

Washington JTC Policy Work Group Meeting

Discussion Materials December 6, 2011

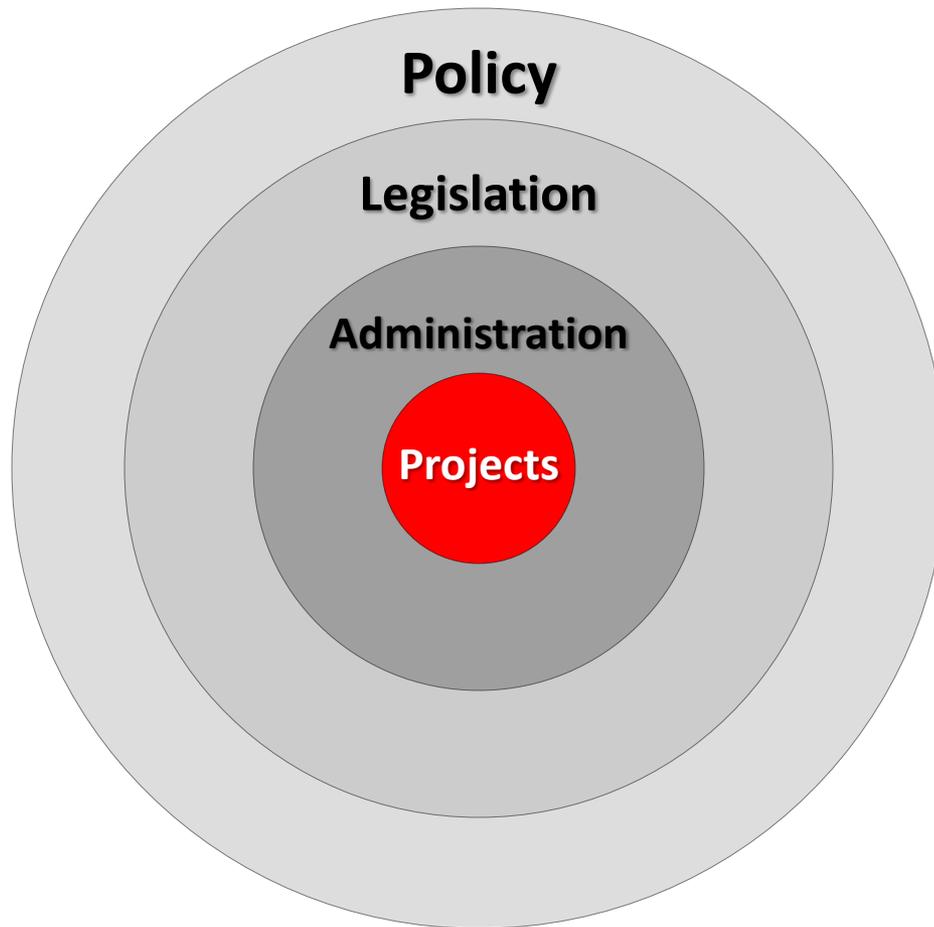


Agenda

Time	Item	Presenter
10:00 AM	Welcome / Overview	Representative Judy Clibborn / Simon Shekleton
10:15 AM	Discussion of Conceptual P3 Implementation Plan Recommendations <ul style="list-style-type: none">- Policy- Legislation- Administration- Schedule and Milestones	Simon Shekleton / Sam Barend
12:15 PM	Working Lunch	General Q&A
1:00 PM	Financial Model Inputs for CRC, 509 & 167 <ul style="list-style-type: none">- Revenues- Initial Capital Costs- Long term Capital Costs- Operating Costs- Risk Registers / VFM Inputs	Simon Shekleton / Susan Kehoe
2:30 PM	Break	
2:45 PM	Financial Model Results Update	Iain Tester / Ian Flanagan
3:50 PM	Next Steps	Sam Barend
4:00 PM	Close	

Discussion of Recommendations

Overview



In developing recommendations it is critical to understand the ideal relationship between Policy, Legislation and Administration:

- *Policy is all encompassing and defines the needs, preferences and objectives of the State as concisely as possible*
- *Legislation should be designed to fully reflect the State's policy objectives – and in its purest form is simply a tool for implementing such policy*
- *The State's Administration is tailored to empower the Policy objectives of the State, within its legislative architecture*
- *Projects should only be attempted within this framework*

Overview

The State must develop its P3 approach sequentially

1. Policy
This study will provide policy recommendations to implement a P3 program in Washington.
2. Legislation
This study will recommend a legal framework, to be drafted into legislation by Washington State drafters, for consideration in 2012.
3. Administration
This study will recommend a graduated administrative structure to implement a P3 program in Washington.
4. Projects
This study will present findings about potential P3 suitability for the five projects analyzed in the study, and will recommend an appropriately scaled P3 program (# of projects needed to start a P3 program and to make a program viable in the long-term.)

Policy Recommendations

1. Adopt a policy framework that identifies a number of minimum public interest protections that must be assumed to be binding requirements of all future P3 projects, implementable and enforceable through statutes and/or mandatory guidelines.
2. Utilize the two-step screening tool developed by the JTC to determine if a project is suitable, from an initial qualitative perspective, to be advanced as a P3.
3. Employ the financial model developed by the JTC study to determine whether Value for Money is greater in a P3 approach compared to a traditional delivery method.

