CAPITAL PROJECTS ADVISORY REVIEW BOARD (CPARB)

Pilot Program Recommendations for

K-12 Performance-Based Construction Contracts

Report to the Washington State Legislature

December 2011

Submitted by
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CPARB
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I. Executive Summary

The 2011 Legislature passed Engrossed Substitute House Bill (ESHB) 1497 for the Capital Budget. Section 7010 directs the Capital Projects Advisory Review Board (CPARB) together with the Department of Enterprise Services (DES) and the Office of Superintendent of Public Instruction (OSPI) to develop a performance-based school construction pilot program and deliver a report to the House Capital Budget Committee and the Senate Ways and Means Committee by January 1, 2012.

CPARB established a diversely represented subcommittee to address Section 7010 and prepare this report which has been approved by the full CPARB board. (See Appendix A for subcommittee list.)

Section 7010 requires four deliverables which are provided in the following sections of the report.

- Section III. Guidelines for developing a prequalified list of energy services contractors
- Section IV. A process for evaluating the projects submitted by school districts
- Section V. A model contract that requires a guarantee of system performance
- Section VI. Rulemaking and Oversight

While the new law anticipated using contracting processes allowed in RCW 39.35A (Performance-based contracts for water conservation, solid waste reduction, and energy equipment), the CPARB recommends that the K-12 pilot program use the existing design build process of RCW 39.10.300 to the extent appropriate and possible because it better addresses multi-discipline projects and has the ability to select the best design and construction team. (See Appendix B for RCW 39.35A and Appendix C for RCW 39.10.300)

The recommended approach is to implement a contractual mechanism known as Design Build Operate Maintain (DBOM), which has been successfully employed in the state of Washington.

The key elements of this process are:

1. Develop energy, resource conservation and other performance requirements for the new facility or modernization project.

2. Prequalify 3-5 business entities that will compete for the opportunity to design, build, operate and maintain the facility, while guaranteeing its performance to the specified standards.

3. Select and contract with an entity to be the Design Builder, responsible for designing and constructing the facility to the specified standards.

4. After the construction is complete, engage the Design Builder to operate and maintain key elements of the building systems and guarantee that the energy and resource conservation requirements of the contract are met. The duration of the operation and maintenance contract will be specified by the School District. CPARB recommends a minimum period of two to five years for this work.

Challenges to implementing the program that may need further study include funding incentives for school districts to use the process and the need to find appropriate projects for the pilot program.

II. Engrossed Substitute House Bill 1497 Section 7010

CPARB is directed to deliver a report as directed in Engrossed Substitute House Bill 1497 passed in the 2011 Legislature. The applicable section of the capital budget bill that applies to CPARB is provided here along with some explanations.

The budget bill calls for a program to be developed in the form of a report.

> NEW SECTION. **Sec. 7010.**
> The capital projects advisory review board and the department of general administration [now the department of enterprise services], in consultation with the office of superintendent of public instruction, shall develop a performance-based school construction pilot program. The pilot program must consist of a minimum of two new K-12 school construction projects and two K-12 modernization projects, for consideration under the school construction assistance grant program. Performance-based contracting as allowed in RCW chapter 39.35A shall be the means of project delivery for all applicable systems or structural improvements. The program shall at a minimum include the following: (1) guidelines for developing a prequalified list of energy services contractors eligible for selection to lead or participate on a team to design and construct a new building, or renovate a building; (2) a process for evaluating the projects submitted by school districts to determine if they are candidates for the pilot; (3) a model contract that requires a guarantee of system performance by way of ongoing monitoring and verification of energy measures to be used in the building; and (4) any rule making or oversight that the DES considers necessary for the success of the pilot program. The pilot program recommendations shall be delivered to the House Capital Budget Committee and the Senate Ways and Means Committee by January 1, 2012.

Performance-based Contracting as allowed in RCW Chapter 39.35A shall be the means of project delivery. RCW Chapter 39.35A calls for "Performance-based contracts between a public body and any other entity for providing utility services on a performance guarantee basis. RCW Chapter 39.35A is included in Appendix B.

The legislation requires that the pilot program consist of a minimum of two new K-12 schools and two K-12 modernization projects considered under the OSPI School Construction Assistance Grant Program. A summary of the program is included in Appendix D.

III. Guidelines for Developing a Prequalified List of Energy Services Contractors

Guidelines for developing a prequalified list of energy services contractors eligible for selection to lead or participate on a team to design and construct a new building, or renovate a building.

The Energy Services Program in RCW Chapter 39.35A provides for DES to establish a registry of energy services contractors. While this is a good approach in establishing a pool of qualified contractors from which to select for energy services contracts, CPARB does not recommend this approach for performance-based school construction or modernization projects.

Prequalify contractors for each specific pilot project. The recommended approach for prequalifying contractors for performance-based school construction and modernization projects is to conduct the prequalification for each specific pilot project. Once a school district has a project designated for the pilot program, this option has the advantage of allowing the school district to take advantage of the most qualified local firms with specific expertise in the type of construction or modernization required. The prequalification process would be open to all entities.

Use Design Build Operate Maintain (DBOM) contracting model. CPARB recommends that a contracting model called Design Build Operate Maintain (DBOM) be used as the procurement method for the performance based pilot projects. Under this method, a phased selection process is conducted using the guidelines in RCW 39.10.300, 320, and 330.

