

PUBLIC-PRIVATE PARTNERSHIPS IN TRANSPORTATION ACT

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Section 1 Findings and Intent.

(a) The legislature makes the following findings:

(1) It is essential for the economic, social, and environmental well-being of the State and the maintenance of a high quality of life that the people of the State have an efficient transportation system.

(2) The ability of the State to provide an efficient transportation system will be enhanced by a public-private sector program providing for private entities to undertake all or a portion of the study, planning, design, development, financing, acquisition, installation, construction, improvement, operation, and maintenance of transportation systems and facility projects.

(3) A public-private program will provide benefits to both the public and private sectors. Public-private initiatives provide a sound economic investment opportunity for the private sector. Such initiatives will provide the State with increased access to property development and project opportunities, financial and development expertise, and will supplement State transportation revenues, allowing the State to use its limited resources to further enhance the same projects or other projects.

(b) This Act is intended to achieve the following goals through public-private partnerships:

(1) provide a well-defined mechanism to facilitate the collaboration and creative cost and risk sharing in transportation between the public and private partners;

(2) bring innovative thinking from the private sector to bear on transportation needs within the State and access specialized development, financing, design, construction management, operations, management services and techniques available in the private sector;

(3) reduce the public cost of project delivery and services for eligible facilities;

(4) expedite project delivery;

(5) encourage private investment in public infrastructure;

(6) use any funding source, where financially advantageous and in the public interest;

(7) encourage life cycle efficiencies in transportation projects;

(8) foster flexibility in the Department's procurement methodologies to provide the best value to the State in eligible facilities under this Act;

(9) provide better use and leverage of public resources, increasing private investment in public facilities, enhancing capital formation for large projects, and providing savings to taxpayers;

(10) develop eligible facilities in cooperation, consultation, and with the support of the affected communities and local jurisdictions;

(11) solicit, evaluate, negotiate, and administer public-private agreements with the private sector relating to the planning, financing, development, design, construction, upgrading, reconstruction, operation or maintenance of transportation systems and facilities; and

(12) seek assistance in the development of facilities provided by federal programs administered by the United States Department of Transportation.

(c) The legislature intends that the powers granted to the Department in this Act are in addition to any other powers of the Department under applicable law.

Section 2 Definitions.

The definitions in this Section apply throughout this Act.

(a) "Concession" means any lease, ground lease, franchise, easement, permit, or other binding agreement transferring rights for the use or control, in whole or in part, of an eligible facility by the Department or other Unit of Government to a private partner in accordance with this Act. For purposes of this Act, a concession is one type of public-private partnership.

(b) "Department" means the State Department of Transportation.

(c) "Eligible facility" means any facility developed, operated or held in accordance with this Act, including any existing, enhanced, upgraded or new facility used or useful for the safe transport of people or goods via one or more modes of transport, whether involving highways, railways, monorails, transit, bus systems, guided rapid transit, fixed guideways, ferries, boats, vessels, inter-modal or multi-modal systems, or any other mode of transport, as well as facilities, structures, parking, rail yards or storage facilities, vehicles, rolling stock, or other equipment, items or property related thereto.

(d) "Private partner" means a person, entity, or organization that is not the federal government, a state, a political subdivision of a state or a Unit of Government.

(e) "Public-private partnerships in transportation program" or "program" means the program as provided in this Act.

(f) "Unit of government" means any department or agency of the State or agency, office, or department of a state, city, county, district, commission, authority, entity, port, or other public corporation organized and existing under statutory law or under a voter-approved charter or initiative, and any intergovernmental entity.

Section 3 Rules and Guidelines.

The Department shall adopt such rules or guidelines as it determines necessary to carry out the intent of this Act.

Section 4 Project Delivery Methods.

The Department is hereby authorized to provide for the development or operation of eligible facilities using a variety of project delivery methods and forms of agreement. Such methods may include a wide range of possibilities, including without limitation:

- (a) pre-development agreements leading to other implementing agreements;
- (b) a design-build agreement;
- (c) a design-build-maintain agreement;
- (d) a design-build-finance-operate agreement;
- (e) a design-build-operate-maintain agreement;
- (f) a concession providing for the private partner to design, build, operate, maintain, manage and/or lease an existing, enhanced, upgraded or new facility; and
- (g) such other project delivery method or agreement or combination of methods or agreements as in the determination of the Department will serve the public interest.

Section 5 Procurements.

(a) The Department is authorized procure services under this Act using any of the following:

(1) calls for project proposals, whereby the Department describes a class of transportation facilities or a geographic area in which private entities are invited to submit proposals to develop transportation facilities;

(2) solicitations using, without limitation, requests for qualifications, short-listing of qualified proposers, requests for proposals, negotiations, best and final offers or other procurement procedures;

(3) 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;

(4) procurements seeking from the private sector development and finance plans most suitable for the project;

(5) best value selection procurements based upon price and/or financial proposals or other factors; and

(6) such other procedures as the Department determines may further the intent of this Act.