Development of Legislation: Context

Legislation must address all phases and facets of P3 projects:

- Phases of P3 Projects

- Project identification and screening (for P3), planning of funding sources
- Procurement including the development of tender process and documents, project agreements, bid conditions (bid bonds etc); and the management of Best and Final Offer (BAFO) and Financial Closing periods
- Construction and Operating Periods
- Handback or Termination

- Facets of P3 Projects

- Relationship and interaction between the public and private sector
- Project related stakeholder outreach (PR)
- Tolling and operations by private and public parties
- Public and private funding and execution of construction and operations
- Solicited and/or unsolicited proposals
- Ownership and tax treatments
- Approval and enforcement of binding project agreements, control and oversight

Review of Legislation

- The consultants have conducted a thorough legal review in this study, involving the following steps
 - Identified existing problems with current legislation
 - Discussed issues other States have encountered in advancing P3 projects due to incomplete or overly prescriptive legislation
 - Reviewed best practices in P3 legislation in other States (such as VA, TX, Puerto Rico, Florida)
 - Provided recommendations on legislative changes that would ensure the finance ability of transportation P3 projects and uphold public policy protections in Washington State
- The following tables outline, by specific issues – both the concerns with the State’s current legislation and recommendations for best practices to include in future legislation

Legislative Recommendations

1. Washington State should revise current P3 legislation to encompass public interest protections, ensuring that for every project advanced key policy goals are upheld. These protections include:
 1. The State should maintain control and/or ownership of assets involved in P3 projects.
 2. Value for Money must be assessed and show a positive value before the State pursues a P3 project.
 3. Upfront payments generated by P3 projects to the State by the private partner should be used only to address transportation needs, and not diverted to pay for other government costs.
 4. The long-term quality of service delivered in a P3 project must be ensured through stringent contract provisions and ongoing oversight.
 5. The State must safeguard against private partners realizing excessive returns.
 6. P3 projects should possess the same State apprenticeship requirements as any other public works project. Ensure solvency of private partners
 7. P3 projects should conform to the State's toll setting policy, rather than allowing the private sector to change toll rates.

Legislative Recommendations - Continued

1. Washington State should revise current P3 legislation to encompass public interest protections, ensuring that for every project advanced key policy goals are upheld. These protections include:
 8. Through contractual and legislative provisions, the State must ensure that the private partner selected will be solvent and able to deliver over the long-term.
 9. The State should maintain the ability to terminate a P3 contract, or concession agreement, if the private partner is not able to deliver according to the performance specifications of the contract.
 10. The P3 contract should clearly specify the condition the asset must be in when the long-term lease concludes.
 11. Prevailing wage laws should be adhered to for all P3 projects.
 12. Minority and Women-Owned Business Enterprises (MWBES) should be encouraged to participate in P3 initiatives.

Legislative Recommendations

2. Remove the post-procurement discretionary action by the State Transportation Commission and other post-procurement, pre-execution processes.
3. Authorize the creation of a centrally located, oversight office within the Department of Transportation that is responsible for upholding public interest concerns and facilitating projects in the best interest of the public and private sector. The legislature should adequately fund this P3 office.
4. Clearly authorize a full range of procurement structures and tools, such as two-step procurements, Request for Qualifications (RFQ)/shortlisting and a Request for Proposals (RFP), and period for dialogue with proposers.

Legislative Recommendations

5. Enable the use of privately arranged or issued debt financing and allow the private partner to realize a return on equity
6. Revise provisions directing toll revenues into the transportation innovative partnership account and making expenditures from toll revenues subject to appropriation.
 - These provisions should not adversely affect private sector financing of eligible projects.
 - Toll revenue expenditures should be freed from legislative appropriation.

Review of Legislation: Specific Recommendations

Issue	Concern with current law	Recommended Change
Legislative Approval during the procurement process	Post-procurement legislative approval of contract	<ul style="list-style-type: none"> • Pre-procurement independent agency approval of P3 use ; OR • Post-procurement hearings, reviews and other procedures before contract award
Toll setting	Legislative approval required for changes in toll rates	<ul style="list-style-type: none"> • Toll regime and maximum rates governed by contract; OR • Regulated utility model for setting future tolls
Ability to utilize private financing	No private debt issuance or equity	<ul style="list-style-type: none"> • Public and private financing authorized; • Enable conduit issuance of private activity bonds • Allow private sector return on equity
Property Tax	No property tax exemption	Ad valorem property tax exemption
Continuing Appropriations	No allowance for availability payment PPP projects	Allow DOT to enter into alternative delivery contracts that provide for annual or extended payment procedures, such as availability payment contracts, and may make commitments to make payments under such contracts in the event of early termination.
Procurement Process	No discussion of how projects would be procured, other than unsolicited proposals	Include overview of RFQ, RFP, Review Process, Evaluation Manual, Discussion with Bidders, Best and Final Offer. Allow alternative technical concepts, and stipends for use of bidder Intellectual Property.
State Apprenticeship Requirements	No mention in current legislation	Language included in legislation that recommends/encourages the use of apprenticeship programs as part of PPP projects

