Transportation Commission from, say, a computer program, which requires only basic operating instructions and the input of data in order to produce a logical answer. This is a basic difference in the philosophy of decision sciences. There are many elements of objective project review and evaluation that are detailed in these rules. Those elements are enhanced with another dimension of decision-making, which is that of subjective, informed opinion and judgment rendered by a citizen Commission. These rules contain both objective criteria and decision-making processes, which serve as fundamental safeguards against arbitrary action, and subjective, informed judgment, which is capable of adapting and responding to changed circumstances and information asymmetry. WAC rule 468-600-355 is a particular expression of the latter.

15. The option of allowing the Commission to conduct competitive negotiations (WAC 468-600-360) occurs well into the project selection process and after the Proposer has likely spent hundreds of thousands of dollars to reach this point in the review. The possibility of having a proposal rejected this late in the process will likely have a chilling effect on the private sector's willingness to participate in this program.

WSDOT response: The comment is an astute observation on the downside risk if the Commission elects competitive negotiations with any regularity. The option of competitive negotiations is contained in the rules, but it is certainly not mandatory and for reasons pointed out in the comment, ought to be employed very judiciously and in instances where there are multiple proposals with no clear leader.

16. The rules related to protesting the rejection or award of a contract to a competitor in a competing proposal context (WAC 468-600-365) assumes that an aggrieved Proposer would have access to information relevant in proving that there was an improper award, yet much of a competing proposal would ostensibly be protected as trade secret.

WSDOT response: As is the case with many other competitive selection processes at WSDOT and other parts of state government, detailed scoring records would be kept and, if a protest is filed under WAC 468-600-365, those records would be made available to the challenger. Furthermore, all elements of a competing proposal(s) would need to be made available to the challenger (probably after redacting trade secret information, unless waived by the apparent successful proposer). The procedures specified in WAC 468-600-365 are similar to other protestation of bid award procedures in use by government. If an aggrieved party felt that the administrative remedy provided in the rules is inadequate, that party retains the right to appeal the Commission's decision to a court of

competent jurisdiction. The procedures provided in the WAC do not replace any rights under state law.

17. Subsection (2) of WAC 468-600-370 grants the Proposer the option of not proceeding after the Commission has selected the proposal and authorized negotiations. There ought to be a penalty associated with the withdrawal of the proposal at this stage, considering the hundreds of thousands of dollars in state expense incurred to get the project to this point.

WSDOT response: The right to withdrawal in subsection (2) is limited to situations where the Commission selects a proposal for negotiation, but subject to satisfaction of certain conditions (a provisional selection, as referred to in the rules). This is the legal equivalent of a counter-offer, since the state is adding new terms to the proposal that were not otherwise present in the original submittal (or "offer"); the state could not (and should not) seek to penalize a Proposer for not accepting what amounts to a counter-offer.

18. WAC 468-600-741 requires public hearings on proposed project agreements, but fails to indicate what specific deliberations by the Commission will follow that hearing, whether the deliberations will be public, and what information the Commission will consider before taking action. The rules should be more specific regarding these issues.

WSDOT response: The concerns raised in this comment are essentially the same as in #14 above; WSDOT's response is the same as in #14.

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November 13, 2006

To:

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Subject:

COMMENTS ON PROPOSED RULE: CHAPTER 468-600 WAC TRANSPORTATION INNOVATIVE PARTHERSHIP PROGRAM (TIPP)

I am herewith submitting comments to the subject proposed rule.

468-600-030 Conflict of interest.

In (2), what is the commission's and department's plan and schedule for providing the required conflict of interest guidelines and policies? They need to be available when the proposed rule becomes effective. Otherwise, potential applicants to the TIPP will be working with incomplete information and cannot be held to a standard that does not exist. If these guidelines and policies are planned to be a separate rule making process, then that should be stated in this rule. Otherwise, this proposed rule is incomplete and should not be considered for adoption at this time.

468-600-100 Department to establish programmatic approach to solicitation of TIP projects.

1. The rule should state a reasonable deadline for the department to issue its first registry of projects eligible for development.

2. In (2), when considering additional projects or removal of projects to/from the registry, a request for information seeking comments and suggestions from the public and private sectors is to be published. The rule should state the purpose of this request for information.

