

WORKING DRAFT

This model legislation has been prepared solely for informational purposes and should be not construed as a statement of United States Department of Transportation or Federal Highway Administration policy.

This model legislation is based on a survey of existing State statutes that authorize public-private initiatives. The purpose of this model PPP legislation is to provide States with an example of what basic elements to consider and address in PPP authorizing legislation. It is meant to serve as a representation of the core provisions dealing with issues that a State should consider when pursuing greater private sector involvement in the delivery of transportation services. Users are advised that the model legislation cannot anticipate the relationship of State laws with the model provisions contained herein. This model legislation has been prepared solely for informational purposes and should be not construed as a statement of United States Department of Transportation or Federal Highway Administration policy.

AN ACT

concerning Public-Private Transportation Initiatives

Be it enacted by the [State Legislature] that:

SECTION 1. [State Code Citation] is amended to read:

§1-101. Definitions.

(a) “Affected jurisdiction” means any county [, city, or town / or municipal corporation], or other unit of government within the State in which all or part of a transportation facility is located or any other public entity directly affected by the transportation facility.

(b) “Department” means the State Department of Transportation.

(c) “Force majeure” means an uncontrollable force or natural disaster not within the power of the operator or the State.

(d) “Maintenance” includes ordinary maintenance, repair, rehabilitation, capital maintenance, maintenance replacement, and any other categories of maintenance that may be designated by the Department.

(e) “Material default” means any failure of an operator to perform any duties under a public-private agreement, which jeopardizes delivery of adequate service to the public and remains unsatisfied after a reasonable period of time and after the operator has received written notice from the Department of the failure.

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(f) “Operate” means any action to maintain, rehabilitate, improve, equip, or modify a transportation facility.

(g) “Operator” means a private entity that has entered into a public-private agreement under this [title/chapter/article].

(h) “Private entity” means any natural person, corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public benefit corporation, non-profit entity, or other business entity.

(i) “Public-private agreement” means the agreement between a private entity and the Department that relates to the development, financing, maintenance, or operation of a transportation facility subject to this [title/chapter/article].

(j) “Public-private initiative” means an arrangement between the Department and one or more private entities, the terms of which are stated in a public-private agreement, that provides for:

(1) acceptance of a private contribution, including a money payment, for a project or service for a transportation facility;

(2) sharing of resources and the means of providing a project or service for a transportation facility;

(3) cooperation in researching, developing, and implementing projects or services for a transportation facility.

(k) “Transportation facility” means any, including new and existing, highway, road, bridge, tunnel, overpass, ferry, airport, public transportation facility, vehicle parking facility, seaport facility, rail facility, intermodal facility, or similar facility open to the public and used for the transportation of persons or goods, and any building, structure, parking area, appurtenances, or other property needed to operate such facility that is subject to a public-private agreement.

(l) “User fees” means the rate, toll, fee, or other charges imposed by an operator for use of all or part of a transportation facility.

(m) “Utility” means a privately, publicly, or cooperatively owned line, facility, or system for producing, transmitting, or distributing communications, cable television, power, electricity, light, heat, gas, oil, crude products, water, steam, waste, storm water not connected with highway drainage, or any other similar commodity, including fire or police signal system or street lighting system, which directly or indirectly serves the public.

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§1-102. Solicited Proposals.

(a) The [INSERT STATE'S PROCUREMENT ACT] shall not apply to solicited proposals under this [title/chapter/article].

(b) The Department may solicit, receive, consider, evaluate, and accept a proposal for a public-private initiative.

(c) In soliciting and selecting a private entity with which to enter into a public-private initiative, the Department may utilize one or more of the following procurement approaches:

(1) sealed bidding;

(2) selection of proposals, with or without negotiations, based on qualifications, best value, or both; or

(3) any competitive selection process that the Department determines to be appropriate or reasonable.

(d) The Department may consider the following factors in evaluating and selecting a bid or proposal to enter into a public-private initiative:

(1) the ability of the transportation facility to improve safety, reduce congestion, increase capacity, and promote economic growth;

(2) the proposed cost of and financial plan for the transportation facility;

(3) the general reputation, qualifications, industry experience, and financial capacity of the private entity;

(4) the proposed design, operation, and feasibility of the transportation facility;

(5) comments from local citizens and affected jurisdictions;

(6) benefits to the public;

(7) the safety record of the private entity; and

(8) other criteria that the Department deems appropriate.

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(e) The Department may select multiple private entities with which to enter a public-private agreement for a transportation facility if it is in the public interest to do so.

(f) The Department shall select a private entity or entities for a public-private initiative on a competitive basis to the maximum extent practicable.