(b) For any procurement in which the Department issues a request for qualifications, request for proposals, or similar solicitation document, the request shall generally set forth the factors that will be evaluated and the manner in which responses will be evaluated.

(c) In evaluating proposals, 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.

(d) The Department is authorized to pay a stipend to a proposer based upon the Department's estimate, in its sole discretion, of the value of the work product received, but only if the Department has determined that the proposal submitted was responsive to the Department's request for proposals and met all requirements established by the Department for the project. In exchange for such stipend, the Department may require the recipient to grant to the Department the right to use any work product contained in the recipient's proposal, including technologies, techniques, methods, processes and information contained in the recipient's project design.

(e) The Department may charge a reasonable administrative fee for the evaluation of an unsolicited project proposal.

(f) The Department may procure services, award agreements and administer revenues as authorized in this Section 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.

(g) The Department may retain financial, legal and other consultants and experts inside and outside the public sector to assist in the evaluation, negotiation, and development of eligible facilities under this Act.

(h) The Department may spend such moneys as may be reasonably necessary for the development of procurements, evaluation of concepts or proposals, negotiation of agreements and implementation of agreements for development or operation of eligible facilities under this Act.

Section 6 Public-Private Partnership Agreements.

(a) In any public-private partnership or other agreement for any eligible facility under this Act, the Department is authorized to include, without limitation, provisions:

(1) authorizing the private partner to collect user fees, tolls, fares or similar charges, including, without limitation, provisions:

(A) specifying technology to be used in the facility;

(B) establishing circumstances under which the Department may receive a share of revenues from such charges; and/or

(C) governing enforcement of tolls, including provisions for use of cameras or other mechanisms to ensure that users have paid tolls that are due and provisions allowing the private partner access to relevant data bases for enforcement purposes;

(2) allowing for payments to be made by the State to the private partner, including for example availability payments or performance based payments;

(3) allowing the Department to accept payments of money and share revenues with the private partner;

(4) addressing how the partners will share management of the risks of the project;

(5) specifying how the partners will share the costs of development of the project;

(6) allocating financial responsibility for cost overruns;

(7) establishing the damages to be assessed for nonperformance;

(8) establishing performance criteria and/or incentives;

(9) addressing the acquisition of rights-of-way and other property interests that may be required, including provisions addressing the exercise of eminent domain as provided in Section 10 of this Act;

(10) establishing recordkeeping, accounting and auditing standards to be used for the project;

(11) for a project that reverts to public ownership, addressing responsibility for reconstruction or renovations that are required in order for a facility to meet all applicable government standards upon reversion of the facility to the State;

(12) providing for patrolling and law enforcement on public facilities;

(13) identifying any Department specifications that must be satisfied, including provisions allowing the private partner to request and receive authorization to deviate from such specifications on making a showing satisfactory to the Department;

(14) requiring a private partner 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 which 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;

(15) authorizing the private partner in any concession agreement to collect user fees, tolls, fares or similar charges to cover its costs and provide for a reasonable rate of return on the private partner's investment, including without limitation provisions such as the following:

(A) that the charges may be collected directly by the private partner or by a third party engaged for that purpose;

(B) a formula for the adjustment of user fees, tolls, fares or similar charges during the term of the agreement;

(C) for an agreement that does not include such a formula, provisions regulating the private partner's return on investment; and/or

(D) a variety of traffic management strategies, including without limitation:

(i) general purpose toll lanes;

(ii) high occupancy vehicle lanes where single or low occupancy vehicles may "buy-in" to use of higher occupancy vehicle lanes by paying a toll;

(iii) lanes or facilities where the tolls may vary during the course of the day or week or according to levels of congestion anticipated or experienced; and/or

(iv) such combinations of, or variations on, the foregoing, or other strategies, as the Department may determine appropriate on a facility-by-facility basis; and/or

(16) specifying remedies available and dispute resolution procedures, including but not limited to the right of the private partner to institute legal proceedings to obtain an enforceable judgment or award against the Department in the event of a default by the Department, and procedures for use of dispute review boards, mediation, facilitated negotiation, arbitration, and other alternative dispute resolution procedures.

(b) The Department is authorized to enter into agreements, whether a concession agreement or other form of agreement, with any private partner which includes provisions as described in Section 6(a) of this Act notwithstanding any other provision of State or local statute, regulation or law.

(c) The Department may approve any request from another Unit of Government to develop an eligible facility in a manner similar to that used by the Department under this Act.

(d) Notwithstanding any other provision of State or local statute, law or regulation, agreements under this Act property developed, operated or held by a private partner under a concession agreement pursuant to this Act shall be exempt from any and all State and local ad valorem and property taxes that otherwise might be applicable.

