Public Policy Considerations in Public-Private Partnership (PPP) Arrangements

United States Department of Transportation
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Introduction: Scope and Outline of Report

This report is intended to help frame public policy considerations in public-private partnership (PPP) arrangements. State legislatures and public officials have taken these considerations into account in PPPs. Each state's approach, however, varies depending on a number of factors, including the public sector's policy objectives, the interests of the users, the characteristics of the project and specific risk factors. This report examines how different states have responded to the issues most frequently raised by examining provisions in state law and PPP agreements.

This report identifies and addresses 14 public policy issues related to PPPs, based on a review of Congressional and state legislative hearings, publications, and discussions with key federal, state and local decision makers.

Each issue is addressed in a separate section that includes (i) analyses of how state transportation departments and other public authorities have addressed the public policy considerations in those areas and (ii) charts detailing legislative and contract provisions that have been used.

Different issues arise in PPPs involving long-term leases or concessions for existing facilities (also known as brownfield projects) and PPPs involving the construction and long-term operation of new facilities (also known as a greenfield projects). The different approaches to each type of PPP are discussed.

While there are various risks and public policy considerations inherent in conventional approaches to transportation funding and procurement, this report does not address these risks.

As PPPs must be authorized pursuant to state law, this review references, where applicable, state statutes that bear on public policy considerations. The public policy issues most frequently addressed in state statutes include the following:

- criteria for selection of projects;
- the procurement process;
- confidentiality of proposals;
- maximum terms of PPP agreements;
- use of PPP proceeds;
- surety bonds and other security requirements;
- exemption from real estate taxation;
- financing authority;
- use of condemnation authority;
- protection of existing employees;
- rate-setting authority;
- toll violation enforcement; and

- dispute resolution.

A comprehensive list of state PPP legislation is included in Exhibit A.

This report reviews a range of PPP agreements including agreements for large greenfield projects, such as the SH 130 Turnpike Segments 5&6, agreements for managed lane projects, such as the I-495 Capital Beltway HOT Lanes Project and SR 91 express lanes project, as well as agreements for the long-term operation and maintenance of existing assets, such as the Chicago Skyway, the Indiana Toll Road and the proposed Pennsylvania Turnpike Concession, which was not executed. A list of these agreements, and the acronyms used in the report to refer to them, is included in Exhibit B.

Several other projects still in the procurement stage are also instructive and are reviewed, including Florida's I-595 Express Lanes, Texas' IH 635 (LBJ Freeway) Managed Lanes Project, and North Tarrant Express, and Alaska's Knik Arm Bridge. The provisions of proposed agreements for these projects are discussed in the report to the extent that public information is available.

Executive Summary of Issues

1) Toll Rates: How can we assure that future toll rates will be reasonable?

A concessionaire's ability to increase user fees over the life on an agreement is one of the most important drivers of value in long-term concessions that are financed based on user fees. Public agencies can address the risk of monopoly pricing through contractual limitations on rate increases keyed to major economic indices or through other policy initiatives designed to ensure competition or empower consumers.

2) How should a reasonable rate of return be established?

The contribution of private capital is one of the most important benefits of PPPs. The capital is used to pay the costs of project design and construction, long-term operation and maintenance, as well as rehabilitation and upgrades. Private operators assume these costs and the risks associated with these project elements in exchange for the right to earn a return on their investment. The approaches that have been used to limit monopoly profits in toll road concessions include: (1) competition (including modal competition); (2) caps on rates of return; and (3) revenue sharing above certain equity returns.

3) How should the term of the PPP agreement be determined?

Private operators need the length of the concession period, often called the "term," to be long enough to allow them to recover their costs and to achieve a reasonable return on investment. The longer the term of the contract, the more likely it is that the beneficial incentives associated with ownership will be realized. One policy consideration in setting contract terms is the level of risk of the project; however, other policy considerations are also important, such as incentives to innovate, overall impact on government budgets and governmental capability and desire to operate various transportation assets. Federal, State and local tax considerations are also key components. Recent PPP agreements have terms ranging from 35 years to 99 years. Some states have set statutory limits on the length of PPP agreements, most commonly 50 years.

4) How should the public sector evaluate the trade-off between upfront payments and the ability to share in revenues over the term?

The issue of maximizing an upfront payment versus sharing in revenues throughout the concession period arises if project revenues are likely to be more than sufficient to repay initial equity and debt, long-term operating and maintenance costs, as well as costs of renewal and rehabilitation. The decision generally turns on the unmet needs of the agency in the immediate future and over the term of the agreement, the risk in valuation of the facility, investment alternatives available to the public sector, and the risk that construction costs will increase in the future at a rate in excess of the discounted rate of future revenue returns. To the extent a public agency pursues revenue sharing, it will obviously reduce any upfront consideration paid by the concessionaire.

5) How should upfront or annual proceeds of a transaction be spent?

PPPs for existing facilities, unlike most greenfield projects, generally include large upfront payments. These payments present public owners with opportunities to fund capital programs and retire debt. Accompanying these opportunities are public policy considerations as to how these funds will be allocated. There are issues about how to balance transportation and other state or local priorities, projects within or between geographic regions, and benefits for current and future users.

6) Public Sector Comparator: How to determine whether the public sector could have achieved the same or better financial results as a PPP through public borrowings and public operation?

Public authorities seek to maximize the amount of capital that can be raised for construction, as well as minimize long-term operating costs by granting concessions for new facilities. Several public owners have engaged financial advisors to help evaluate the public and private sector alternatives to determine if public of private sector financing offers the best value for the public.

7) How can the quality of long term maintenance be assured?

One of the most often-expressed issues raised about PPPs is ensuring that the private operator will maintain the asset and make necessary improvements. Different approaches to maintenance and mandatory capacity improvements from past agreements include detailed or performance-based maintenance standards, reserve requirements, inspections and audits. In addition, the private concessionaire has strong incentives to fully capitalize a project upfront to limit long term operations and maintenance obligations.

8) Handback: How to ensure that a leased facility will be returned to the public sector at the end of the term in a state of good repair?

Private operators have an incentive to invest in maintenance and capital improvements to attract users and lower operating costs, but this incentive diminishes towards the end of the term, when new investments might not attract enough users to pay for the cost of the improvements. Public agencies recognize this risk, and have used a variety of strategies, including letters of credit, annual audits and maintenance reserve funds to protect the public and ensure proper maintenance by the concessionaire through the end of the term.

9) Are there reasonable approaches to the construction of unplanned facilities that have an adverse effect on project revenues?

Private operators, their lenders and investors need to be able to make projections of revenues based on reasonable assumptions about future demand. The public sector, on the other hand, needs to be free to make investments in the future to meet actual growth, foreseen or unforeseen. Current PPP agreements do not specifically prohibit the public sector from building facilities in the future that may reduce the private sector’s revenues. Private operators are instead provided limited and formula–driven compensation if the construction of facilities not planned when the agreement was executed results in a proven reduction in revenue produced by the privately operated facility.