Review of Legislation: Specific Recommendations (continued)

Issue	Concern with current law	Recommended Change
Use and appropriation of toll revenues	Private partner claim to project revenues is subordinate to the state motor vehicle fund	Revise controls on toll revenues (funding into innovative partnerships account; appropriations requirement) so that they do not adversely affect private sector financing of eligible projects and so that toll revenue expenditures are freed from legislative appropriation.
Eligible projects	Eligible project limited to those having the primary purpose to transport people or goods.	Revise current P3 legislation to expand the scope of eligible transportation projects beyond those whose primary purpose is transportation (i.e. solar panels along highways)
Personnel System Reform Act	Services must be provided in accordance with collective bargaining arrangements, personnel system reform act, and civil service laws.	If necessary, Washington State should rectify any insurmountable barrier to the use of P3s created by existing provisions concerning the state personnel system reform act.
Non-compete clauses	No mention in current legislation	Prohibit non-compete clauses that provide any remedy to the private party other than reasonable compensation for net adverse effects on revenue, and except out from contractual protection those projects identified in long-range transportation plans at procurement.

Review of Legislation: Specific Recommendations (continued)

Issue	Concern with current law	Recommended Change
Maintaining control and/or ownership over the asset	No mention in current legislation	The alternative project delivery contract shall provide that, while the private entity may receive a lease, easement, operating interest or other short-term or long-term interests in existing assets and/or assets to be developed as part of the eligible project, at all times the ownership of the assets shall remain with the eligible public entity.
Quality of service	No mention in current legislation	The lease agreement shall include performance standards, including, but not limited to, levels of service. Failure to comply with the lease agreement in any significant manner shall constitute a default under the agreement and the department or the regional transportation agency, as appropriate, shall have the option to initiate processes to revert the facility to the public agency.
Preventing excessive returns	No mention in current legislation	The legislation should specify the inclusion of a revenue sharing provision in which the public agency receives a share of the profits if the profits exceed a certain threshold.
Solvency of private partners	No mention in current legislation	Evidence that the members of the contracting entity have completed, or have demonstrated the experience, competency, to complete, a project of similar size, scope, or complexity, and that proposed key personnel have sufficient experience and training to competently manage and complete the design and construction of the project, and a financial statement that ensures that the contracting entity or lessee has the capacity to complete the project.

Review of Legislation: Recommendations (continued)

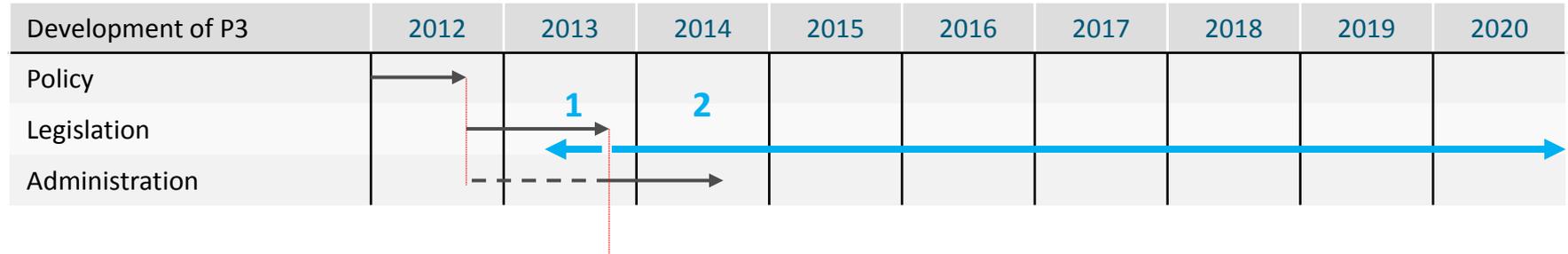
Issue	Concern with current law	Recommended Change
Minority and Women-Owned Business Enterprises	No mention in current legislation	The DOT should encourage and may in their discretion include a requirement in the alternative project delivery contract that the private partner demonstrate good faith efforts to comply with the objectives and goals of minority and women-owned business enterprises pursuant to goals set forth in Washington State law.
Handback requirements	No mention in current legislation	The alternative project delivery contract shall provide for the handback of the eligible project to the public entity at the expiration or earlier termination of the alternative project delivery contract at no charge to public entity. At the time of handback, the project shall be delivered to the public entity free of any encumbrance, lien or other claims.
Evaluation Criteria	No mention in current legislation	Qualifications and reputation of bidder, upfront payment offered by bidder, or ongoing availability payment proposed, quality of the proposal, willingness to hire local workers/contractors,
Contract Oversight	No mention in current legislation	The DOT shall oversee the performance and compliance of the private partner under the Partnership Contract. To such effect, the DOT shall give to the Legislature an annual report on the development of the project and the compliance by the private partner with the contract terms.
Unsolicited Proposals	Constrained	Do not include in legislation

Review of Legislation: Specific Recommendations (continued)

