

Comparison: FHWA, ABA and Nossaman Model Legislation for Transportation Public-Private Partnerships

FHWA MODEL LEGISLATION	ABA CRITICISM	NOSSAMAN MODEL LEGISLATION
<p>Definitions. ‘Operate’ means any action to maintain, rehabilitate, improve, equip, or modify a transportation facility.</p>	<p>Definition is too broad. As defined, it would include any design, construction, or operations contract. It also does not distinguish between PPP contracts under the legislation and other contracts under traditional procurement law. As a result, it is "likely to create substantial confusion among bidders and proposers" which will tend to increase costs, raise prices, decrease the level of competition and increase the likelihood of litigation</p>	<p>Not a defined term.</p>
<p>Solicited proposals - exemption from other procurement law. §1-102(a) provides that the states procurement act shall not apply to solicited proposals.</p>	<p>By exempting PPPs from state procurement laws, the legislation destroys:</p> <ul style="list-style-type: none"> • transparency • advance notice of government requirements • fair treatment of competitors • ethical safeguards for public officials • ethical safeguards for private parties (prohibitions on gratuities, kickbacks, bribery, etc.) • proper enforcement of civil rights and labor laws • full disclosure of creation of governmental obligations requiring appropriation of government funds • appropriate risk allocation provisions - supersede • protection against funding deficiencies • indemnifications - supersede perhaps • wipes out standing judicial and administrative decisions without reflection • prevailing wage • dispute resolution - do we want to supersede? 	<p>§5(f) provides that the Department may procure services, award agreements and administer revenues as authorized in the legislation notwithstanding any requirements of other State or local statute, regulation or law relating to public bidding or other procurement procedures or other provisions otherwise applicable to public works, services or utilities. Thus, conflicting procurement statutes such as requirements for sealed bids or award to the lowest responsible bidder are superseded. Other procurement statutes which do not conflict with the model legislation would not be superseded.</p>
<p>Proposal submission and evaluation. §1-102(b) Broadly allows the Department to solicit, receive and evaluate proposals for public-private initiatives.</p>	<p>This provision omits any requirement that the government announce the evaluation factors in advance.</p>	<p>§5(b) of the NGKE model legislation requires that any request for qualifications, request for proposals, or similar solicitation document set forth the evaluation factors and the manner in which responses will be evaluated.</p>

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<p>Procurement methodologies. §1-102(c) - provides that the Department may use: sealed bidding; selection of proposals with or without negotiations, based on qualifications, best value; any competitive selection process determined "appropriate or reasonable."</p>		
<p>Evaluation factors. §1-102(d) - identifies a non-exclusive list of factors that the Department may take into account in evaluating a bid or proposal, such as safety, reduction in congestion proposed cost, qualifications, financial capability, etc.</p>	<p>These provisions are inherently confusing, and the list in (d) is internally inconsistent. For example, safety may be inconsistent with reduction in congestion. The use of the term "bid" is confusing when used in conjunction with evaluation factors. These problems are likely to cause confusion among proposers and result in increased costs. The legislation fails to require that the evaluation factors be set forth in full in advance of receipt of proposals, a flaw which undermines the potential for true "head-to-head" competition.</p>	<p>The provisions in the NGKE model legislation are similar to the FHWA model legislation in these areas. §5(a) identifies a range of procurement methodologies in general terms. §5(c) broadly provides that "the Department may accord such relative weight to factors such as cost, financial commitment, innovative financing, technical, scientific, technological, or socio-economic merit, and other factors as the Department deems appropriate to obtain the best value for the State." As indicated above, one substantive difference is that the NGKE model specifically requires that RFQs and RFPs identify the evaluation factors and describe how the submissions will be evaluated.</p>
<p>Confidentiality. §1-102(g) sets forth two alternative provisions governing confidentiality of information submitted in the procurement process. Version 2 simply provides (1) that the private entity may request the Department to review, prior to submission of a solicited proposal, information that the private party has identified as confidential or proprietary to determine whether it will be subject to disclosure under state sunshine" statutes, and (2) that the Department will take appropriate action to protect exempt information from disclosure. Version 1 includes somewhat greater detail, including provisions allowing the private entity to object prior to any disclosure.</p>	<p>The alternative provisions are inconsistent with best practices as reflected in the ABA's 200 Model Procurement Code. The provisions should preclude "technical leveling" by protecting information submitted pre-award. Bidders should be allowed to designate information submitted as confidential. After award, the need to ensure process integrity needs to be weighed against the proposers' interest in avoiding disclosure of information previously designated as "confidential." Courts are well-equipped to resolve these issues.</p>	<p>§8 generally conforms to the ABA's position. Proposers may invoke protection against disclosure by (1) conspicuously designating information as "confidential and proprietary and trade secrets," (2) stating the reasons why protection is necessary and (3) complying with any applicable provision of state law with respect to protection of such information. Proposers are required to provide an "executive summary" of the proposal covering the major non-confidential elements of the proposal which is subject to disclosure. Notwithstanding any other provision of state or local law, no part of the proposal other than the executive summary is subject to disclosure pre-award. After award of the contract and conclusion of any protest or challenge, applicable "sunshine" law will govern disclosure.</p>