10) What criteria should be used to select appropriate projects for PPPs?

The decision to pursue a PPP requires research and consideration of many factors, including the policy objectives of the public sector, customer benefits, public support, and the financial prospects of the new project. Owner agencies have developed guidelines and statutes that govern how they make these decisions.

11) How can competition be assured, and the procurement process be made fair and transparent?

Transparency is a key consideration with all public contracting. States have developed solicitation requirements that address transparency and disclosure of proposals in statutes and regulations related to the procurement process and required public hearings.

12) How can the public sector be protected in the event of the private partner's default or bankruptcy?

Concession contracts typically provide that if the concessionaire materially defaults in carrying out its obligations or becomes bankrupt or insolvent, its lenders will have certain step-in rights to cure the default and provide a new operator. If the lenders do not step in, the public sponsor can terminate the agreement and either contract with another entity to operate the facility or step in and operate the facility itself.

13) How do PPPs impact existing employees in concessions of existing assets?

When a private operator takes over an existing facility, there can be impacts on existing employees. There are various contractual means to protect the financial interests of existing employees.

14) How can compliance with existing and future environmental standards be assured?

Environmental impacts are a consideration in any infrastructure project. PPPs are subject to the same state and federal laws that apply to conventionally procured projects. Past agreements address environmental compliance by including such matters as the private party's obligation to perform mitigation activities required by the environmental approvals and indemnification of the public owner against claims resulting from the private operator's failure to comply with environmental laws and government approvals.

Public Policy Issues – Legislative and Contract Approaches

The 14 public policy issues addressed in this report are those most often raised in federal and state legislative hearings, reports and articles. Many are addressed in authorizing legislation providing for specific restrictions or guidelines. Detailed provisions in specific project agreements reflect policy decisions and are refined to reflect the characteristics of the project and the specific goals of the public agency. States have taken different approaches to the same issue depending on whether the PPP is a greenfield or a brownfield concession. Agreements for development of new corridors also tend to include different provisions than those for the addition of new or managed lanes in existing corridors. Finally, more recent projects have included provisions that build on lessons learned from earlier projects or international transactions.

1. Toll Rates: How can we assure that future toll rates will be reasonable?

Shifting responsibility for rate setting to a private contractor raises policy issues related to monopoly pricing. From an economic perspective, toll rates should approach the marginal societal cost of driving.

Reasonable toll rates would include variable toll rates set high enough in peak periods to efficiently manage congestion. In addition, project developers must be able to project that future toll revenues will be sufficient to retire debt, pay for the costs of operation, maintenance and future capital improvements, and provide a reasonable return to investors. Raising debt and equity for these projects, whether for construction or for payment of any upfront fee, requires a reasonable assurance that revenues from tolls will be sufficient for these purposes.

Under public ownership, toll rate increases have rarely reflected inflation, and some have not even provided for the increasing cost of maintaining the toll roads. This is primarily due to the fact that there are generally weak incentives for public operators to price roads at a socially optimal level.

All recent agreements for operation of existing or newly constructed tollroads have included limitations on how often and how much toll rates could be increased. These are summarized in Table 1.1 below. In most projects, the mechanisms used to control toll rates consist of specific limitations on rate increases. One early project, the Dulles Greenway in Virginia, was developed under state legislation that mandated utility-style toll-rate regulation, but in April 2008, toll rate increases on the Greenway were linked to economic indices.

For congested facilities, setting maximum fixed toll rates will likely be in conflict with a desire to minimize congestion through variable pricing. For these projects, limiting returns on equity or providing for revenue sharing has been used in lieu of rate caps to protect against monopoly profits. This methodology is described in Section 2, below.

While private operators are usually allowed to increase toll rates in accordance with major economic indices, they are not required to do so, and have strong incentives not to increase the toll rates if it would decrease use of the facility and reduce revenues.

In addition to rate caps, most PPP agreements also provide for exemptions from tolling for police, emergency vehicles, and certain other public users. Suspension of tolling in emergency situations, such as hurricane evacuation, has also been mandated.

Agreement	Relevant Provision	Type of Project	Methodology
Chicago Skyway	Schedule 6	Brownfield	**Set rates until 2017**, then indexed rate may be increased to the greater of 2%, the % increase in CPI or per capita GDP.
Indiana Toll Road	Schedule 7.1	Brownfield	**Set rates until 2011**, then indexed rate may be increased to the greater of 2%, the % increase in CPI or per capita GDP.
Pocahontas Parkway/ Transurban Concession	Article 4, Exhibit F	Brownfield	**Set rates until 2017**, then indexed rate may be increased to the greater of 2.8%, the % increase in CPI or per capita GDP.
SH-121 (NTTA)	Article 22, Exhibit R	Greenfield	**Set rate increases every two years until 2012**. **Index:** After 2012, rate changes are allowed every two years, with the maximum increase determined by CPI (if the two year increase is less than 6 percent) or the Employment Cost Index (ECI) for the South United States, if CPI has increased by more than 6 percent over the past two years. **Exception:** If the increase in ECI is higher than CPI, the CPI change is used. The NTTA has the option to deviate from these limitations if it determines higher tolls are necessary to allow the NTTA to service debts related to the facility, or to preserve the financial condition of the NTTA System[1].
SH-130 5&6	Article 3, Exhibit 4.	Greenfield	**Rates are adjusted annually.** **Index:** The maximum rate change is governed by the change in nominal gross state product per capita according to the most recently published value of the nominal gross state product for the

[1] Project Agreement, SH 121 Toll Project, available at http://www.dallasnews.com/sharecontent/dws/img/11-07/1109Project-Agreement-121.pdf

Agreement	Relevant Provision	Type of Project	Methodology
			State of Texas as published by Bureau of Economic Analysis.
I-H 635	Article 3, Exhibit 4	Managed Lanes	**The "base toll rate cap" initially caps tolls at $0.75/mile**. **Index:** The cap can be adjusted every five years, at a rate equal to the increase in CPI.
Dulles Greenway	Regulated by SCC under VA. CODE ANN. § 56-542 (2007)	Greenfield	**Utility Style Rate Setting.** The operator must apply to the Virginia State Corporation Commission for permission to increase rates. Legislation passed in April 2008 directed the Commission to approve toll rate increases from 2013 to 2020 that are equal to the greater of (i) the increase in the consumer price index from the last toll rate increase, plus one percent, (ii) the increase in the real gross domestic product from the last toll rate increase, or (iii) 2.8 percent.
I-495 HOT Lanes[2]	Sections 4.04 and 12.02.	Managed Lanes	**Congestion Pricing.** This facility will use congestion pricing, including dynamic tolling with potential toll rate changes at frequent intervals, in order to maintain free-flowing traffic conditions. **Exemptions**: High Occupancy Vehicles (HOV-3), Mass Transit Vehicles and Commuter Buses, school buses, motorcycles and Exempt Vehicles (emergency vehicles and law-enforcement vehicles using the HOT Lanes in the performance of their duties) are exempted from tolls.