Issue	Current Concern	Recommended Change
Define Authority of PPP Office	No mention in current legislation	<ol style="list-style-type: none"> 1. To procure, contract, negotiate and execute PPP contracts (including hiring advisory support) 2. To establish and update priorities in the evaluation and development of eligible projects 3. Identify and analyze project opportunities throughout the state that could benefit from alternative project delivery methods and that should be considered as a PPP; 4. To promote and conduct studies, research, analyses and investigations, including, but not limited to, research of domestic and international projects that have employed alternative project delivery methods, and identification and evaluation of lessons learned from those projects; 5. Serve as a clearinghouse for information on best practices for alternative project delivery methods; 6. Serve as a means of reducing transaction costs, increase efficiency and promote consistency among alternative procurement methods 7. Establish a consistent framework for operations, including standardizing procedures, procurement documents and contracts, taking into account differences among sectors, projects, procurement approaches, contract types, sources of public funding, applicable state law and other relevant factors 8. Conflict of interest

Administration: Phasing Considerations

Requirements change over time with project and process development



1. Initial Phase (not project specific – may occur before new legislation is adopted)

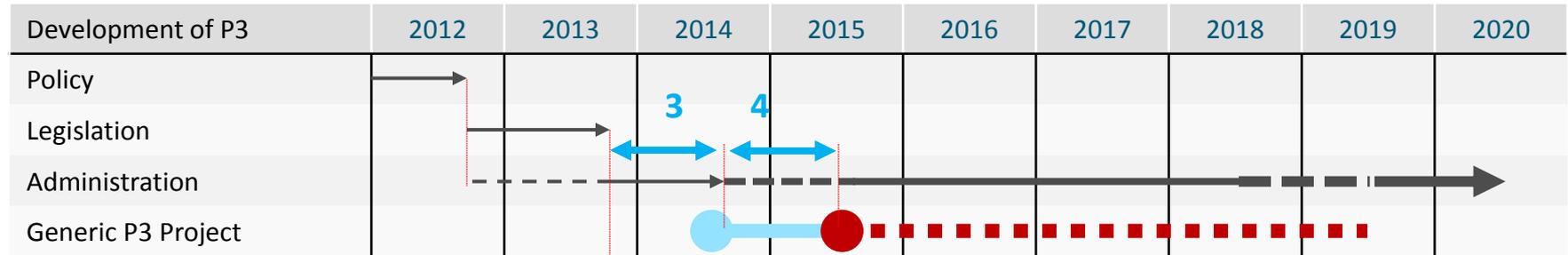
- Administration **should** (but does not yet have to) be capable of supporting the selection, screening and proposition of candidate P3 projects; and **must** be capable of supporting the development of P3 legislation

2. Minimum Steady State Phase (not project specific – after new legislation is enacted)

- Administration **must** be capable of supporting the selection, screening and proposition of candidate P3 projects, including the development of one or more P3 finance / risk / delivery concepts for assessment;
- Administration **must** be capable of managing all outreach, interfaces and PR with the public and private sector
- Administration **must** be capable of ramping up for at least one project development phase in a timely manner and **must** be capable of managing or dismissing unsolicited proposals

Administration: Phasing Considerations

Requirements change over time with project and process development



3. Preliminary Project Development Phase (pre-procurement)

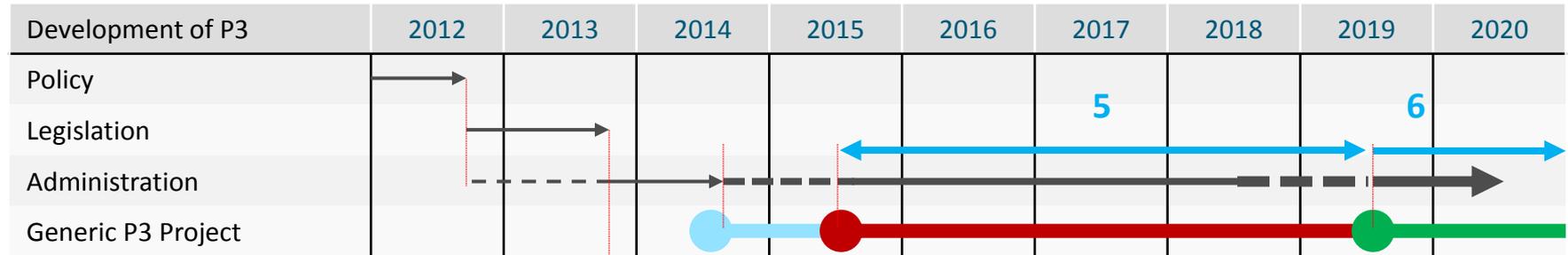
- Administration **must** be capable of assessing the suitability of P3 delivery for specific projects, and for selected projects, **must** be capable of seeking legislative support for such an approach
- Once P3 legislation is enacted and authority given to pursue project development through an agreed P3 concept; administration **must** be capable of transitioning to a procurement phase