Version #1

(g) (1) A private entity may request a review, prior to submission of a solicited proposal, by the Department of information that the private entity has identified as confidential or proprietary to determine whether such information would be subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(2) A private entity may identify confidential or proprietary information submitted as part of a solicited proposal. A private entity shall have an opportunity to object to the release of any information it identifies as confidential or proprietary.

(3) The Department shall review any information identified as confidential or proprietary by a private entity as part of a solicited proposal and shall determine if such information is exempt from disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(4) The Department shall inform the private entity that submitted the information of its determination of whether information identified by the private entity as confidential or proprietary is subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(5) The private entity shall have the opportunity to object to the determination that the information is subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT] or to withdraw its proposal.

(6) Any information determined by the State to be confidential or proprietary shall be exempt from disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(7) Any information not determined to be confidential or proprietary may be subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

Version #2

(g) (1) A private entity may request a review, prior to submission of a solicited proposal, by the Department of information that the private entity has identified a

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confidential or proprietary to determine whether such information will be subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(2) The Department shall take appropriate action to protect confidential or proprietary information that a private entity provides as part of a solicited proposal and that is exempt from disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

§1-103. Unsolicited Proposals.

(a) The [INSERT STATE'S PROCUREMENT ACT] shall not apply to this section.

(b) (1) The Department may receive, consider, evaluate, and accept an unsolicited proposal for a public-private initiative if the proposal:

(A) is independently originated and developed by the proposer;

(B) benefits the public;

(C) is prepared without Department supervision; and

(D) includes sufficient detail and information for the Department to evaluate the proposal in an objective and timely manner.

(2) Within [INSERT NUMBER] days after receiving an unsolicited proposal, the Department shall undertake a preliminary evaluation of the unsolicited proposal to determine if the proposal complies with the requirements under paragraph (1) of this subsection.

Version #1

(c) (1) A private entity may request a review, prior to submission of an unsolicited proposal, by the Department of information that the private entity has identified as confidential or proprietary to determine whether such information would be subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(2) A private entity may identify confidential or proprietary information submitted as part of an unsolicited proposal. A private entity shall have an opportunity to object to the release of any information it identifies as confidential or proprietary.

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(3) The Department shall review any information identified as confidential or proprietary by a private entity as part of an unsolicited proposal and shall determine if such information is exempt from disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(4) The Department shall inform the private entity that submitted the information of its determination of whether information identified by the private entity as confidential or proprietary is subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(5) The private entity shall have the opportunity to object to the determination that the information is subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT] or to withdraw its proposal.

(6) Any information determined by the State to be confidential or proprietary shall be exempt from disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(7) Any information not determined to be confidential or proprietary may be subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

Version #2

(c) (1) A private entity may request a review, prior to submission of an unsolicited proposal, by the Department of information that the private entity has identified a confidential or proprietary to determine whether such information will be subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(2) The Department shall take appropriate action to protect confidential or proprietary information that a private entity provides as part of an unsolicited proposal and that is exempt from disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(d) (1) If the unsolicited proposal does not comply with the subsection (b)(1) of this section, the Department shall return the proposal without further action.

(2) If the unsolicited proposal complies with the subsection (b)(1) of this section, the Department may continue to evaluate the proposal in accordance with this section.

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(e) (1) If the unsolicited proposal complies with the subsection (b)(1) of this section, the Department shall advertise the unsolicited proposal for the purpose of receiving competitive proposals for the same proposed transportation facility.

(2) The advertisement shall outline the general nature and scope of the unsolicited proposal, including the location of the transportation facility and the work to be performed on or in connection with the transportation facility and shall specify an address to which a competing proposal may be submitted.

(3) The advertisement shall specify a reasonable time period by which competitors must submit a competing proposal to the Department.

(f) The Department may charge a reasonable fee to cover its costs to process, review, and evaluate an unsolicited proposal and any competing proposals.

(g) The Department shall:

(1) determine if any competing proposal is comparable in nature and scope to the original unsolicited proposal;

(2) evaluate the original unsolicited proposal and any comparable competing proposal; and

(3) conduct any good faith discussions and, if necessary, any negotiations concerning each qualified proposal.

(h) The Department shall evaluate an unsolicited proposal and any comparable competing proposal using the following factors:

(1) novel methods, approaches, or concepts demonstrated by the proposal;

(2) scientific, technical, or socioeconomic merits of the proposal;

(3) potential contribution of the proposal to the Department's mission;

(4) capabilities, related experience, facilities, or techniques of the private entity or unique combinations of these qualities that are integral factors for achieving the proposal objectives;

(5) qualifications, capabilities, and experience of the proposed principal investigator, team leader, or key personnel, who are critical to achieving the proposal objectives;

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(6) how the proposal benefits the public; and

(7) any other factors appropriate to a particular proposal.