School districts are to develop and publish performance requirements before using the DBOM process. A prerequisite to undertaking the DBOM selection process is for the school district to develop and publish a set of performance requirements that define the parameters and expectations that must be met. The performance requirements consist of functional requirements and technical requirements. For the performance-based school pilot projects, the functional requirements are the K-12 Educational Specifications, which will define the programmatic functions that must be provided by the project. The technical specifications define the physical attributes and energy performance requirements to be achieved by the project. Both functional and performance requirements should be developed by licensed professionals under the supervision of the school district. Whether these professionals are in-house or hired consultants, they should be retained for purposes of evaluating the proposals received from the competitors and for ensuring that the construction is performed in accordance with the performance requirements.

Once the project performance requirements are defined and documented, the DBOM selection process can commence. The first phase is a prequalification process, which should be customized to meet specific project requirements.

Example Prequalification Criteria. The following is a sample set of prequalification criteria that may be used as a guide for developing a prequalification process.

1. **Qualifications Criteria:**
   To demonstrate qualifications to perform the work, each proposer must submit written evidence, as called for below, in a format specified and suitable to the school district.

a. The individuals or entities that will be providing professional design services must be listed in the proposal.
b. The firm providing the utility operations services must be listed in the proposal.
c. The firm providing building management services must be listed in the proposal.

2. **Minimum Qualifications Required:**
   a. Licensure of design professionals in applicable jurisdiction.
   b. As a team, the Builder, Architect and Utility Operations Subcontractor must demonstrate relevant experience in the project type and in the design build contracting method.
   c. Minimum Experience in Design-Build Method of Contracting:
      i. Builder: Two (2) projects over $___ million each.
      ii. Utility operations subcontractor: Two (2) projects over $___ million each.
   d. Bonding Capacity: Proposer (prime) must demonstrate that they can provide bonding in accordance with the state law.
   e. Insurability: Statement to the effect that the insurance requirements of the Agreement can be met by the proposer.

3. **Required Professional Design Disciplines:**
   a. Architecture and landscape architecture.
   b. Structural, mechanical, electrical and civil engineering.
   c. Acoustical and vibration consultant.
   d. Geotechnical and foundations consultant.

In a competitive environment, the prequalified entities would develop their proposed designs to a point at which they could satisfy themselves and the district that they will meet the performance requirements and be able to guarantee that performance for a period of building operation determined by the district. At that point, final proposals to design, build and operate the facility would be requested from the prequalified firms.

Example Final Selection Criteria. Final selection criteria could be as follows:

1. **Basis of selection:** The successful proposal (both initial proposal and best-and-final proposal) will be the one that provides the best value to the School District, based on total score calculated by the Jury using ranked quality, price, and time criteria ("weighted criteria"), as well as any exceptional qualifications.

2. **Design/Quality/Quantity/Qualifications Criteria:** In evaluating proposals, Owner will consider the following in the order given:

   Proposal price and life-cycle cost: ____ points
   - Maximum allowable design and construction cost (pass/fail);
   - Relative life-cycle cost ($/SF) of net usable floor area, see note.
   - Note: Proposer with the lowest life-cycle cost shall be awarded the maximum points for this criterion, all others shall be awarded points in reverse proportion to the amount their life-cycle cost exceeds the lowest life-cycle cost.

Concept of the proposal: ____ points

- Functional capability and flexibility.
- Net assignable school area.
- Number of vehicle parking stalls on site.
- Sustainability and energy efficiency.
- Quality of materials and building systems.
- Aesthetic image and character appropriate for program and site context.
- Health and safety of students, staff and visitors.

Ability to bring added value to the district that achieves the highest building performance:_____ points

- Demonstrated ability to obtain Energy Star certification.
- Experience in accessing alternative funding sources.
- Demonstrated commitment to innovative delivery strategies.

Ability of professional personnel: _____ points

- School and/or educational facility design experience.
- Experience designing facilities for public agencies.
- Design excellence.
- Construction management excellence.
- Plans to seek the engagement of the small, minority and women-owned and disadvantaged business community and their historical outreach efforts relating to inclusion of these groups.

Past performance on similar projects: _____ points

- _____ District projects.
- School projects.
- Design-build projects.

Ability to meet time and budget requirements: _____ points

- Time and budget record on projects referenced in d. above.

Ability to provide a 100% performance and payment bond (up to $___ million): _____ points

- Proposer has sufficient bonding capacity in its own name (pass/fail).

Recent, current, and projected workloads of the proposer: _____ points

- Designer's capacity to design the project within proposed schedule; and
- Builder's capacity to build the project within the proposed schedule.

Location: _____ points

- Builder has an established office located in _____ area; and
- Architect-of-Record has an established office located in _____ area.

Safety: _____ points

- Builder's Accident Prevention Program; an
- Builder's Experience Modification Rate (EMR) is 1 or less (pass/fail).

Other information relevant to the project: _____ points

- Design and construction schedule.

Total points available: _____ points

IV. A Process for Evaluating the Projects Submitted by School Districts

A process for evaluating the projects submitted by school districts to determine if they are candidates for the pilot.