4. Project Development Phase (project specific – throughout procurement)

- Administration **must** be capable of supporting all elements of a solicited or unsolicited procurement process including industry outreach / market sounding and RFI stage; development / refinement of the project definition and concept; including the development of the Project Agreement , Risk Apportionment approach and Financial Framework; RFQ and RFP preparation and assessment; Best and Final Offer (BAFO) / Preferred bidder negotiations and achieving all conditions precedent for Financial Close

Administration: Phasing Considerations

Requirements change over time with project and process development



5. Project Construction Phase (post procurement, usually pre Operations)

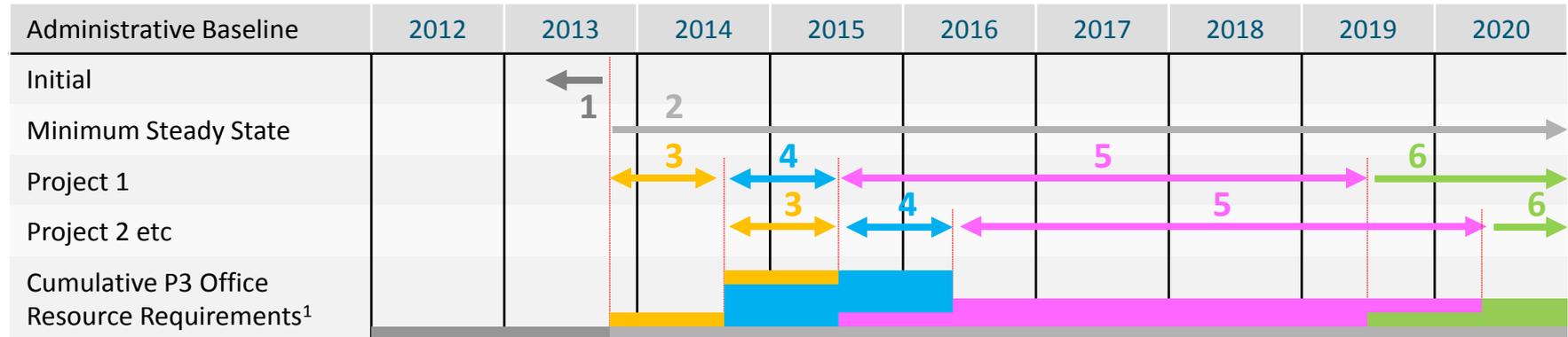
- Administration **must** be capable of monitoring and meeting all financial and contractual obligations to the selected private party that may include milestone payments for construction, delivery of land or approvals etc
- Administration **must** be capable of liaising with private party Sponsors, and their Lenders and contracted entities as necessary, usually through an Independent Engineer or other agreed experts

6. Project Operational Phase (usually post construction until Termination)

- Administration **must** be capable of assessing the performance of the private party in meeting its obligations under the Project Agreement and in enforcing any subsequent negotiations, penalties or changes
- Administration **must** be capable of monitoring and meeting the State's obligations under the Project Agreement (that may be technical, legal, financial or administrative in nature)

Administration: Phasing Considerations

Requirements change over time with project and process development



- Steady state resource requirements depend on scale of the P3 program but are stable
- Project specific resource requirements change over time and are cumulative
 - Phase 3 (Preliminary Project Development) requirements will generally focus on use of the Project screening tools and internal coordination; advisors may be required to assist with project assessment and market sounding
 - Phase 4 (Project Development) will require intensive coordination between numerous State, public and private bodies, and will definitely require the P3 office to engage technical, legal and financial procurement advisors
 - Phase 5 (Construction) requires lower intensity monitoring and negotiations ramping down to a steady state
 - Phase 6 (Operations) also require monitoring and negotiations ramping down to a steady state

Current Administration: Internal Resources (Discuss)

The following functions relevant to the development of State Transportation P3 Projects

WSDOT

- Project Approvals
 - Right of Way Acquisition
- Preliminary Design and Development
 - Preliminary Revenue Forecasting
 - Preliminary Cost Forecasting
 - Project Risk Assessment (CEVP)
- Project Controls during procurement, construction and operations
 - Ability to engage on-call advisors
- Project Oversight and Management
 - Operations and Maintenance
 - Tolling and ITS
 - Houses P3 Office

Office of the State Treasurer

- Issuance of any Public Debt
- Innovative Partnership Account (up front payments)

Legislature

- Approves WSDOT Programs and Budgets
- Determines form and content of changes in law
- Ultimate representation of State's Public Interest

Transportation Commission

- Final P3 decision making authority
 - Toll setting authority¹

1. There may be precedent in the State for toll increases to be fixed long term according to annual CPI increases or similar, and not subject to appropriation. This is the preferred P3 approach and must be addressed in the development of legislation

Administration: Recommended Resources

The following table provides recommendations on which internal and external resources should be engaged at each identified Phase. Recommendations are based on the current function and resources of relevant internal bodies, and industry standard use of advisors