[2] Amended and Restated Comprehensive Agreement Relating to the Route 495 HOT Lanes Project in Virginia (December 19, 2007), available at http://www.virginiadot.org/projects/resources/ARCA with ExhibitA-Definitions.pdf.

2. How should a reasonable rate of return be established?

The contribution of private capital to pay the costs of design and construction of a project, as well as long-term operation and maintenance, rehabilitation and upgrades is one of the most important benefits of a PPP. Typically, the private partner is repaid and is permitted to earn a return on its investment, through the collection of tolls or other fees paid by users of the project.

As noted above, the private partner's return can be restricted through contractual provisions that cap the amount of user fees that the operator can charge, while requiring strict adherence to operating and maintenance standards.

There are four other approaches that have been used to limit returns in toll road concessions: (1) competitive bidding; (2) revenue sharing; (3) absolute caps on rates of return; and (4) utility-type rate regulation. Table 2.1 summarizes the various provisions of recently executed project agreements that address rate of return regulation and revenue sharing.

The approach public officials use to address rate of return limitations depends on a number of factors, including (a) the net benefits to society, (b) the policy objectives of the public sector, (c) the risk profile of the project, and (d) the competitive nature of the procurement.

Use of Competition to Capture Market Rates of Return

Competition leaves the determination of a reasonable rate of return to the market by using a competitive bidding process under which the project is awarded to the developer who (given the toll rate structure) can offer the government the most value or agree to the lowest public subsidy. Bidders are forced to lower their expected rates of return so they can make more attractive bids. In the Chicago Skyway and Indiana Toll Road concessions, which were subject to competitive bids, there was no explicit limit on rate of return. The winning bid was presumed to reflect a competitive, if not the lowest, projected after-tax return. The actual rate of return will be a product of how efficiently the concessionaire can operate the toll road and how attractive the road is to users.

One approach that has been considered in the United States is for bidders to compete on the basis of the lowest public subsidy they require to undertake the project. These payments are called "availability payments." In these PPP structures there are no caps on rate of return. Instead, competition incentivizes bidders to bid the lowest availability payment that they are willing to accept (the lowest acceptable rate of return) in order to assume the risks and responsibilities of construction and operating cost projections.

Revenue Sharing based on Rate of Return

Most projects do not place a pre-set absolute limit on the concessionaire's rate of return, as that would deprive the concessionaire of the incentive to operate the project efficiently once the return cap is exceeded. Rate of return regulation also necessitates the determination of the actual rate of return which can be burdensome. Instead, several agencies have opted for revenue sharing provisions that allow both the public sector and the private operator to share in the upside potential of these projects. Such provisions allow the public sector a share of the revenues generated by the facility once the concessionaire has reached a specified level of return. Typically, the public agency relies on market surveys provided by financial advisors to determine the thresholds above which the agency receives a portion of the toll revenues from the concessionaire. These arrangements can also weaken private sector incentives to increase efficiencies and innovate.

For managed lanes projects, in which tolls are set in relation to traffic, returns can be shared to take advantage of increased revenues resulting from higher tolls when there is greater demand for use of the corridor.

A recent variation on this model is the use of pre-set revenue bands, from which the agency will be paid a certain percentage of revenues. This reduces the burden on the agency to monitor the concessionaire's return and avoids possible disputes related to the concessionaire's accounting systems. Pre-set revenue bands were included in the (now terminated) SH-121 agreement, and in the SH-130 Segments 5&6 project in Texas.

The ability to refinance once a project is underway is another factor that impacts the return. There have been cases in which the equity share of the long-term concession transaction has been reduced by refinancing debt under better terms, improving the return on investment initially estimated for the long-term concession agreement. Several recent concession agreements provide for the public sector to share in the benefit from these refinancing gains, either through separate provisions or within the meaning of other revenue sharing measures. Such terms will limit concession payments.

Utility Regulation

Utility-style rate regulation is another way to limit the private party's return on investment. Virginia's first public-private legislation included utility-style rate regulation.[3] The Dulles Greenway, Virginia's first private highway concession was developed under this legislation. The concessionaire had to apply to the Virginia State Corporation Commission (SCC) prior to raising tolls. One problem with utility-style regulation is that it can produce incentives for the private sector to inflate costs. In addition, it can be subject to political risk. For example, when

[3] Virginia Highway Corporation Act of 1988, VA. CODE ANN.§§56-535 – 552 (2007)

the SCC was evaluating the operator's application for a toll rate increase, it received more than 600 public comments on the proposed change, almost all opposed to the increase, despite the concessionaire's evidence that the proposed increase and traffic was in line with past levels and its return on investment for the coming year would be approximately 0.62%.

Virginia subsequently enacted new public private legislation that avoided this methodology for setting tolls and rates of return. On April 14, 2008, Virginia adopted a law directing the SCC to approve requests for toll rate increases during the period from 2013 to 2020 that are equal to the greater of (i) the increase in the consumer price index from the last toll rate increase, plus one percent, (ii) the increase in the real gross domestic product from the last toll rate increase, or (iii) 2.8 percent.

Table 2.1 Contract Rate of Return Limitations

Agreement	Relevant Provisions	Rate of Return Limit	Revenue Sharing?	Methodology
Chicago Skyway	N/A	Competition bid based on highest upfront payment, capped toll rates.	No	**Capped Rates:** Toll rates in this agreement are capped. The rate of return the concessionaire will achieve will be based on traffic levels and how efficiently it can operate the facility.
Indiana Toll Road	N/A	Competition bid based on highest upfront payment, capped toll rates.	No	**Capped Rates:** Same as Chicago Skyway.
Pocahontas Parkway/ Transurban Concession	§5.01	Revenue sharing based on levels of return on total investment	Yes	**Capped Rates and Revenue Sharing:** Once the concessionaire has achieved a certain rate of return on total investment the private and public partners will share additional revenue. **Thresholds:** 1)The pre-tax internal rate of return on Total Invested Project Funds reaches 6.5% during the first period, after which the concessionaire must pay VDOT 40% of gross toll revenues. 2) The concessionaire's pre-tax internal rate of return on Total Invested Project Funds reaches 8%, after which, the concessionaire must pay 80% of gross toll revenues to