For purposes of responding to this provision of Section 7010, CPARB makes the following assumptions:

1. The Legislature may appropriate a source of funds to assist the pilot program. Alternatively, an interested district may seek other sources of funding, such as the Energy Services Contracting Program, some form of borrowing or various resource conservation grant programs.

2. A school district that qualifies its project for the pilot program may borrow money from the appropriated funds, or another source of funding, and repay the loan with its operating budget, based on the estimated savings generated by the project. Operational cost savings generated by energy performance will not likely be sufficient to fully fund the project.

3. School districts will continue to raise revenue through traditional means and, when qualified, will apply for financial assistance through the OSPI School Construction Assistance Program (SCAP).

4. A district would not have to be eligible for a SCAP grant to qualify a project for the performance- based school pilot program. Districts that are eligible to receive a SCAP grant, or can otherwise fund a project will be eligible to apply for the performance-based pilot program. If successful in its application, funding from the pilot program would be used to reduce the funding required from the district's bond issue or levy.

As a means of evaluating applications for the performance-based pilot program, CPARB recommends using the Project Review Committee (PRC) process currently in place under RCW 39.10. The committee is set up to review projects submitted by public bodies to determine if an alternative public works delivery process is the best method. An excerpt from the statute is inserted below.

RCW 39.10.250
Project Review Committee — Duties.
The committee shall:

(1) Certify, or recertify, public bodies for a period of three years to use the design-build or general contractor/construction manager, or both, contracting procedures for projects with a total project cost of ten million dollars or more;

(2) Review and approve the use of the design-build or general contractor/construction manager contracting procedures on a project by project basis for public bodies that are not certified under RCW 39.10.270;

(3) Review and approve the use of the general contractor/construction manager contracting procedure by certified public bodies for projects with a total project cost under ten million dollars;

(4) Review and approve not more than ten projects using the design-build contracting procedure by certified and noncertified public bodies for projects that have a total project cost between two million and ten million dollars. Projects must meet the criteria in RCW 39.10.300(1). Where possible, the committee shall approve projects among multiple public bodies. In June 2010, the committee shall report to the board regarding the committee's review procedure of these projects and its recommendations for further use; and

(5) Review and approve not more than two design-build demonstration projects that include procurement of operations and maintenance services for a period longer than three years. The statute section may have to be revised to reflect the performance based program. Guidelines will have to be developed by CPARB and PRC to help the PRC make a determination if a school district is entitled to use the program. This can be accomplished in a future subcommittee meeting after the program is initiated. CPARB considers it important that a representative from OSPI be designated as a member of the PRC, either as a permanent position or as an adjunct member when the PRC is reviewing performance based school pilot projects.

The PRC should answer two basic questions. Follow up questions are also provided.

1. Is the project appropriate and does it qualify?
   a. Is the project being considered under the School Construction Assistance Grant Program?
   b. What are the performance opportunities that exist?
   c. What political or labor relations obstacles are there and how are they being addressed?
   d. What is the outcome that the district expects from using this process?
   e. What baseline is being used and how will the outcome exceed it?

2. Does the project team have the appropriate experience?
   a. What is the structure of the procurement and project management team for the district and who are the key entities?
   b. What design build experience is available?
   c. How is the list of prequalified energy services contractors being prepared?
   d. What is the form of model contract that is being considered?
   e. What key monitoring or compliance measures will be in place?
   f. What is the form of guarantee that is anticipated from the provider?

CPARB notes here that the DBOM Process recommended in this report is a sophisticated methodology that may require an interested school district to hire outside consultant services. Performance-based design build contracting remains a relatively uncommon approach among Washington state agencies. The added complexity of the DBOM approach will be a challenge for most school districts.

CPARB recommends that the Energy Star Program be considered as a means of evaluating the performance of a potential performance-based school pilot project. Given that building performance is a central goal of the enabling legislation, there should be clear standard for these projects to achieve both in submitting for funding and post-occupancy operations. Requiring all projects, whether new construction or renovation, to obtain and maintain ENERGY STAR certification would provide a mechanism for calculating and monitoring the performance of projects funded by the legislation.

- ENERGY STAR certification provides a national standard for energy efficiency and carbon footprint reduction. To qualify for ENERGY STAR certification, a K-12 building must earn a 75 or higher on EPA's 1-100 energy performance scale, indicating that the facility performs better than at least 75 percent of similar buildings nationwide. The ENERGY STAR performance scale accounts for differences in operating conditions, regional weather data, and other important considerations.

- Generally speaking, an ENERGY STAR certified K-12 school building costs .40 cents per square foot less to operate than an average K-12 facility. These savings could be applied to the funding mechanism for the performance school program.

- ENERGY STAR is a visible, understandable standard for building performance. The public sees Energy Star certificates on a wide range of familiar products, from appliances to computers and electronics. The taxpayers of our state are likely to have some understanding of the value of their investment in performance buildings if they see an ENERGY STAR label in the lobby of a K-12 school.

V. A Model Contract that Requires a Guarantee of System Performance

Developing a model contract for a program this complex is a challenging task at this stage of the planning. The model contract depends on many variables still to be determined. Legal specialists will have to be engaged to draft a model contract.