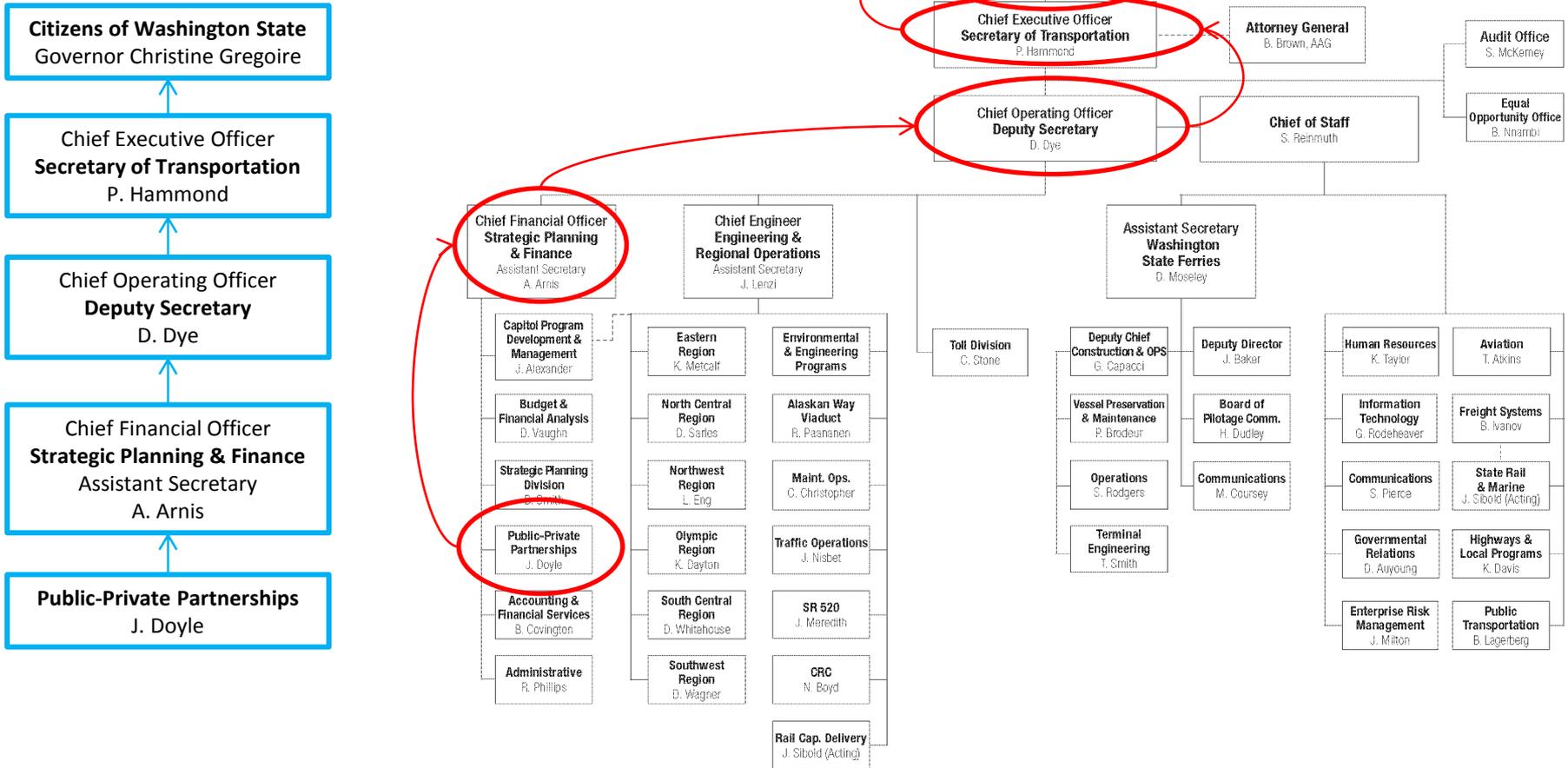
Development Phase	WSDOT	Transportation Commission	Legislature	Financial Advisor	Legal Advisor	Tech Advisor / IE
Phase 1 – Initial	P3 Office	Information Only	Approval Required	Recommended (or on call)	Required	Optional
Phase 2 – Minimum Steady State	P3 Office	Information Only	Input through P3 Exec Board	Optional	Optional	Optional
Phase 3 – Preliminary Project Development	P3 Office Project Staff		Input through P3 Exec Board	Recommended (or on call)	Recommended (or on call)	Recommended (or on call)
Phase 4 – Project Development	P3 Office Project Staff		Input through P3 Exec Board	Required	Required	Required
Phase 5 - Construction	P3 Office Project Staff		Input through P3 Exec Board	Recommended (or on call)	Recommended (or on call)	Required
Phase 6 – Operations	P3 Office	Information Only	Input through P3 Exec Board	Recommended (or on call)	Recommended (or on call)	Required