Table 2.1 Contract Rate of Return Limitations				
Agreement	**Relevant Provisions**	**Rate of Return Limit**	**Revenue Sharing?**	**Methodology**
				VDOT.
SH-121	§5.3, Exhibit 7, Part C.	Revenue sharing based on preset revenue bands	Yes	The concessionaire would have paid TxDOT a percentage of its revenue (0%, 12.5%, 25% or 50%, according to fixed revenue amounts, increased in accordance with the same index used in the toll escalation regime.
SH-130 5&6	§5.1.2, Exhibit 7, Part B.	Revenue sharing based on preset revenue bands	Yes	**Revenue Sharing Terms:** The revenue sharing agreement is similar to the proposed terms for SH-121. In addition, the concessionaire will pay a fee of $67 million if TxDOT raises the posted speed limit to 80 mph, and a fee of $100 million if TxDOT raises the limit to 85.
IH-635	§5.3, Exhibit 7	Revenue sharing based on preset, rate of return bands.	Yes	Increased revenue sharing percentages once developer's internal rate of return exceeds 15%, 18%, 21% and 23%.
Dulles Greenway	VA. CODE ANN. §56-542 (2007)	Utility-style regulation.	No	**Utility-style Regulation:** All of the concessionaire's toll rate increases must be approved by the Virginia State Corporation Commission, which takes into account rate of return.
I-495 HOT Lanes	§5.01, Exhibit L	Revenue sharing	Yes	**Terms:** Similar to Pocahontas/ Transurban. **Thresholds:** Over 7.940% total return on investment – 5% of gross revenue shared with public sector. Over 8.497% total return on investment – 15% of gross revenue shared with public sector. Over 8.966% total return on investment – 30% of gross revenue shared with public sector.
SR-91 (AB-680)	§§9.2, §9.3, §9.5	Absolute limit on rate of return.	Yes	Each year the concessionaire was required to calculate its return on investment based on a formula taking into account the capital costs of the project and total cumulative revenues Over 17% return on investment,

Table 2.1 Contract Rate of Return Limitations				
Agreement	**Relevant Provisions**	**Rate of Return Limit**	**Revenue Sharing?**	**Methodology**
				available revenues after expenses will go to Caltrans. The concessionaire may be entitled to incentive payments for increases in peak-hour traffic throughput or capital improvements.

3. How should the term of the PPP agreement be determined?

The length of the concession period, often called the "term," has varied widely in U.S. PPPs, from the 35 year term for the proposed I-595 Corridor Improvement Project to the 99-year terms for the Chicago Skyway and Pocahontas/Transurban transactions. The length of the term raises policy issues related to the ability of the public sector to project its needs far into the future, and the desire to be able to address changing circumstances.

The term of the agreement should reflect the policy objectives of the public sector and the risk profile of the project. Other considerations are also important, such as incentives to innovate, overall impact on government budgets and governmental capability and desire to operate various transportation assets. In projects where the project owner is expecting a large upfront payment, a longer term can help maximize the value to the private partner, and so increase the size of the payment. In projects where traffic and revenue are uncertain, especially for greenfield projects that include newly constructed facilities, longer terms help ensure that the investor will realize its targeted return on investment. A good example is the Pocahontas Parkway Project. The concessionaire was required to inject capital in the early years based on expectations that profit from increased demand in later years would offset the losses incurred in the initial years of operation.

Shorter terms can be used for projects where there is lower risk of repayment, especially with facilities that have stable streams of revenue that can be forecast with a high level of confidence. Availability payments, which are not dependent on traffic volumes can support shorter terms because of the lower risk to the private sector.

Certain Federal, State and local tax considerations, such as the ability to qualify for accelerated depreciation, also factor into the length of the term. Although the concessionaire is not the owner of the existing toll road, if the term of the lease exceeds the remaining design life of the asset at the time of the transaction, barring other countervailing factors, the IRS will treat the concessionaire as the owner for tax purposes. Tax ownership qualifies the concessionaire to depreciate the portion of its upfront payment allocated to the tangible physical assets over 15 years for a highway, as opposed to the full term of the lease.[4]

Table 3.1 lists the stated terms of recent concessions.

[4] See statements of Linda Carlisle and Edward Kleinbard at hearing of US Senate Committee on Finance, Subcommittee on Energy, Natural Resources and Infrastructure, "Tax and Financing Aspects of Highway Public-Private Partnerships, July 24, 2008, *available at* http://transportation.house.gov/Media/File/Highways/20070213/ssm.pdf

Table 3.1 Stated Terms of Concession Agreements	
Agreement	**Description**
Chicago Skyway	**99 year** lease of an existing toll road.
Indiana Toll Road	**75 year** lease of an existing toll road.
SH 130 5&6	**50 year** lease on a 40-mile segment of State Highway 130, the construction to be financed by the private party.
SH 121	**50 year** lease of a 12-mile tolled section of SH-121 to the North Texas Toll Authority (NTTA), which will be built and maintained by the NTTA.
SR 91	Originally constructed under a **35-year** franchise agreement between California Private Transportation Company and the State of California]http://www.innovativefinance.org/projects/highways/91.asp.
I-495	**80 year** lease on HOT lanes on the Capital Beltway, which will be built, operated and maintained by the private operator.
Pocahontas/Transurban Concession	**99 year** contract assumed by a private company that will maintain and operate the road for the remainder of the term, and build an extension to the Richmond International Airport.

Some States have capped the maximum term of agreements by legislation. Table 3.2 below provides examples of maximum terms imposed by statute.

Table 3.2 Statutory Limits on Concession Terms	
State	**Statute**
California	**35 year maximum term**, commencing on the date of the agreement. CAL. GOV. CODE § 5956.6 (2007)
Colorado	**99 year maximum term**, commencing on the date of the agreement. COLO. REV. STAT. § 43-1-1202(1)(d)(II) (2007)
Delaware	**50 year maximum term**, commencing on the completion of the project. 2 DEL. CODE ANN. title 2 § 2004(a) (2008).
Florida	**50 year maximum term**, commencing on the date of the agreement, or up to 75 years based on certain findings. Agreements can exceed 75 years only with the approval of the Legislature. FLA. STAT. ANN.. § 334.30(12) (2008)
Mississippi	**50 year maximum term**, commencing from the date of the agreement; no extensions or renewals. MISS. CODE. ANN. § 65-43-3(3)
Pennsylvania	Pennsylvania explored two options with regard to the Pennsylvania Turnpike. Governor Rendell put forward a plan (introduced in the PA legislature as H.B. 2593, 2008 Leg. Reg. Sess. (Pa. 2008) and .H.B. 1590, 2007 Leg. Reg. Sess. (Pa. 2007) calling for a 75 year lease of the Turnpike. Act 44 calls for a 50-year lease of I-80 to the Pennsylvania Turnpike Authority.
Puerto Rico	**50 year maximum term**, commencing on the completion of the project. 9 P.R. LAWS ANN. § 2004A(1)(I) (2004).

Table 3.2 Statutory Limits on Concession Terms	
State	**Statute**
Texas	**50 year maximum term**, commencing on final acceptance of the project or the start of revenue operations, but not in excess of 52 years. TEX. TRANSP. CODE ANN. §§ 227.023(f); TEX. TRANSP. CODE § 227.082(a)-(b) (2007).
Washington	**50 year maximum term**, commencing on the date of the agreement. WASH. REV. CODE § 47.46.040 (2008).