(i) After evaluating the unsolicited proposal and any competing proposals, the Department may:

(1) accept the unsolicited proposal and reject any competing proposals;

(2) reject the unsolicited proposal and accept a comparable competing proposal if the Department determines that the comparable competing proposal is the most advantageous to the State;

(3) accept both an unsolicited proposal and a competing proposal if accepting both proposals is advantageous to the State; or

(4) reject the unsolicited proposal and any competing proposals.

(j) Subsection (c) of this section shall apply to any unsolicited proposal or competing proposal that is rejected.

§1-104. Public-Private Agreement. Version #1

(a) (1) After selecting a solicited or unsolicited proposal for a public-private initiative, the Department shall enter into a public-private agreement for a transportation facility with the selected private entity or any configuration of private entities.

(2) An affected jurisdiction may be a party to a public-private agreement entered into by the Department and a selected private entity or combination of private entities.

(b) The public-private agreement shall provide for the planning, acquisition, financing, development, design, construction, reconstruction, replacement, improvement, maintenance, management, repair, leasing, or operation of a transportation facility.

(c) The financing mechanism included in a public-private agreement may include the imposition and collection of user fees and the development or use of other revenue sources.

(d) A public-private agreement between the Department and a private entity shall specify at least the following:

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- (1) which party will assume responsibility for which specific project elements and the timing of the assumption of responsibility;
- (2) the type of property interest, if any, the private entity will have in the transportation facility;
- (3) if and how the parties will share costs of development of the project;
- (4) if and how the parties will allocate financial responsibility for cost overruns;
- (5) liability for nonperformance;
- (6) any incentives for performance;
- (7) any accounting and auditing standards to be used to evaluate progress on the project; and
- (8) other terms and conditions.

§1-104. Public-Private Agreement. Version #2

(a) (1) After selecting a solicited or unsolicited proposal for a public-private initiative, the Department shall enter into a public-private agreement for a transportation facility with the selected private entity or any configuration of private entities.

(2) An affected jurisdiction may be a party to a public-private agreement entered into by the Department and a selected private entity or combination of private entities.

(b) A public-private agreement under this [title/chapter/article] shall provide for the following:

- (1) the planning, acquisition, financing, development, design, construction, reconstruction, replacement, improvement, maintenance, management, repair, leasing, or operation of a transportation facility;
- (2) the term of the public-private agreement;
- (3) the type of property interest, if any, the private entity will have in the transportation facility;

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(4) a description of the actions the Department may take to ensure proper maintenance of the transportation facility;

(5) whether user fees will be collected on the transportation facility and the basis by which such user fees shall be determined and modified;

(6) compliance with applicable Federal, State, and local laws;

(7) grounds for termination of the public-private agreement by the Department or operator; and

(8) procedures for amendment of the agreement.

(c) A public-private agreement under this [title/chapter/article] may provide for the following:

(1) review and approval by the Department of the operator's plans for the development and operation of the transportation facility;

(2) inspection by the Department of construction of or improvements to the transportation facility;

(3) maintenance by the operator of a policy of liability insurance or self-insurance;

(4) filing by the operator, on a periodic basis, of appropriate financial statements in a form acceptable to the Department;

(5) filing by the operator, on a periodic basis, of traffic reports in a form acceptable to the Department;

(6) financing obligations of the operator and the Department;

(7) apportionment of expenses between the operator and the Department;

(8) the rights and duties of the operator, the Department, and other State and local governmental entities with respect to use of the transportation facility;

(9) the rights and remedies available in the event of default or delay;

(10) the terms and conditions of indemnification of the operator by the Department;

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(11) assignment, subcontracting, or other delegation of responsibilities of the operator or the Department under the agreement to third parties, including other private entities and other State agencies;

(12) sale or lease to the operator of private property related to the transportation facility;

(13) traffic enforcement and other policing issues, subject to section 1-111, including any reimbursement by the private entity for such services; or

(14) other terms and conditions.

§1-105. Reversion of Transportation Facility to the Department.

In the event of termination of the public-private agreement, the authority and duties of the operator cease, except for any duties and obligations that extend beyond the termination as provided in the public-private agreement, and the transportation facility reverts to the Department and shall be dedicated to the Department for public use.

§1-106. Material Default; Remedies.

