

LIMITED LIABILITY COMPANIES FOR INTERLOCAL AGREEMENTS

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Every once in awhile a little gem appears from deep within new legislation enacted in Olympia.

That is the case with Substitute House Bill 2639 (Chap. 198, Laws of 2008), which was enacted to improve the ability of public utility districts and other municipal utilities to enter into cooperative renewable energy projects.

The little gem for all municipalities came in the form of an amendment to the Interlocal Cooperation Act that will now allow local governments to form limited liability companies as the legal framework for any type of cooperative project among public agencies.

The Interlocal Cooperation Act has for many years permitted local governments to jointly engage in activities that each of them can individually carry out. When organizing those activities, the Act allowed local governments to form an unincorporated “joint board” to pursue their common goals, or a private non-profit corporation, or a partnership. The joint board approach is fairly loose, and allows the participating entities to give that unincorporated entity whatever responsibilities they choose under the particular interlocal agreement. However, joint boards have no separate legal status, and practical problems have arisen from time to time, such as whom the “employees” of a joint board work for. Do they work for each of the participating local governments? For the lead government that manages them? For the joint board itself? (Note that the joint board has no separate legal existence.) Another issue is that using an unincorporated joint board for an interlocal project may not provide adequate protection from liability for the member governments in the event that the activity causes damage to a third party. In other words, the courts might look through the joint board to the member governments.

Historically, local governments seeking to provide a liability shield and a clearly separate entity for employment, contracting and other purposes, have established non-profit corporations to

carry out their joint activities. This is permitted under RCW 39.34.030(3)(b). A non-profit corporation may undertake responsibilities granted to it under its articles and bylaws, and can help shield the member governments from liability for the corporation's contract breaches or negligence. A non-profit corporation also creates a separate entity with a narrow purpose; this can reduce distractions and enable the corporation, its board and its employees to zero-in on accomplishing a specific task. The corresponding disadvantage is that an independent corporation, with a board of directors focused on that entity's responsibilities (even a board composed solely of local government officials), might engage in activities or make decisions that were not envisioned by the governments that created it.

RCW 39.34.030(3)(b) also permits local governments partnerships to carry out their joint activities. Partnerships have rarely been used because they have the disadvantage of creating a separate entity for audit purposes, but at the same time, because they are not corporations, they do not have the same potential for limiting the liability of governmental members.

Consequently, we rarely see partnerships used to carry out joint projects under the Interlocal Cooperation Act.

SSB 2639 has amended RCW 39.34.030(3)(b) to add one more type of corporate entity under which interlocal activities can be arranged: the limited liability company. "LLCs" have gained in private sector popularity during the passed two decades because they provide a liability shield while at the same time providing exceptional flexibility in the structure of the entity's governance. In other words, an LLC under Chap. 25.15 RCW can be organized with fewer requirements imposed by state law (a non-profit corporation under Chapter 24.03 RCW or Chap. 24.06 RCW comes with some potentially unwanted statutory baggage). Thus, by organizing an intergovernmental enterprise as an LLC, the local governments may be able to provide the protection of liability they desire while building an intergovernmental structure that helps ensure that the intergovernmental entity will stick to its assigned tasks and will not become overly independent from its members. In other words, the ability of local governments to form LLCs to carry out their tasks may turn out to provide them with the best of the joint board approaches and the best of the non-profit corporation approaches. Time will tell, as we begin to structure LLCs to fit the needs of their governmental members.

It should be pointed out that the Interlocal Cooperation Act limits LLCs to new entities “whose membership is limited solely to participating public agencies.” It will also be the case with those LLCs, as with other entities formed under the Interlocal Cooperation Act, that they will be subject to public audit, and, as instrumentalities of their members, they will likely be subject to the open meetings law, the public disclosure law, the public bidding laws, and similar statutes governing public entities in our state.