Ability to Extend Concession Term

Typically, concessions do not provide for renewals beyond the stated term of the agreement. However, some agreements have provided for extensions to the term to provide relief to the concessionaire for unanticipated events outside of the concessionaire's control, such as force majeure events.[5] During the life of a concession, events beyond the parties' control can and do occur that delay progress, particularly during construction. Extensions of time allow the concessionaire an opportunity to recoup its loss through operating the concession for an additional period.

[5] See, e.g. Chicago Skyway Concession and Lease Agreement, §15.

4. How should the public sector evaluate the trade-off between upfront payments and the ability to share in revenues over the term?

The issue of maximizing an upfront payment versus sharing in revenues during the concession period arises only if revenues are likely to exceed initial capital costs, including debt repayment and a reasonable return on investment, long-term operating and maintenance costs, and costs of renewal and rehabilitation. Brownfield projects with proven traffic and revenue typically fall into this category, as well as certain greenfield projects in very high-volume traffic areas.

The largest upfront payments have been garnered for long-term leases of existing facilities, such as the Chicago Skyway ($1.83 billion), Indiana Tollroad ($3.8 billion), and the highest bid received for the proposed concession of the Pennsylvania Turnpike ($12.8 billion). Upfront payments were also offered for the opportunity to build some greenfield projects, including SH 121 in Texas. Cintra bid $2.1 billion upfront, with an estimated $700 million to be paid over the 50-year concession for SH 121 and NTTA later offered TxDOT $2.5 billion in upfront payments, with payments over the life of the concession to exceed $833 million (in 2007 dollars).

The public sector may accept a large upfront payment rather than pursuing future revenues because it can put the proceeds to use immediately or invest them in ways which will generate more value than the periodic payments they will forego. Other factors that are considered include the unmet needs of the agency in the immediate future and over the term of the agreement, the risk in valuation of the facility, investment alternatives available to the public sector, and the risk that construction costs will increase in the future at a rate in excess of the discounted rate of future revenue returns.

A key factor in valuing projects is the toll revenue stream. Existing facilities that have histories of toll operations are relatively easy to value. The Chicago Skyway, Indiana Toll Road and proposed Pennsylvania Turnpike concessions attracted bids in the billion dollars plus range based on historical traffic and revenue. By contrast, greenfield projects are more difficult to value because of the absence of historical data about traffic demand. Furthermore, risks related to design and construction tend to depress the dollar amount of upfront payments offered for greenfield facilities. Managed lanes added to existing highways present additional challenges related to the complexities of projecting revenues from variable tolls and the percentage of non-revenue HOV use.

5. How should proceeds of a transaction be spent?

The monetization of existing assets may include large upfront payments that present public owners with opportunities to advance the construction of unfunded capital programs, as well as reduce debt burdens. Accompanying these opportunities are public policy considerations as to how these payments should be allocated. There are issues about how to balance transportation and other state or local programs, projects within or between geographic regions, and benefits for current and future users.

The City of Chicago used proceeds from the lease of the Chicago Skyway to repay project debt, create reserve accounts and provide for programs unrelated to transportation. The proceeds from the Indiana Toll Road, on the other hand, were completely dedicated to transportation Projects in the vicinity of the toll road and around the State and funded a 10-year transportation capital program.

Most of the statutory restrictions on the use of proceeds provide for depositing the funds in a transportation trust fund of some kind, so that funds from transportation projects are available solely for transportation investment. See Table 5.1.

Upfront lease payments may be spent in the early years, while the public will continue paying tolls throughout the life of the lease. If funds are invested in capital projects that have a long life, or are used to provide other lasting benefits, future users of those projects will also benefit as well as current users. Table 5.2 details some of the past fund allocations from concession agreements.

Table 5.1 Statutory Provisions for Use of Proceeds

State	Statute
California	California limits the use of excess toll revenues, and requires that excess revenues be applied to the indebtedness of the contracting entity, deposited in the State Highway Account, or used for improvements on the project, except that in leases with regional toll authorities the excess will be paid to the regional authority for use in improving public transportation near the project boundaries. CAL. STS. & HIGH CODE § 143(e)(1) (2007)
Colorado	The State DOT's share of the revenues must be deposited in a state highway supplementary fund and used for transportation purposes. COLO.. REV. STAT 43-1-1205 (2007)
Delaware	Excess revenues must be paid into the Delaware transportation trust fund. DEL.CODE ANN. tit. 2 2006 (2008)
Florida	Proceeds from leases are to be deposited in the transportation trust fund. FLA. STAT. ANN. §337.251 (8)(2008
Minnesota	Revenues from HOT/HOV beyond the cost of the project are to be split between capital improvements in the corridor and increased bus services within the corridor. MINN STAT. § 160.93 (2007)

Table 5.1 Statutory Provisions for Use of Proceeds	
State	**Statute**
Mississippi	Any share of toll revenues paid to the Mississippi DOT shall be deposited into the department's highway fund to be used by the department for the construction and maintenance of highways. H.B. RES. 3, 2008 Leg. 1st Extraordinary Sess. (Miss. 2008)
Oregon	Money from transportation project must go to the State Transportation Enterprise Fund. OR. REV. STAT §383.009 (2005)
Texas	Revenue derived from a transportation project may not be applied for a purpose or to pay a cost other than a cost or purpose that is reasonably related to or anticipated to be for the benefit of a transportation project. Each year, if an authority determines that it has surplus revenue from transportation projects, it shall reduce tolls, spend the surplus revenue on other transportation projects in the counties of the authority, or deposit the surplus revenue to the credit of the Texas Mobility Fund. TEX. TRANSP. CODE ANN. §§ 370.172, 370.174 (2007).
Virginia	A comprehensive agreement entered into under the PPTA must provide for the distribution of any earnings in excess of the maximum rate of return as negotiated in the comprehensive agreement. Without limitation, excess earnings may be distributed to the Commonwealth's Transportation Trust Fund, to the responsible public entity, or to the private entity for debt reduction or they may be shared with appropriate public entities. Any payments under a concession arrangement for which the Commonwealth is the responsible public entity shall be paid into the Transportation Trust Fund. VA. CODE ANN. § 56-566, (2007)
Washington	Proceeds from innovative partnerships will be put into a transportation innovative partnership account, and allocated to subaccounts for projects approved by the state legislature. The state may use moneys in the transportation innovative partnership subaccount to ensure the repayment of loan guarantees or extensions of credit made to or on behalf of private entities engaged in the planning, acquisition, financing, development, design, construction, reconstruction, replacement, improvement, maintenance, preservation, management, repair, or operation of any eligible project. WASH REV. CODE § 47.29.230 (2008)

Table 5.2 Application of Proceeds in Brownfield Concessions		
Agreement/ Proposal	**Upfront Payment**	**Allocation/Proposed Use**
Chicago Skyway	$1.83 billion.	**Debt Retirement, Reserve Fund, etc.** The City of Chicago used the upfront payment to pay outstanding debt (from the Skyway and the City), create long-term and mid-term reserve funds, provide budget relief, and pay for other non-transportation-related programs.
Indiana Toll Road	$3.85 billion.	**Debt Retirement and Transportation Program.** The state will use the upfront payment to pay outstanding toll bonds and fully fund the State's 10-

Table 5.2 Application of Proceeds in Brownfield Concessions		
Agreement/ Proposal	**Upfront Payment**	**Allocation/Proposed Use**
		year "Major Moves" transportation capital program. 34 % of the funding going to the "Major Moves" program will be invested in the seven counties where the facility is located to address equity concerns. 66 % of the traffic comes from out-of-state drivers, so revenues can be invested in other areas of the state.
Pennsylvania	Highest bid received was $12.8 billion.	**Debt Retirement, Investment for transportation projects etc.** According to the state administration's calculations, approximately $2.3 billion would have been used to assume existing debts and other obligations, leaving about $10.5 billion which would have been invested, generating revenues to pay for highway, bridge and public transit projects.