Issues to consider: (1) What information is requested and how will the department use it? (2) The rule should clearly state what decisions are to be made by the department and/or commission based on the information received.

3. In (3), the rule states that at least once every two years the department is to develop a plan for conducting a solicitation of proposals. It doesn't say anything about when or how often an actual solicitation of proposals is to take place. The entire TIPP's process for solicited proposals is based on the department periodically conducting these solicitations. The rule should be more specific as to when the first solicitation is to occur and how often future solicitations should occur. Developing a plan once every two years is not the same as conducting a solicitation for proposals. This uncertainty will likely discourage potential developers from participating in the TIPP. The rule needs to be more specific as to how and when these solicitations will occur.

4. In (3)(d), the rule states that the department is not required to solicit proposals only for projects listed on the registry. If this is the case, then what is the purpose of the registry? If the department wants to offer up a project for solicited proposals, then the department should put it on the registry list first. The existence of "drop-in" projects (i.e., projects available to be proposed but not listed on the registry) indicates the department has not done its homework in planning for projects qualifying for solicited proposals.

468-600-210 Projects eligible for unsolicited proposals.

1. In (3), the rule needs to set forth the procedure for the commission to identify a project not included in the Washington transportation plan (WTP) as being a "priority need of the state" (using the words as stated in the proposed rule) and thus qualifying the project as one eligible for an unsolicited proposal.

2. If the Commission is to be able, on its own, to identify projects that qualify for unsolicited proposals, then how will this be done? Most if not all of these "commission-originated projects" will be identified first by parties other than the commission or the department. Accordingly, the rule should provide the procedure for a party to interact with the Commission in order to receive fair consideration of a proposed project that is not included in the WTP. With the option of "commission-originated projects" available, there will be great interest in getting the commission's approval of a project first before submitting an unsolicited project proposal especially if the commission is initially unaware of the existence of such a potential project.

Issues to consider: (1) Is the party that has identified a potential project and wants to qualify it for an unsolicited proposal supposed to first bring its idea to the department or should it go directly to the commission? (2) How will the commission interact with parties desiring to bring a new project ideas that's not included in the WTP directly to the commission's attention? (3) What role, if any, will the department have with these "commission-originated projects?

3. If the commission has no interest in pursuing projects not listed in the WTP (which is very likely), then this provision for "commission-originated projects" should be deleted from the rule.

468-600-215 Department's management of unsolicited proposals.

General Comments: This section states that all unsolicited project proposals are subject to postponement of, or delays in, their processing. In effect, these conditions give clear indication that there is no certainty that any unsolicited project proposal will ever see the light of day. Sub-section (6) states this uncertainty: "By submitting an unsolicited proposal, each proposer thereby waives and relinquishes every claim of right, entitlement or expectation that the processing and consideration of its proposal will not be subject to suspension under this rule." The fact that an unsolicited proposal can be killed anywhere along its way to approval will discourage developers from fronting the time and cost of making such a proposal.

Clearly, the commission and the department will put their emphasis on projects already listed on the registry. That's why the registry is so important (see my comments 468-600-100, above). This uncertainty and the likelihood that unsolicited proposals will be given a very low priority lead to my suggestion that the option for unsolicited project proposals either be reconstituted to be more appealing to potential proposers (i.e., remove some of this negative tone that's written into the rule) or that it be entirely deleted from the rule.

468-600-230 Fees to accompany unsolicited proposals.

The schedule of fees for unsolicited proposals is of such importance to this rule that, absent a fee schedule, this rule is incomplete and should not be considered for adoption at this time.

468-600-310 Preliminary review of proposals.

1. In (1), the rule should state a reasonable time limit for the department to conduct its preliminary review of solicited proposals and a time limit for certifying them and forwarding them to the evaluation panel.

2. In (2) & (3), the rule should state a reasonable time limit for the evaluation panel to review unsolicited conceptual proposals and to report the result of its evaluation and its recommendation to the commission.

468-600-315 Commission review of unsolicited conceptual proposals.

For unsolicited conceptual proposals that receive the approval of the evaluation panel, the commission is next supposed to review the approval and recommendation and approve or disapprove the proposal for further evaluation and action by the state.