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<p>Unsolicited proposals - exemption from other procurement law. §1-103(b) provides that the states procurement act shall not apply to solicited proposals.</p>	<p>See discussion above re: solicited proposals.</p>	
<p>Unsolicited proposals - consideration, evaluation and acceptance. §1-103(b) provides that the Department may receive, evaluate and accept an unsolicited proposals if it was "independently originated by the proposer," benefits the public, was prepare without Department supervision, and includes sufficient detail to permit objective and timely evaluation.</p>	<p>This provision is inconsistent with best practices as reflected in the ABA's 2000 Model Procurement Code. It would allow the Department to "accept" an unsolicited proposal after applying undefined evaluation factors. Key terms are undefined, such as "independently originated" and "without Department supervision." It would appear to allow the Department to be involved so long as it did not "supervise" the preparation of the proposal.</p>	<p>§5(a)(3) provides that the Department may procure services pursuant to unsolicited proposals, provided that if the Department determines there is sufficient merit to pursue any unsolicited proposal, reasonable opportunity for other entities to submit competing proposals for consideration and possible contract award is provided. No other provisions are included in the model legislation with respect to procedures for unsolicited proposals, other than the requirement the Department to promulgate regulations to implement the Act. It is anticipated that unsolicited proposals would be an area to be addressed in regulations.</p>
<p>Unsolicited proposals - competition. §1-103(e) provides that the Department must "advertise the unsolicited proposal" for the purpose of obtaining proposals for the same transportation facility, providing a reasonable time period for submission of competing proposals..</p>	<p>These provisions are inconsistent with best practices as represented in the ABA's 2000 Model Procurement Code. It requires the Department to spend "precious resources" in forcing potential competitors either to compete on terms established by the unsolicited proposer or to decline to compete. The provision "may encourage conduct that is not healthy" and "arguably, is not fair to competitors." Language should be added to remove any competitive advantage to the initial submitter simply because the time required is insufficient to create a level playing field.</p>	<p>See above.</p>
<p>Unsolicited proposals - fee for review. §1-103(f) provides that the Department may charge a reasonable fee for processing, reviewing and evaluating an unsolicited proposal and any competing proposals.</p>	<p>Potential competitors would have yet another disincentive to compete if they are charged such a fee.</p>	<p>§5(e) provides only for the Department to charge a reasonable administrative fee for evaluation of the unsolicited proposal.</p>

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<p>Unsolicited proposals - evaluation factors. §1-103(h) identifies a number of factors that the Department is required to consider in evaluating an unsolicited proposal and any competing proposals. (Refer to text of model legislation for details.)</p>	<p>This provision is inconsistent with the ABA's 2000 Model Procurement Code. The evaluation factors mandated here for unsolicited proposals are different from the non-mandatory factors identified for solicited proposals in §3-102(d), which is both unusual and confusing. Omitted from this listing are standard evaluation factors such as price, quality, level of service, and life cycle costs. The factors seem to favor the unsolicited proposal over the competing proposals. "Novelty" of a proposal is not inherently valuable, yet it is mandated as a factor. Combining "scientific, technical, or socioeconomic merits" into a single factor does not inform proposers or evaluators how the factors will be applied. The factors for "capabilities" and "qualifications" are important but are more typically considered as part of a pre-qualification process rather than as stand-alone award criteria.</p>	<p>§5(c) of the NGKE model legislation provides that in evaluating proposals, the Department may consider "cost, financial commitment, innovative financing, technical, scientific, technological, or socio-economic merit, and other factors as the Department deems appropriate to obtain the best value for the State."</p>
<p>Public-Private Agreements. §1-104(a) sets forth two alternative versions with respect to the terms of PPP agreements. Version 1 is significantly shorter than Version 2. Both contain a list of provisions that must be included in the agreement, but the provisions are not the same in the two lists. Version 2 also sets out a list of optional provisions that may be included in the agreement.</p>	<p>Both versions are inconsistent with best practices as represented in the ABA's 2000 Model Procurement Code, principally because the basis for competition is not clearly established in prior to submittal of proposals. The terms of the resulting agreement are not established until after award, preventing a price comparison among competitors based on common contractual terms. This will result in high transaction costs for potential proposers and is problematic for evaluators who must try to measure the value of disparate proposals against an unknown standard. This process will result in higher prices to transportation users and less advantageous contract terms for the government.</p>	<p>See comments above.</p>

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<p>Reversion. §1-105 provides that in the event of termination of the agreement, the transportation facility reverts to the Department, except for obligations intended to extend beyond termination.</p>	<p>This provision is inconsistent with best practices as reflected in the ABA's 2000 Model Procurement Code. The provision should make it clear that in the event of operator default, the obligations with respect to debt and equity financing must remain the operator's risk. In the event of default, financing institutions should have the choice of protecting their investment by refinancing to ensure ongoing operations, or to allow the government to proceed with a substitute procurement for a new operator.</p>	<p>The NGKE model legislation includes no comparable provisions, other than to provide that on reversion, the private entity may be required to renovate or reconstruct the facility to standards specified by the Department. (§6(a)(11))</p>
<p>Bonds. The FHWA model legislation does not specifically address the subject of performance and payment bonds. The broad provisions of §§1-102(a) and 1-103(b) providing that the state's procurement act shall not apply to solicited or unsolicited proposals <u>may</u> have the effect of avoiding any Little Miller Act requirements for contractors to provide performance and payment bonds.</p>	<p>§1-107 of the model legislation should be revised to include "appropriate requirements" for surety bonds, operations bonds, and errors and omissions insurance.</p>	<p>§6(a)(14) provides that the private partner may be required to provide performance and payment bonds, parent company guarantees, letters of credit, and/or other acceptable form of security. The penal sum or amount of the security may be less than 100% of the value of the contract involved based upon the Department's determination, made on a facility-by-facility basis, of what is required to adequately protect the State.</p>

Fredric W. Kessler

Partner

Nossaman Guthner Knox & Elliott LLP

445 S. Figueroa Street, 31st Floor

Los Angeles, CA 90071

(213) 612-7829

fkessler@nossaman.com

www.nossaman.com