6. Public Sector Comparator: How to determine whether the public sector could have achieved the same or better financial results as a PPP through public borrowings and public operation?

Public debt financing and operating structures can be attractive because State and local bonds can be issued on a tax-exempt basis. In 2005, the Federal government authorized the issuance of $15 billion in tax-exempt private activity bonds for privately developed highway and freight transfer facilities, which makes private financing more competitive with tax-exempt public financing. Privately financed transactions can create value because equity participants will invest against (1) the spread between total projected revenues and the amount the bond markets will lend against (so-called “coverage”), and (2) revenues that will accrue to the project between the date that bonds are retired and the end of the concession – which may be 15 to 64 years, depending on the term.

Public sector debt capacity is limited by state and local law. The ability of the private sector to provide upfront financing for a project’s full costs can significantly accelerate project delivery and reduce costs. There are analytical tools available to help State and local transportation officials evaluate the benefits that could be provided by private sector financing as compared with the most cost-effective methods of public sector funding and procurement.

States may wish to consider using a “value for money” type of analysis in choosing between public and private sector financing arrangements for transportation infrastructure. Generally, this involves engaging financial advisors to evaluate the net present value of the public and private sector alternatives available, in order to aid the public agency in choosing the one that offers the best value for the public. For example, the Florida Department of Transportation used an explicit value for money analysis as the basis for electing the availability payment concession approach for the Port of Miami Tunnel Project, which was not completed.[6] The Texas Department of Transportation used similar comparisons for its PPP projects.

[6] Lowell R. Clary, “Port of Miami Tunnel and Access Improvement Project,” Presentation at Transp. Research Board 2006 Summer Conference. http://www.innovativefinance.org/events/pdfs/trb_summer06_clary.pdf.

7. How can the quality of long term maintenance be assured?

One of the most often-expressed issues raised about PPPs is ensuring that the private operator will maintain the asset and make necessary improvements. In fact, the private entity will be highly motivated to maintain the facility in top condition in order to protect its investment and attract the greatest number of customers.

Contract terms that secure these expectations with detailed performance requirements have become standard in PPP transactions. Many contracts include schedules of improvements required to be carried out by the private operator over the life of the agreement. Additional security for the operator's performance can be provided by requiring deposits to be made to reserves for operation, maintenance and rehabilitation ahead of distributions to equity investors. State laws and contract provisions also provide the public sponsor the ability to monitor, inspect and audit the private operator's performance.

The concessionaire's lenders will also have a strong interest in policing the operator and its maintenance of the facility in order to avoid any threat of contract termination due to the private operator's default.

Concessionaires have strong incentives to invest in high quality materials and construction methods at the beginning of an agreement, because such upfront investments will generally yield lower operation and maintenance costs over the term of the agreement. As these agreements approach their final expiration date, however, the concessionaire has a diminishing interest in investing in the facility because it will not fully reap the benefits of its investment. Owners naturally want to take possession of an asset in good condition, rather than an asset that is in need of costly capital improvements. To protect the public against the possibility of underinvestment by concessionaires at the end of the term, agreements generally include provisions that require the concessionaire to furnish additional security, either as a letter of credit, a bond or a cash deposit. These provisions are generally referred to as "handback" provisions, and are discussed in greater detail in Section 8, below.

Table 7.1 Contract Operation and Maintenance Provisions

Agreement	Section	Requirements
Indiana Toll Road	7.3(c) Use of Toll Revenues.	**O&M Terms.** The concessionaire is required to pay for all costs of maintenance (including reconstruction, resurfacing, restoration and rehabilitation) before making any distribution of toll revenues to its equity owners. The contract includes detailed O & M provisions with which the concessionaire must comply.

Table 7.1 Contract Operation and Maintenance Provisions		
Agreement	**Section**	**Requirements**
Pocahontas/ Transurban Concession	8.02 Operator Obligation to Manage and Operate. 8.04 The O&M Contractor.	**O&M Terms.** The concessionaire is required to maintain, repair, renew, and reconstruct the project, and to perform extraordinary maintenance and repair work. The agreement includes a detailed set of performance standards and measurements (Exhibit H). **O&M Operator.** Additionally, the concessionaire must hire an experienced operator to perform traffic management, maintenance and toll collection who must be approved by VDOT. VDOT may withhold its approval if it determines the proposed operator would be incapable of performing its duties, based on the operator's financial strength, experience, reputation, past history of debarment or prohibition from participations in state or federally funded projects, or the material terms of the proposed engagement.
SH-121 (Now being carried out by the North Texas Toll Authority and not being developed as a PPP)	8.1.1, Developer and TxDOT Obligations; Transition of Operations 8.5 Renewal Work	**O&M Terms.** The concessionaire would have been required to operate and maintain the project in accordance with (a) good industry practice, as it evolves from time to time, (b) requirements set out in the contract (c) all laws, (d) the requirements, terms and conditions set forth in all governmental approvals, (e) the approved project management plan, and (f) all other applicable safety, environmental and other requirements, taking into account the project right of way limits and other constraints affecting the project. **Quality Terms.** The contract included detailed provisions governing performance requirements, performance measurement, and a schedule of renewal work to aid in scheduling and performing renewal work. The concessionaire must perform renewal work as necessary to comply with the performance requirements. The concessionaire must provide annual reports on renewal work performed each year, describing the location, nature, and dates of commencement and completion of each element of the work, as well as the total cost of all renewal work performed during the year. During the last years of the contract when the hand-back requirements reserve is in effect, the concessionaire would have been required to detail its draws on the reserve.
SH-130 5&6	8.1.1 Developer Obligations 8.5 Renewal Work	**O&M Terms.** Substantially similar to the SH-121 provisions. **Quality Terms.** Substantially similar to the SH-121 provisions.
IH-635	8.1.1 Developer Obligations 8.5 Renewal Work	**O&M Terms.** Substantially similar to the SH-121 and SH-130 5&6 provisions. **Quality Terms.** Substantially similar to the SH-121 terms.