The recommended approach is to implement a Design Build Operate Maintain (DBOM) program, based on the design build provisions in RCW 39.10. While not definitively prescribed here, it is anticipated that two main contracts would be utilized in this program.

1. A design build contract for the construction or modernization.
    a. AIA, DBIA or a comparable form of contract
    b. A list of performance and resource considerations that must be guaranteed by the DBOM contractor.
    c. A Payment and Performance Bond would be required for the construction contract.

2. A Building Management and Utility Services contract, in which the Design Builder becomes the DBOM Contractor. The DBOM Contractor is responsible for guaranteeing the performance of the facility and for providing building management and utility services over the operational duration specified by the school district.
    a. Provisions for a guarantee through the life of the contract.
    b. A summary of assumptions and provisions for an annual test of those assumptions to be compared to annual utility audit.
    c. A cost and payment structure that holds the contractor at risk for performance.
    d. A Payment and Performance Bond would not be required for this contract. However, the energy cost savings guarantee, the maintenance guarantee, utility incentives, and efficiency guarantees would be performance obligations under the Building Management and Utility Services contract.
    e. The University of Washington can provide a model contract that is being successfully implemented in the state of Washington.

Project bonding and enforcement of the performance guarantees will be a challenge for these projects. See Appendix E for additional bonding information.

VI. Rulemaking and Oversight

CPARB does not anticipate that additional rule making will be required to implement the performance-based school pilot program.

As recommended in Guidelines for Developing a Prequalified List of Energy Services Contractors, CPARB proposes that the CPARB's Project Review Committee (PRC) be charged with review and approval of pilot projects.

Oversight of the pilot program should be accomplished through project data collection in accordance with the requirements of RCW 39.10. Data would be submitted to CPARB for review.

Administrative costs that are incurred by the Department of Enterprise Services and by the Office of the Superintendent of Public Instruction will be borne by the projects.

VII. Appendices

A. CPARB's K-12 Performance-Based School Construction Contracts Subcommittee
B. RCW 39.35A "Energy Services Statute"
C. RCW 39.10.300 Alternative Public Works Design Build Statute
D. OSPI School Construction Assistance Program Overview
E. Notes from CPARB Surety/Insurance Representative, Larry Byers
F. Northwest Energy Efficiency Council Comments
G. North Shore School District Letter
H. Naches Valley Public Schools Letter

APPENDIX A. CPARB's K-12 Performance-Based School Construction Contracts Subcommittee

Member Name	Representing
John Lynch, Chair *	Department of Enterprise Services
Cathy Canorro *	Office of Minority and Women Business Enterprises
Christine McCorkle *	Subcontractors
Chuck Davis *	Public Hospital Districts
Damon Smith *	Design Engineers
Dan Seydel	Small Businesses
Darlene Septelka	Design Build Institute
Ed Kommers *	Subcontractors
Eric Smith	University of Washington
Gordon Beck	Office of Superintendent of Public Instruction (K-12)
Helaine Honig *	Cities
Mark Riker *	Labor
Olivia Yang *	Higher Education
Stan Bowman	American Institute of Architects
Steve Crawford *	School Districts
Vince Campanella *	General Contractors
Walter Schacht *	Design Architects

* denotes board member of CPARB

APPENDIX B. RCW 39.35A "Energy Services Statute"

Chapter 39.35A RCW

Performance-based contracts for water conservation, solid waste reduction, and energy equipment

RCW Sections

39.35A.010
Findings.

The legislature finds that:

(1) Conserving energy and water in publicly owned buildings will have a beneficial effect on our overall supply of energy and water;

(2) Conserving energy and water in publicly owned buildings can result in cost savings for taxpayers; and

(3) Performance-based energy contracts are a means by which municipalities can achieve energy and water conservation without capital outlay.

Therefore, the legislature declares that it is the policy that a municipality may, after a competitive selection process, negotiate a performance-based energy contract with a firm that offers the best proposal.
[2007 c 39 § 1; 1985 c 169 § 1.]

39.35A.020
Definitions.

Unless the context clearly indicates otherwise, the definitions in this section shall apply throughout this chapter.

(1) "Energy equipment and services" means energy management systems and any equipment, materials, or supplies that are expected, upon installation, to reduce the energy use or energy cost of an existing building or facility, and the services associated with the equipment, materials, or supplies, including but not limited to design, engineering, financing, installation, project management, guarantees, operations, and maintenance. Reduction in energy use or energy cost may also include reductions in the use or cost of water, wastewater, or solid waste.

(2) "Energy management system" has the definition provided in RCW 39.35.030.

(3) "Municipality" has the definition provided in RCW 39.04.010.

(4) "Performance-based contract" means one or more contracts for water conservation services, solid

waste reduction services, or energy equipment and services between a municipality and any other persons or entities, if the payment obligation for each year under the contract, including the year of installation, is either: (a) Set as a percentage of the annual energy cost savings, water cost savings, or solid waste cost savings attributable under the contract; or (b) guaranteed by the other persons or entities to be less than the annual energy cost savings, water cost savings, or solid waste cost savings attributable under the contract. Such guarantee shall be, at the option of the municipality, a bond or insurance policy, or some other guarantee determined sufficient by the municipality to provide a level of assurance similar to the level provided by a bond or insurance policy.