Administration: Organizational Considerations

Existing WSDOT Office of P3 Structure

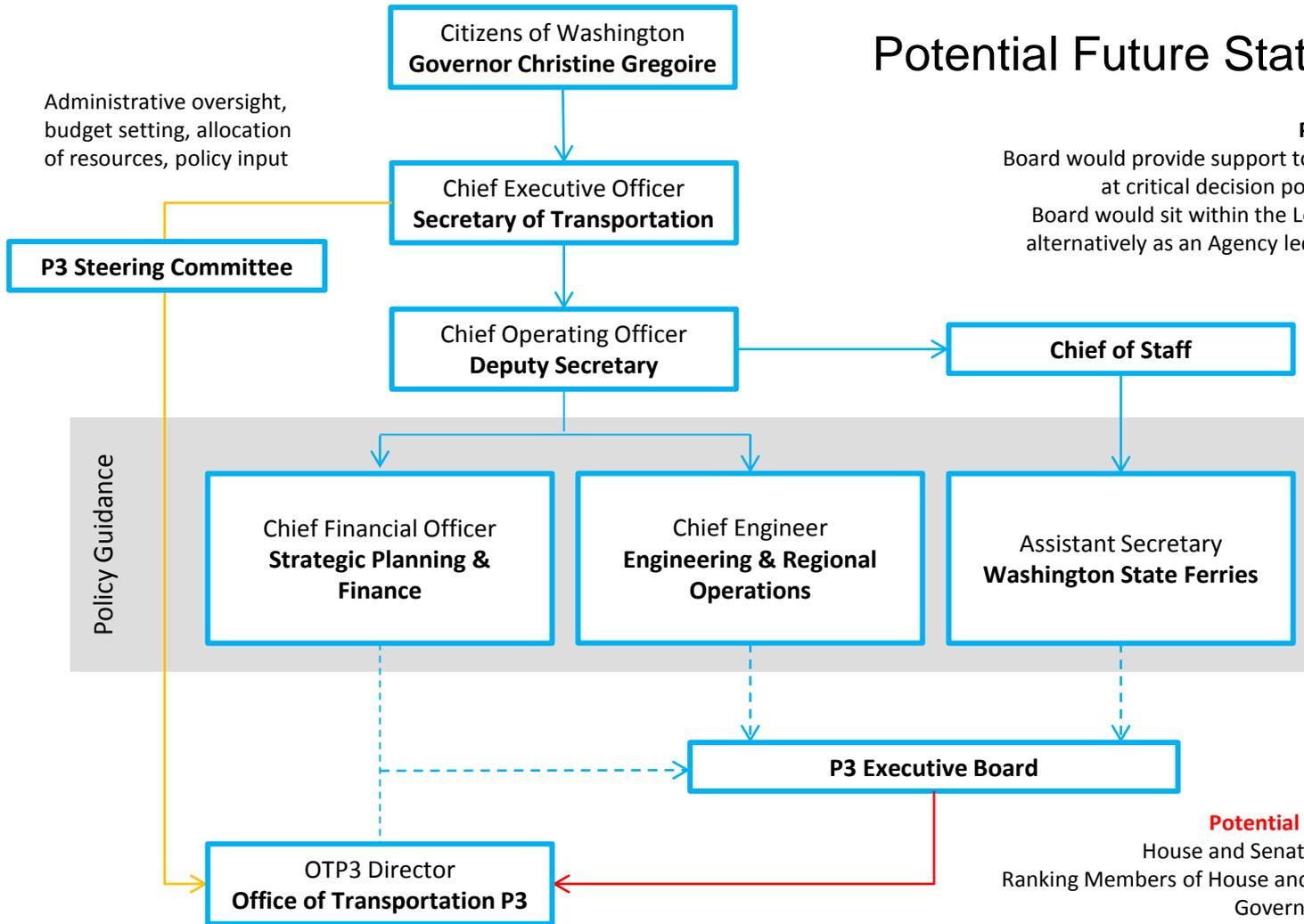


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Administration: Organizational Context

Potential Future State P3 Structure



Potential P3 Executive Board Remit:
Board would provide support to the P3 office on behalf of the State at critical decision points – refer following slide for detail. Board would sit within the Legislative Branch (recommended) or alternatively as an Agency led by Governor-Appointed Executives

Potential P3 Steering Committee representation:
WSDOT Capital Program Development and Management
WSDOT Chief Operating Officer
WSDOT head of the Toll Division
WSDOT Operations Manager

Potential P3 Executive Board representation:
House and Senate Transportation Committees Chairs
Ranking Members of House and Senate Transportation Committees
Governor’s Office of Financial Management
State Treasurer’s office
Transportation Commission

Administration: P3 Executive Board Approval Milestones

Project Phases and Primary Activities



- Initial Review & Assignment
 - Projects screened for potential usage of PPP delivery model
 - Where government elects to use PPP procurement method, project mandate assigned
- Request for Qualifications
 - P3 Executive Board must approve Request for Qualifications (RFQ) drafted by the P3 Office before it is issued to market
 - If RFQ is approved by the Board the project is readied for the market and the RFP documentation prepared
 - Initial Value-for-Money (“VFM”) assessment prepared
- Request for Proposals
 - P3 Executive Board must approve Request for Proposals (“RFP”) before it is issued
 - Technical and commercial proposals of respondents evaluated
 - Highest ranking proposals awarded right to finalize contract
 - VFM assessment updated
- Commercial & Financial Close
 - Potential negotiation and finalization of contract documentation
 - VFM assessment finalized
- Construction & Operations
 - Construction progress monitored
 - Initial operations monitored as required by project terms and stakeholder considerations