(e) The agreement shall contain a provision by which the private partner expressly agrees that it shall be barred from seeking injunctive or other equitable relief to delay, prevent or otherwise hinder the Department from developing or constructing any facility that: (1) was unplanned as of the time the public-private partnership agreement was executed; and (2) that would or might impact the revenue the private partner would or might derive from the facility developed under the agreement. However, the agreement may provide for reasonable compensation to the private partner for the adverse effect on toll revenues or other user fee revenues resulting from development and construction of such an unplanned revenue impacting facility.

Section 7 Funding and Financing.

(a) Any lawful source of funding may be utilized for the development or operation of an eligible facility under this Act, including without limitation:

(1) the proceeds of grant anticipation revenue bonds authorized by 23 U.S.C. Sec. 122 or any other applicable federal or State law.;

(2) grants, loans, loan guarantees, lines of credit, revolving lines of credit, or other arrangements available under the Transportation Infrastructure Finance and Innovation Act under 23 U.S.C. Sec. 181 et seq., or any other federal or State law;

(3) federal, State, or local revenues;

(4) user fees, tolls, fares, charges, lease proceeds, rents, availability payments, gross or net receipts from sales, proceeds from the sale of development rights, franchise fees, permit fees, or any other lawful form of consideration; and/or

(5) private activity bonds as described by 26 U.S.C. Sec. 142(a)(15) and other forms of private capital; and/or

(6) such other forms of public and private capital as may be available.

(b) As security for the payment of financing described in this Section, the revenues from the project may be pledged, but no such pledge of revenues constitutes in any manner or to any extent a general obligation of the State. Any financing may be structured on a senior, parity, or subordinate basis to any other financing.

(c) The Department shall have the authority and power to issue toll revenue bonds to provide funds for any project under this Act.

(d) The Department may accept from the United States or any of its agencies such funds as are available to this State or to any other Unit of Government for carrying out the purposes of this Act, whether the funds are made available by grant, loan, or other financing arrangement. The Department may enter into such agreements and other arrangements with the United States or any of its agencies as may be necessary, proper, and convenient for carrying out the purposes of this Act.

(e) The Department may accept from any source any grant, donation, gift, or other form of conveyance of land, money, other real or personal property, or other valuable thing made to the State, the Department, or a local government for carrying out the purposes of this Act.

(f) Any eligible facility may be funded in whole or in part by contribution of any funds or property made by any private entity or public sector partner that is a party to any agreement entered into under this Act.

(g) Federal, State and local funds may be combined with any private sector funds for any project purposes, notwithstanding any other provision of State or local statute, regulation or law.

Section 8 Confidentiality and Public Disclosure.

(a) A proposer shall identify those portions of a proposal or other submission that the proposer considers to be trade secrets or confidential commercial, financial, or proprietary information. In order for confidential and proprietary information and trade secrets to be eligible for exemption from disclosure, the private entity must: (1) invoke such exclusion upon submission of the information or other materials for which protection is sought; (2) identify the data or other materials for which protection is sought with conspicuous labeling; (3) state the reasons why protection is necessary; and (4) fully comply with any applicable provisions of State law with respect to information the proposer contends should be exempt from disclosure.

(b) Each request for proposals issued pursuant to this Act shall require each proposer to include with its proposal an executive summary covering the major elements of its proposal that do not address the proposer's price, financing plan or other confidential or proprietary information or trade secrets which the proposer intends to be exempt from disclosure. Such executive summary shall be subject to release and disclosure to the public at any time. Notwithstanding any other provision of State or local law, in order to maximize competition under the Act, no part of a proposal other than the executive summary shall be subject to release or disclosure by the Department prior to award of the public-private partnership contract and the conclusion of any protest or other challenge to such award, absent an administrative or judicial order requiring such release or disclosure. Following award of the contract and the conclusion of any protest or other challenge to such award, the provisions of the public records act shall apply to any release of any part of the proposal.

Section 9 Government Agreements.

The State may, either separately or in combination with any other public sector partner, enter into working agreements, coordination agreements, or similar implementation agreements, including the formation of multi-state transportation organizations, to carry out the joint implementation of a transportation project under this Act.

Section 10 Eminent Domain.

The State may exercise the power of eminent domain to acquire property, rights of way, or other rights in property for projects that are necessary to develop, operate or hold an eligible facility under this Act, regardless of whether the property will be owned in fee simple by the State or whether such property will be leased to the private partner to use, lease or operate for its business purposes in connection with the public-private partnership project.

Section 11 Federal Laws and Severability.

(a) If no federal funds are used on an eligible facility, the law of this State, including this Act, shall govern. Notwithstanding any provision of this Act, if federal funds are used on an eligible facility and applicable federal statutes, regulations or laws conflict with this Act or require provisions or procedures inconsistent with this Act, the applicable federal statutes, regulations or laws shall govern.

(b) If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.