(5) "Water conservation" means reductions in the use of water or wastewater.
[2007 c 39 § 2; 2001 c 214 § 18; 1985 c 169 § 2.]

Notes:
Severability -- Effective date -- 2001 c 214: See notes following RCW 80.50.010.
Findings -- 2001 c 214: See note following RCW 39.35.010.

39.35A.030
Performance-based contracts for water conservation services, solid waste reduction services, and energy equipment and services.

(1) Each municipality shall publish in advance its requirements to procure water conservation services, solid waste reduction services, or energy equipment and services under a performance-based contract. The announcement shall state concisely the scope and nature of the equipment and services for which a performance-based contract is required, and shall encourage firms to submit proposals to meet these requirements.

(2) The municipality may negotiate a fair and reasonable performance-based contract with the firm that is identified, based on the criteria that is established by the municipality, to be the firm that submits the best proposal.

(3) If the municipality is unable to negotiate a satisfactory contract with the firm that submits the best proposal, negotiations with that firm shall be formally terminated and the municipality may select another firm in accordance with this section and continue negotiation until a performance-based contract is reached or the selection process is terminated.
[2007 c 39 § 3; 1985 c 169 § 3.]

39.35A.040
Application of other procurement requirements.

If a municipality chooses, by resolution or other appropriate mechanism, to negotiate a performance-based contract under this chapter, no otherwise applicable statutory procurement requirement applies.
[1985 c 169 § 4.]

39.35A.050
Energy service contractor registry — Identification of performance-based contracting services.

The state *department of general administration shall maintain a registry of energy service contractors and provide assistance to municipalities in identifying available performance-based contracting services.
[2001 c 214 § 19.]

Notes:
*Reviser's note: The "department of general administration" was renamed the "department of enterprise services" by 2011 1st sp.s. c 43 § 107.
Severability -- Effective date -- 2001 c 214: See notes following RCW 80.50.010.
Findings -- 2001 c 214: See note following RCW 39.35.010.

APPENDIX C. RCW 39.10.300 Alternative Public Works Design Build Statute

RCW 39.10.300

Design-build procedure — Uses.

(1) Subject to the process in RCW 39.10.270 or 39.10.280, public bodies may utilize the design-build procedure for public works projects in which the total project cost is over ten million dollars and where:

(a) The design and construction activities, technologies, or schedule to be used are highly specialized and a design-build approach is critical in developing the construction methodology or implementing the proposed technology; or

(b) The project design is repetitive in nature and is an incidental part of the installation or construction; or

(c) Regular interaction with and feedback from facilities users and operators during design is not critical to an effective facility design.

(2) Subject to the process in RCW 39.10.270 or 39.10.280, public bodies may use the design-build procedure for parking garages, regardless of cost.

(3) The design-build procedure may be used for the construction or erection of preengineered metal buildings or prefabricated modular buildings, regardless of cost and is not subject to approval by the committee.

(4) Except for utility projects and approved demonstration projects, the design-build procedure may not be used to procure operations and maintenance services for a period longer than three years. State agency projects that propose to use the design-build-operate-maintain procedure shall submit cost estimates for the construction portion of the project consistent with the office of financial management's capital budget requirements. Operations and maintenance costs must be shown separately and must not be included as part of the capital budget request.

(5) Subject to the process in RCW 39.10.280, public bodies may use the design-build procedure for public works projects in which the total project cost is between two million and ten million dollars and that meet one of the criteria in subsection (1)(a), (b), or (c) of this section.

(6) Subject to the process in RCW 39.10.280, a public body may seek committee approval for a design-build demonstration project that includes procurement of operations and maintenance services for a period longer than three years.

[2009 c 75 § 4; 2007 c 494 § 201. Prior: 2003 c 352 § 2; 2003 c 300 § 4; 2002 c 46 § 1; 2001 c 328 § 2. Formerly RCW 39.10.051.]

Notes:

Sunset Act application: See note following chapter digest.

Effective date -- 2002 c 46: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [March 14, 2002]." [2002 c 46 § 5.]

Effective date -- 2001 c 328: See note following RCW 39.10.210.

APPENDIX D. OSPI School Construction Assistance Program Overview

Q: What is the state's role in funding school facilities?

{A} OSPI's School Construction Assistance Program operates as a partnership between local school districts and the state to fund construction of new schools and modernize existing facilities.

The state contributes some funding, as well as technical assistance in facility planning, construction, and contracting. School districts have primary responsibility for school construction funding, and as the facility owner, are responsible for overseeing all phases of the project.

Q: How are projects funded?

{A} **Local funding.** To be eligible for state assistance, a school district must demonstrate local support for the proposed project by raising local revenues. ***General obligation bonds*** are the primary source of local revenues. School bond measures require a supermajority to pass. ***Impact fees***, when approved by city/county governments with a fee structure, can be assessed on new development projects.

State funding sources. State revenues to fund school projects come from multiple sources, including management of ***trust lands***, the ***general fund***, state-issued ***general obligation bonds***, and a portion of state ***lottery funds***. The composition of total state funding across these sources changes over time, depending on budget decisions by the Governor and the Legislature.

Q: What types of projects receive funding?

{A} **New construction projects** build new schools to accommodate "unhoused students" in a growing school district.

Modernization projects renovate and upgrade existing school facilities.