Governance Reporting

-  Board reporting provided at summary level, with detailed reporting on an exception basis, for the duration of the project phase
-  P3 Executive Board **approval** required to move into next project phase; Board reporting provided on a detailed project level

Administration: P3 Office Staffing and Funding Recommendations

- Washington's P3 office will need initial seed capital to fund organizational costs such as staff, normal administrative expenses, and outside technical, legal and financial advisors (which vary over time per slide 23)
 - We recommend initially, a core staff of 1 or 2 Full Time Employees (FTEs) supplemented by WSDOT Project Staff and potentially staff from other agencies as required based on skill sets
 - New hire FTEs must have first-hand experience executing P3 projects and be capable of building institutional knowledge across financial, commercial, legal, technical and process issues
 - In house staff should be sought with an understanding of project delivery, project planning, State finance and procurement, along with private sector individuals that bring a mix of project finance, project management, legal, market awareness, and other relevant skill sets required to adequately and expeditiously fulfill the P3 Office's charge.
- The State should permit and encourage the P3 office to pursue cost recovery through application fees, transaction fees and periodic/ongoing service fees

Schedule: Milestone Recommendations

The State must reach political consensus that its policy is sufficiently well defined to pursue changes in legislation and administration. We recommend this be targeted for 2012 based on the findings of this study and ensuing debate

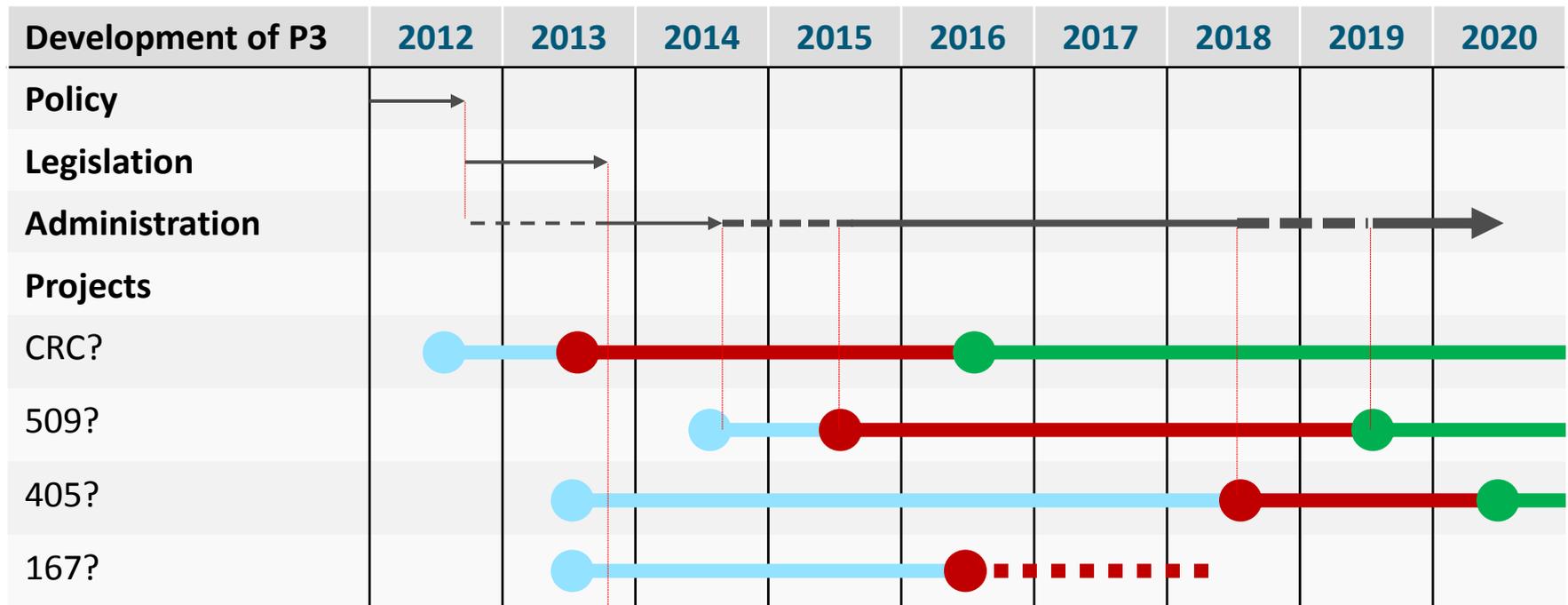
The effort to modify the State's P3 legislation could then start during 2012. The new legislation must be signed into law before the first P3 project enters procurement, and before initial P3 administrative changes are finalized

The State's P3 Administration must ramp up over time, initially to cover pre-procurement activities such as screening. Initial changes must take P3 legislation into account, and at a minimum be capable of supporting 1 procurement process

Project milestones for development¹ construction and operations phases (blue, red, green respectively) are shown below

This indicates that CRC procurement is probably too advanced for a P3 approach; while the 509 and 405 may be viable.

P3 Administration must continue to evolve over time in line with project needs (through development, procurement, negotiation, construction and operation phases); and with the number of P3 projects in process (see following slide)



Next Steps