Table 7.1 Contract Operation and Maintenance Provisions		
Agreement	**Section**	**Requirements**
I-495 HOT Lanes	8.03 Concessionaire Obligation to Manage and Operate. 8.04 Operations, Maintenance and Tolling; O&M Contractor.	**O&M Terms.** The concessionaire is required to manage, maintain and operate the HOT lanes in accordance applicable laws, regulatory approvals, and the terms of the contract, including the operations and maintenance requirements (Exhibit N). The concessionaire is not responsible for the maintenance or renewal of the Springfield Interchange. The concessionaire is responsible for: (i) the management and control of traffic on the HOT Lanes, (ii) the maintenance and repair of the HOT Lanes Project, its systems and components, including the electronic toll and traffic management system, (iii) the operation of the HOT Lanes Project, collection and enforcement of tolls and other incidental charges (iv) the maintenance, compliance with and renewal of Regulatory Approvals, (v) traffic management, and maintenance and repair responsibilities, and (vi) carrying out activities in accordance with a traffic management plan developed by the concessionaire in coordination with VDOT. **O&M Operator.** The concessionaire may subcontract with an active operator with the expertise, qualifications, experience, competence, skills and know-how to perform the operations and maintenance obligations of the concessionaire. The concessionaire must get VDOT's approval of any operator before engaging them to provide operations and maintenance work. VDOT may withhold its approval if it determines the proposed operator would be incapable of performing its duties, based on the operator's financial strength, experience, reputation, past history of debarment or prohibition from participations in state or federally funded projects, or the material terms of the proposed engagement.
SR-91	6.2 Maintenance.	**O&M Terms.** The concessionaire was responsible for creating a maintenance plan to be approved by Caltrans. Concessionaire was required to maintain the project according to Caltrans' published maintenance schedules and standards, and had the option to engage Caltrans to maintain the non-toll collection components of the facility. If the concessionaire were not to contract with Caltrans for maintenance of the project, then Caltrans would monitor the concessionaire's compliance with the applicable maintenance standards. The concessionaire was required to maintain toll collection facilities, machinery and any other toll operation equipment. Concessionaire was required to conform to Caltrans' standards on signing, cone and barricade placement, equipment requirements, traffic control methodology, traffic

Table 7.1 Contract Operation and Maintenance Provisions		
Agreement	**Section**	**Requirements**
		management plans, and safety standards while performing maintenance work. If maintenance required an interruption in service, the concessionaire (or the contractor hired to provide the maintenance work) was required to provide 30 days advance notice of the interruption to Caltrans, except in cases of emergency.

Table 7.2 Contract Requirements for Capital Improvements		
Agreement	**Section**	**Requirements**
Indiana Toll Road	Section 4.2. Schedule 5.5	**Specific Capital Improvements.** The concessionaire's capital improvement obligations include specific capital improvements set forth on Schedule 5.5 of the concession agreement required to be completed by the concessionaire. **Mandatory Expansion Requirements** 1. Implement a barrier-controlled electronic toll collection within two years of the closing date. 2. Expand to 3 travel lanes in each direction from Milepost 14.0 to Milepost 15.5 by December 31, 2008. 3. Expand to 3 travel lanes in each direction from Milepost 10.6 to Milepost 14.0 and lower Toll Road elevation to accommodate the flight path of Gary Chicago International Airport by December 31, 2010. 4. Expand to 3 travel lanes in each direction from Milepost 18.5 to Milepost 20.27 by December 31, 2007.
Pocahontas Parkway/ Transurban Concession	Article 9	**Specific Capital Improvements.** The Operator is required to develop, finance, design, construct, complete, operate and maintain the Airport Connector Road, subject to obtaining TIFIA financing and meeting certain cost estimates.

Mandatory Capacity Improvements

Some agreements have provided for specific circumstances to trigger an obligation to make capacity enhancements.

SH 130 Segments 5&6

In the SH 130 Segments 5&6 project, the developer is required to provide the Texas DOT (TxDOT) with monthly reports of hourly traffic flow data, verified by a traffic and revenue consultant. Additionally, the developer is required to create and use a “Speed Measurement System” to monitor traffic speeds and provide TxDOT with monthly reports of hourly traffic speeds.

These monthly speed reports provide the basis for two trigger events which obligate the developer to make capacity improvements. The first trigger event occurs when any section of the facility experiences three consecutive months in which five percent of hourly speeds are less than 65 mph. After the first trigger, the developer is obligated to present TxDOT with a capacity improvement proposal. The second trigger event occurs when any section of the facility experiences three consecutive months in which more than 10 percent of hourly speeds are less than 60 mph. Following the second trigger, the developer is obligated to design and implement the new capacity improvement.

The provision includes exemptions. The developer will not have to engage in road-widening if the road-widening requires a new record of decision pursuant to the National Environmental Policy Act (NEPA) and a no-build alternative is selected. Also, the developer will not be required to undertake road-widening in the last five years of the term unless the second trigger described above had previously occurred and no other form of capacity improvement would be likely to restore the same level of service.

In this agreement, the developer bears sole responsibility for the costs of the capacity improvements, and is obligated to reimburse TxDOT for the cost of any NEPA-related activities required of TxDOT.

SH 121/Cintra

The cancelled PPP for the SH 121/Cintra project would have required similar monitoring of traffic flows and speeds. This project is now being carried out by the North Texas Tollway Authority and is not being carried out as a PPP. The trigger points were similar to those from SH 130, but in addition to requiring capacity improvements on the part of the developer, the trigger points also made Maximum Peak Toll Rates available to the developer. Instead of referring to a specific traffic speed, the SH 121 agreement referred to either the posted speed limit or a “free flow speed” for the purposes of the first and second trigger events. The “free flow speed” is the monthly average hourly speed of vehicles traveling during periods of Level of Service A – as defined in the Highway Capacity Design Manual. The obligations following the two trigger points would have been the same as those described above – the developer must submit proposals for capacity improvements within 90 days of the first trigger, and implement the selected improvement after the second trigger.

This agreement would have excused the developer from making road-widening capacity improvements if the work was subject to a new record of decision for NEPA and a no action alternative had been selected, or if the road-widening would have required more space than the current right-of-way could provide. The agreement further would have provided that the developer would not have been obligated to make road-widening capacity improvements if the cost of those improvements could not be recovered within the term of the lease, unless TxDOT agreed to subsidize the improvements. Finally, the developer would have been excused from making road-widening improvements if it could have shown that the congestion on the facility was attributable to the inability of connecting facilities to accommodate the vehicles exiting the project facility.

In this agreement, the developer would have borne sole responsibility for the costs of the capacity improvements, and been obligated to reimburse TxDOT for the cost of any NEPA-related activities required of TxDOT.