New-in-lieu of modernization projects replace existing buildings with new ones when more cost effective than modernizing.

Q: What project-related costs can be funded through SCAP?

{A} The state provides assistance for "instructional space" (see below). Related to instructional space, the following categories of work are eligible for assistance:

- Initial planning activities: "Study and Survey"
- Development of educational specifications
- Architectural and engineering work
- Value engineering work
- Energy conservation reports
- Certain inspections and testing
- Furniture and equipment
- Constructability reviews
- Building commissioning
- Construction management
- Art for public spaces

Auxiliary facilities, such as stadia and district administrative space, must be funded entirely with local revenues.

What is instructional space?

Instructional space is defined by Washington Administrative Code 392-343-019 as the gross square footage of a school facility used for the purpose of instructing students.

Q: How much does the State contribute?

{A} State funding assistance is determined using a funding formula, based on three main factors:

A		B		C		
Eligible Area	x	Construction Cost Allocation (CCA)	x	Funding Assistance Percentage	=	Maximum Allowable State Funding Assistance

A. The **eligible area** for new construction projects is calculated by comparing the current district-wide capacity (in square feet) to the district's projected enrollment growth and future space needs:

ELIGIBLE AREA =
Future Enrollment (# of students) x
Per Student Space Allowance
minus Current Capacity

Future Enrollment: *the projected number of students in either the next three or five years*

Per Student Space Allocation: *Grades K-6: 90 square feet (sq ft) per student; 7-8: 117 sq ft per student; 9-12: 130 sq ft per student; students with disabilities: 144 sq ft per student. These allocations do not reflect the true per student space needs, which can vary by school and district education standards*

Current Capacity: *the existing space inventory for the whole district*

For modernization projects, instead of Current Capacity, the square footage of "Improved Space" is deducted.

B. **Construction Cost Allocation (CCA)** is a per square foot amount set by the state and used to determine the level of state funding assistance. OSPI submits requests to the Legislature for periodic increases in the Allocation to keep pace with inflation.

*The **Construction Cost Allocation** used by the state is as follows:*

July 1, 2010	$180.17
July 1, 2009	$174.26
July 1, 2008	$168.79

C. The state applies a **funding assistance percentage** to equalize state funding. The percentage accounts for differences across school districts in wealth and ability to generate revenues through property taxes.

The minimum percentage is 20% of recognized project costs, and can be as much as 100% of recognized costs, depending on district wealth.

School districts that experience rapid population growth may receive extra "growth points" towards their state funding assistance percentage. The points are based on average growth for the past three years.

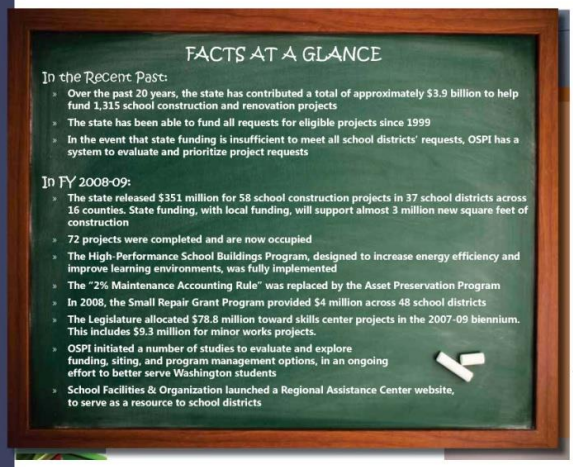
Q: What is the timing for State Funding Assistance?

{A} OSPI releases funding commitments for qualifying projects once a year – after July 1st (concurrent with the start of the state's fiscal year).

Projects may be **"front funded"** or **"non-front funded."** Front funded projects may begin construction prior to the state funding release. Districts using front funding must certify to OSPI that they have adequate funding to pay for the entire project in advance of receiving state monies.

For non-front funded projects, school districts start construction following the state announcement that the district has secured funding.

OSPI School Construction Assistance Program Overview



OSPI

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SCHOOL CONSTRUCTION ASSISTANCE PROGRAM OVERVIEW

In collaboration with educators, students, families, local communities, business, labor, and government, the Office of Superintendent of Public Instruction leads, supports, and oversees K-12 education, ensuring the success of all learners.

Office of Superintendent of Public Instruction

School Facilities & Organization

Construction Assistance Program

School

OSPI School Construction Assistance Program Overview

APPENDIX E. Notes from CPARB Surety/Insurance Representative, Larry Byers

At this point, I do not have any surety language which could ameliorate the surety issues to the point where these contracts would be bondable, as there are numerous underwriting and legal challenges this program would create for contractors, subcontractors and sureties. Since sureties guarantee the contractor's obligations under the terms of the contract, the concerns that I expressed at the meeting are inseparable between sureties and the contractors they bond.

Design-build contracts can be challenging to underwrite to begin with but contracts with built-in guarantees for energy savings and carbon footprint reduction are substantially more hazardous. The proposed DBOM contracts then add long-term guarantees. Some of the key concerns include:

1. Guarantees of unproven technologies and savings that may or may not be realized, even if the project meets the certification requirements.
2. Guarantees of cash flows which can turn a standard performance bond into a credit enhancement mechanism.
3. Lawsuits that inevitably arise when purported energy savings do not occur (especially between the manufacturers of energy systems who blame the contractor who installed the equipment and the contractor who insists the equipment was installed in accordance with the manufacturers' specifications).
4. A much higher design standard (negligence standard vs. breach of contract).
5. Flow down risk to subcontractors.
6. The risk of performance standards embedded into the contract even if the OM is excluded, and
7. Tail liability incurred by the contractor which would be factored into the surety's underwriting.