Issues to consider: (1) The rule should state how the commission is to reach its approval or disapproval and the criteria it will use. (2) Will this approval/disapproval process be open to the public? (3) The rule should state a reasonable time limit for the commission to make its recommendation.

468-600-320 Competing Proposals.

1. In (5), the rule should state a reasonable time limit for the commission and/or the department to forward competing conceptual proposals that it receives to the evaluation panel.

Issues to consider: (1) Is the commission or department expected or required to do anything with these competing conceptual proposals other than merely forwarding them to the evaluation panel? (2) If so, what specifically is to be done?

2. In (5)(a) & (b), the rule should state a reasonable time limit for evaluating the competing conceptual proposal(s) by the evaluation panel and for processing the competing conceptual proposal(s) as described in these sub-sections.

468-600-330 Proposal evaluation factors and criteria.

This section applies to solicited proposals, unsolicited proposals and competing proposals. The rule should state a reasonable time limit for the evaluation panel to complete its work as specified in this section.

468-600-350 Evaluation panel recommendation to commission.

The rule should state reasonable time limits for: (1) the evaluation panel's preparation of the written determination and (2) the evaluation panel's reporting its assessments and recommendations to the commission.

468-600-355 Commission review and selection of proposals.

1. The rule should, as a minimum, address the following questions/issues: (1) What process will the commission use to select proposals? (2) Is the commission required to conduct its evaluation independent of work performed by the department; i.e., will the commission contract with consultants and/or specialists to assist it with this selection process, or will the commission merely rubber-stamp the department's selection? (3) Will the commission's deliberations relating to the selection process be open to the public?

2. The rule should state a reasonable time limit for the commission to select proposals to advance to execution or negotiations of a contract or development agreement.

468-600-360 Commission's authority to elect competitive negotiations.

General Comments: This section covers various paths that the commission may follow in narrowing down the list of project proposers. The problem, from the viewpoint of a project proposer, is that this narrowing-down process occurs well into the selection process and after the project proposer has spent possibly hundreds of thousands of dollars to reach this point and then be eliminated because the commission has determined it will only consider proposals within a "competitive range".

First, the uncertainty inherent in these provisions and the high cost of preparing and submitting a project proposal will discourage many otherwise qualified developers from ever submitting a project proposal under the TIPP.

Second, being "kicked out" of further consideration at this late date will surely lead to protests by the eliminated proposer(s) and could cause lengthy delays in authorizing any project.

468-600-365 Protests of rejection of proposal/award of contract to competitor in competing proposals context.

1. In (2), the protesting proposer is required to demonstrate that all higher-scoring proposers are ineligible for selection. This process requires that the protesting proposer have access to the competing proposals. How does the commission and department plan to accommodate the protester while maintaining confidential aspects of the competitor's proposal?

2. In (3), the protesting proposer will need access to the competitor's proposal and access to every step in the commission's (and the department's) deliberative processes in order to comply with this sub-section. How does the commission and department plan to accommodate the protester while maintaining confidential aspects of the competitor's proposal?

3. In (4), the commission is required to issue a written decision "that resolves the issues raised in the protest." Since there is no certainty that such issues can be resolved, how will this section of the rule ever be implemented?

468-600-370 Notification of apparent successful proposer--Prenegotiation activities authorized.

General Comments: Under sub-section (2), after a proposal is selected (and possibly hundreds of thousands of dollars spent by the state in advancing the proposal to the "successful" level), the proposer of the successful proposal has the option of not proceeding. This is a serious flaw to the entire TIPP.

In order to protect the state's investment in both time and money spent in advancing a project proposal to the "successful" level, the rule should include the assessment of a penalty for a proposer who decides to "bail out" at an advanced stage in the selection process. The penalty

should increase the further into the selection process a proposer gets, and the assessment of this penalty should be at the sole option of the state. A proposer who "bails out" after receiving a "successful" selection notice should be severely penalized.

468-600-741 Public hearings on proposed project and agreement.

The rule should state the purpose of this public hearing.

Issues to consider: (1) Will the commission provide a written summary of the testimony received? (2) What specific deliberations by the commission following the public hearing are to be conducted? (3) Will these deliberations be open to the public? (4) How will the commission process the information received at this public hearing prior to reaching a final decision on the proposal and on the project?

Prepared and submitted by:

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End of comments on proposed Chapter 468-600 WAC

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