(a) Upon the occurrence and during the continuation of material default by an operator, not related to an event of force majeure, the Department may:

(1) elect to take over the transportation facility, including the succession of all right, title, and interest in the transportation facility, subject to any liens on revenues previously granted by the private entity; and

(2) terminate the public-private agreement and exercise any other rights and remedies that may be available.

(b) In the event that the Department elects to take over a transportation facility under subsection (a), the Department:

(1) shall collect and pay any revenues that are subject to lien to satisfy any obligation;

(2) may develop and operate the transportation facility, impose user fees for the use of the transportation facility, and comply with any service contracts; and

(3) may solicit proposals for the maintenance and operation of the transportation facility under section 1-102 of this [title/chapter/article].

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§1-107. Bonds.

(a) (1) The Department may issue and sell bonds or notes of the Department for the purpose of providing funds to carry out the provisions of this [title/chapter/article] with respect to the development, financing, or operation of a transportation facility or the refunding of any bonds or notes, together with any costs associated with the transaction.

(2) Any bond or note issued under this section:

(A) constitutes the corporate obligation of the Department;

(B) does not constitute the indebtedness of the State within the meaning or application of any constitutional provision or limitation; and

(C) is payable solely as to both principal and interest from:

(i) the revenues from a lease to the Department, if any;

(ii) proceeds of bonds or notes, if any;

(iii) investment earnings on proceeds of bonds or notes; or

(iv) other funds available to the Department for such purpose.

(b) (1) For the purpose of financing a transportation facility, the Department and operator may apply for, obtain, issue, and use private activity bonds available under any Federal law or program.

(2) Any bonds debt, other securities, or other financing issued for the purpose of this [title/chapter/article] shall not be considered to be a debt of the State or any political subdivision of the State or a pledge of the faith and credit of the State or any political subdivision of the State.

(c) Nothing in this section shall limit a local government or any authority of the State to issue bonds for transportation projects.

§1-108. Funding from Federal Government or Other Sources.

(a) (1) The Department may accept from the United States or any of its agencies funds that are available to the State for carrying out this [title/chapter/article], whether the funds are made available by grant, loan, or other financial assistance.

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(2) The State assents to any Federal requirements, conditions, or terms of any Federal funding accepted by the Department under this section.

(3) The Department may enter into agreements or other arrangements with the United States or any of its agencies as may be necessary for carrying out the purposes of this [title/chapter/article].

(b) 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 item of value made to the State or the Department for carrying out the purpose of this [title/chapter/article].

(c) Any transportation facility may be financed in whole or in part by contribution of any funds or property made by any private entity or affected jurisdiction that is party to a public-private agreement under this [title/chapter/article].

(d) The Department may combine Federal, State, local, and private funds to finance a transportation facility under this [title/chapter/article].

§1-109. Property Tax Exemption.

(a) This section applies to:

(1) a transportation facility; and

(2) tangible personal property used exclusively with a transportation facility that are:

(A) owned by the Department and leased, licensed, financed, or otherwise conveyed to an operator; or

(B) acquired, constructed, or otherwise provided by an operator on behalf of the Department.

(b) Property listed under subsection (a) of this section are exempt from all ad valorem property taxes and special assessments levied against property by the State or any political subdivision of the State.

§1-110. Eminent Domain.

The Department may exercise the power of eminent domain to acquire property, rights of way or other rights in property for transportation projects that are part of a public-private initiative.

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§ 1-111. Police Powers; Violations of Law.

(a) All law enforcement officers of the State and of an affected local jurisdiction shall have the same powers and jurisdiction within the limits of the transportation facility as they have in their respective areas of jurisdiction and access to the transportation facility at any time for the purpose of exercising such powers and jurisdiction.

(b) The traffic and motor vehicle laws of the State or, if applicable, any affected local jurisdiction shall be the same on the transportation facility as those laws applied to conduct on similar transportation facilities in the State or local jurisdiction.

(c) Punishment for violations of traffic and motor vehicle laws of the State or, if applicable, any affected local jurisdiction on the transportation facility shall be as prescribed by law for conduct occurring on similar transportation facilities in the State or local jurisdiction.

§1-112. Utility Crossings.

An operator under this [title/chapter/article] and any utility whose facility is to be crossed or relocated shall cooperate fully in planning and arranging the manner of the crossing or relocation of the utility facility.

§1-113. Sovereign Immunity.

Nothing in this [title/chapter/article] shall be construed or deemed to limit any waiver of the sovereign immunity of the State or any officer or employee of the State with respect to the participation in or approval of all or any part of the transportation facility or its operation.

§1-114. Regulations.

The Department may adopt rules and regulations to carry out the provisions of this [title/chapter/article].

SECTION 2. This Act shall take effect on [DATE].