In addition to these issues are a separate set of certification-related issues. For instance, according to the proposal, points would be awarded to the contractor based on "a demonstrated ability to obtain Energy Star certification." Since certification is awarded on a project-by-project basis, what if points are awarded to the contractor for his demonstrated ability, the contractor is ultimately awarded the job, but he is unable to obtain certification for the project? What are the damages to the owner, especially if the owner takes occupancy of the building in spite of the absence of certification? When is the project considered substantially complete and how long can the owner hold retention should there be a delay in certification?

Another issue that has not been addressed is how to resolve a situation where a certified project has simply failed to meet projected energy savings for whatever reason. What happens if all energy saving devices and systems were installed properly, the project was built to agreed upon specifications and the OM portion of the contract has now been completed but energy savings has not occurred. How does the owner and contractor resolve these issues? Can this affect the surety that bonded the construction of the project, perhaps several years earlier?

Another consideration that seems to have been overlooked is a requirement for an objective cost-benefit analysis for these projects. For instance, the proposal notes that "an Energy Star certified K-12 school costs forty cents per square foot less to operate than an average K-12 facility" but it does not specify the additional cost to build one of these schools and fails to indicate whether there is an overall net savings. The added risks to the contractor would certainly raise the construction costs even further (assuming that a few contractors might be able to work around the bonding issues) not to mention that there would be so few contractors that could bid on projects like this that the lack of competition would allow for much greater margin.

As you can see, there are numerous, substantial issues that would need to be addressed from a bonding perspective before this proposal could move forward. I do not know if there is a task force meeting scheduled between now and the 8th. If not, I could arrange to meet with you in person or discuss this over the phone at your convenience. Please let me know what works best for you. You can reach me by e-mail or phone.

Larry Byers

NOTE:
The above e-mail was in response to an earlier version of the CPARB proposal where the contractor and surety would have been liable for longer and broader guarantees. The earlier proposal would have created serious underwriting and legal challenges that would have made it difficult for sureties to bond these projects and it also would have reduced competition among contractors bidding on this work.

APPENDIX F. Northwest Energy Efficiency Council Comments

From: Stan Price [mailto:stan@putnamprice.com]
Sent: Friday, December 02, 2011 9:00 AM
To: Lynch, John W. (DES)
Subject: NEEC comments on CPARB Report

NEEC
NORTHWEST
ENERGY
EFFICIENCY
COUNCIL

December 2, 2011

Mr. John Lynch
Department of Enterprise Services

Dear John,

As you know from my earlier letter and our phone conversations, the Northwest Energy Efficiency Council (NEEC) has serious concerns with the CPARB Subcommittee Draft Report on Performance Based School Construction and Modernization. NEEC is a non-profit industry association representing companies that provide energy efficiency products and services in the region. We do not believe that the Draft Report is responsive to the legislative directive in ESHB 1497 Section 7010 and that the report's foundational conclusion that RCW 39.35A cannot be used as the basis for procurement is incorrect.

Please find attached a description of our concerns about the Draft Report and some preliminary suggestions on how CPARB could structure a pilot program that is both responsive to the legislative directive and a path that can ensure post occupancy energy performance that reduces the long term total cost of ownership of the building.

We respectfully ask that you bring our concerns and ideas to both the CPARB Subcommittee and to the CPARB itself so that this alternative to your Draft Report can be carefully considered. If the Draft Report is adopted as is by the CPARB, we ask that our concerns and alternative ideas be communicated in your report to the House Capital Budget Committee.

Sincerely,

Stan Price, Executive Director

Performance Based School Construction and Modernization Report

Comments of the Northwest Energy Efficiency Council

The Draft Report is not responsive to the legislative directive of ESHB 1497 Section 7010

Section 7010 states that the Department of General Administration (now Department of Enterprise Services) is to develop a performance-based school construction pilot program. Section 7010 explicitly states that "Performance-based contracting as allowed in chapter 39.35A RCW **shall** [emphasis added] be the means of project delivery…" The Draft Report, with virtually no discussion or justification, simply states that "…CPARB does not recommend this approach for performance based school construction or modernization projects."

Section 7010 also directs that the pilot program use a contract "…that requires a guarantee of system performance by way of ongoing monitoring and verification of energy measures to be used in the building…" The Draft Report recommends that the "…Energy Star program be considered as a means of evaluating the performance of a potential performance based school pilot project." While ENERGY STAR Portfolio Manager is a useful tool for general use of energy tracking and benchmarking, it is completely different from the energy performance guarantee that is the heart of the 39.35A procurement model in which actual metered post occupancy energy use is guaranteed by the contractor.

The report's recommendation that the pilot use RCW 39.10 directly contradicts the statute's clear language. While 39.10 may have its own individual merits, it is an existing and already tested process for new construction. We see little need to pilot a mechanism that has already been demonstrated.

NEEC recommends that the pilot program use RCW 30.35A as the means for selecting and contracting services for school construction and modernization.

The state should use 39.35A as the prime contracting method for the purposes of the pilot. Testing the concept of using 39.35A – already an accepted and proven mechanism for improving energy performance of existing facilities – is the main intent of Section 7010. Currently, there are 14 qualified firms on the state approved list and any contractor that is not currently pre-approved may become pre-approved for the purposes of this pilot by showing sufficient experience and capability to successfully deliver a project. We fully anticipate that any prime contractor chosen through the 39.35A process will assemble a qualified team of specialists including architects, engineers, consultants, subcontractors, and labor. If a contractor fails to present the client with a qualified team, they simply would not be chosen for the work.

School districts in this state are under extreme operating budget constraints. Many school districts have an appreciation for the value that an energy performance guarantee brings and would relish the opportunity to deploy a strategy successfully used for their existing buildings to new school construction and extensive modernization. Examples of this enthusiasm to use this approach from school districts are attached to these comments.

Section 7010 specifies that the pilot project include at minimum four (4) projects, two new construction and two modernization. We encourage that the pilot include as many projects as there are applications from school districts to the maximum that the Department of Enterprise Services can administratively manage. If the Department cannot manage as many projects as there are applications a set of criteria should be used to evaluate and rank projects for inclusion in the pilot. Those criteria could include things such as ratio of savings to total project cost; payback or return on investment of energy savings; persistence of savings; and other relevant criteria.

By using 39.35A, the energy savings performance guarantee becomes an active component of the pilot project. The contractual guarantee of post occupancy savings is well established and far superior to an aspirational categorization of an ENERGY STAR listing.

Finally, DES should convene a meeting of approved 39.35A contractors to discuss and develop the program details of the pilot.

ESHB 1497 Section 7010 is explicit in its language to develop a pilot program for school construction and modernization using RCW 39.35A. This procurement method is available, is of interest to school districts, and offers the state the opportunity to demonstrate how Washington State schools can be built economically and with low and guaranteed energy operating costs.

APPENDIX G. North School School District Letter

Northshore
School District

Support Services

22105 23rd Drive S.E.
Bothell, WA 98021-4409
(425) 408-7810
Fax (425) 408-7828

November 28, 2011

I recently became aware that you are developing a K-12 school construction pilot program and strongly support its implementation.

As you know, ongoing Washington State budget/revenue pressures are placing significant stress on K-12 (and Higher Education) facilities programs. As a result, Districts need to be allowed to research and develop better ways to predict and control their facilities expenses, including operations and maintenance costs.

School districts do not have a reliable source of discretionary general fund monies available to cover unexpected/expanding operation and maintenance costs. When these types of costs arise, funds must be diverted from other uses, and the quality of the physical learning environment suffers. As an end result, students suffer.

Districts must be enabled to pursue creative and progressive contracting methods that drive down their operations and maintenance overhead costs so that they can redirect those very limited dollars toward student instruction.

RCW 39.35A performance contracting method is a proven and innovative way for school districts to better manage their facilities costs. It is my experience that facilities procured through performance contracting deliver better financial performance over time as compared to other contracting methods. This is specifically because actual "as built" performance is the benchmark - not just theoretical "as designed" performance.

In essence, performance contracting helps to eliminate unexpected future facilities expenses, and mitigate the impact on already overburdened maintenance and operations staff, which means that more money is left over for books for students.

The ability of the 39.35A process to deliver high performing school facilities has been proven in the retrofit context, and the time is right to extend this contracting mechanism to new construction and modernization projects.

APPENDIX H. Naches Valley Public Schools Letter

NACHES VALLEY PUBLIC SCHOOLS
P.O. BOX 99
NACHES, WASHINGTON 98937-0099
Phone: (509) 653-2220 or 457-8592
FAX: (509) 653-1211
DUANE J. LYONS
Superintendent of Schools
RICHARD F. ROULEAU, Principal
Naches Valley High School
TODD A. HILMES, Principal
Naches Valley Middle School (5-8)
ALLISON SCHNEBLY
Naches Valley Elementary (K-4)

Re: **K-12 Performance Based Construction Pilot**

Capital Projects Advisory Review Board,

November 29, 2011

Naches Valley School District is interested in being a part of your pilot project under section 39.35A "K-12 Performance-Based Construction pilot program".

As a School District and community, we are looking at options for constructing an elementary school that will be very energy efficient and find RCW section 39.35A, as a contracting mechanism to procure new facilities, very attractive to us compared to existing contracting methods.

Since new facilities do not come with performance guarantees, they often bring surprises of higher energy bills once they are operational, with significant detrimental impacts on a school district's operating budget. In these tight budgetary times, we hope to benefit from the guarantees in section 39.35A. Among other benefits, this pilot will allow our district to access a long term performance guarantee for our facilities, which is not a required component in any other contracting method.

We have been extremely pleased with our three past experiences using the section 39.35A mechanism on existing buildings, and we look forward to the opportunity to use this mechanism in a new construction project.

Please contact me if you have any questions, or if I can be of any assistance in this regard.

Sincerely,

Duane Lyons
Superintendent of Schools
509-653-1800
dlyons@nvsd.org