SR 125

The SR 125 agreement also has provisions for trigger events that require the developer to implement capacity improvements. However, a different remedy is provided if the developer fails to make the improvement. If the traffic flows fall to Caltrans' "E" level of service for at least two consecutive hours per day on at least 150 days per year over a two-year period, and the developer does not diligently pursue capacity expansion, then the developer can lose the protection of the non-compete provisions of the contract.

Table 7.3 Statutory Maintenance Requirements

State	Statute Guideline
California	User fees will be dedicated to the maintenance of the facility. CAL. GOV'T CODE § 5956.6(b) (4)(2007)
Colorado	It is the duty of all owners or operators of roads upon which tolls are charged to keep their roads in good repair at all points, and the condition of the roads shall be determined by the grade thereof and the season of the year in which they are used. COLO. REV. STAT § 43-3-303 (2007)
Delaware	User fee revenues must be dedicated to establishment and funding of a fund to ensure the adequacy of maintenance expenditures. DEL. CODE ANN. tit. 2. § 2006 (d) (2008)
Minnesota	*Reversion of Toll facility to road authority.* A development agreement that requires transfer or reversion of a toll facility to a road authority must provide the terms and conditions of the transfer or reversion. The facility shall meet at least the maintenance standards of the road authority for facilities of the same functional classification during the term of the agreement. MINN.STAT. § 160.85 (2007) Subd. 7. The agreement must provide the terms and conditions of maintenance, snow removal, and police services to the toll facility. The road authority must provide the services. The services must meet at least the road authority's standards for facilities of the same functional classification. MINN. STAT § 160.86 (2007) (e)
Mississippi	All such highways, pavement, bridges, drainage-related structures and other infrastructure comprising the projects shall be built and maintained in accordance with not less than the minimum highway design, construction and maintenance standards established by the contracting governmental entity for such highways, infrastructure and facilities. MISS. CODE ANN.. § 65-43-3 (2007)

Table 7.3 Statutory Maintenance Requirements	
State	**Statute Guideline**
Oregon	Every agreement between the department and a private entity pursuant to which the private entity owns or operates a tollway and is entitled to collect the revenues therefrom shall provide for the establishment and funding of a maintenance, repair and reconstruction trust fund that is designed to ensure that adequate funds will be available to maintain and repair the tollway, so that the tollway will be surrendered to the department in good condition without need of repair or reconstruction. OR. REV. STAT § 383.019 (2005) (2)
Puerto Rico	The concessionaire may use toll proceeds for payment of the costs of collecting the toll tax and the operation, administration and maintenance of the public highway and its ancillary transit facilities. 9 P.R. LAWS ANN. §2004b (2004)
Virginia	Maintain, or provide by contract for the maintenance of, the qualifying transportation facility. VA. CODE ANN. § 56-565 (2007) E.3.
Washington	Agreements shall require that over the term of the ownership or lease the user fees or toll revenues be applied only to payment of: The capital outlay costs for the project, including the costs associated with planning, design, development, financing, construction, improvement, operations, toll collection, maintenance, and administration of the project. WASH. REV. CODE. § 47.46.050 (2008) (4)(a)

8. Handback: How to ensure that the facility will be returned to the public sector at the end of the term in a state of good repair?

The private operator has strong incentives to invest in maintenance and capital improvements during the term of the concession. Toward the end of the term, the incentive to invest in renewal work weakens. The concessionaire might try to avoid investing in necessary maintenance and capital improvements to the extent it will not be able to recover the costs of such improvements, with a reasonable return, in the last years of the agreement. This could leave the public sector with significant operations and maintenance obligations at the termination of the contract. Public officials have used a variety of strategies to ensure that the project is properly maintained and capitalized by the concessionaire through the end of the concession period.

The Chicago Skyway and Indiana Toll Road concessions both used letters of credit that would be available to the public agency if the concessionaire failed to return the facility in good repair. The Pocahontas Parkway concession requires the concessionaire to maintain an "extraordinary maintenance reserve" to fund any necessary renewal or maintenance work required to put the project in good condition at the termination of the contract. Project agreements in Texas – notably the SH-121, SH-130 (5&6) and I-635 – use detailed hand-back requirements and hand-back requirement reserve provisions that spell out what the condition of the facility must be at the end of the term and the amount that the concessionaire must hold in reserve to ensure its ability to deliver the project in good condition. Summaries of these provisions are included in Table 8.1 below.

Handback provisions have three main purposes: (1) they form part of the concession life-cycle costing approach; (2) they help induce the concessionaire to maintain the facility throughout the concession term; and (3) they add certainty as to the condition of the assets that will revert to the public sector at the end of the term. Hand-back provisions are necessarily project specific because of the types of assets and specific project characteristics involved in each agreement.

Table 8.1 Contract Handback Provisions

Agreement	Section	
Chicago Skyway	16.3 Letters of Credit	**Letter of Credit.** For the last ten years of the lease, the concessionaire annually must provide a letter of credit for an amount equal to its highest annual gross revenue during the preceding ten years. The concessionaire must replace the letter of credit annually in the amount of the undrawn balance plus interest at the bank rate (the WSJ's "prime rate"), until three years after the expiration of the lease and the concessionaire fulfillment of its obligations. Chicago can approve a letter of credit for a reduced amount, on an annual basis, if it determines that the new amount will be sufficient to

Table 8.1 Contract Handback Provisions		
Agreement	**Section**	
		cover all costs of capital improvements for the remainder of the term in light of the condition of the Skyway. If the concessionaire defaults on the agreement, with three business days' notice, Chicago can draw on the letter of credit for what it is owed because of the default.
Indiana Toll Road	16.3. Letters of Credit	**Letter of Credit.** For the last five years of the lease, the concessionaire must provide a letter of credit for an amount sufficient to cover all the costs of capital improvements for the remainder of the term (as set forth in the capital improvement program included in the operating standards). The concessionaire must replace the letter of credit annually in the amount of the undrawn balance plus interest at the bank rate (the WSJ's "prime rate"), until three years after the expiration of the lease and the concessionaire fulfillment of its obligations. If the concessionaire defaults on the agreement, with three business days' notice, the Indiana Finance Authority (IFA) can draw on the letter of credit for what it is owed because of the default. The concessionaire is required to replace each letter of credit at least 60 days prior to its expiration, and may substitute a surety bond, similar security, or cash deposits for the Letter of Credit.
Pocahontas Parkway/ Transurban Concession	8.07 Extraordinary Maintenance and Repair Reserve	**Reserve Fund.** The concessionaire is required to maintain an "Extraordinary Maintenance and Repair Reserve" that will be available for extraordinary maintenance and repair work. The reserve will be held by a collateral agent, and so will be available to VDOT regardless of the concessionaire's solvency. The concessionaire is entitled to investment income on the reserve, and may draw payment from the reserve for extraordinary maintenance and repair work performed. The concessionaire may substitute a letter of credit for the reserve. VDOT may draw the full amount of such a letter of credit if it is not replaced 30 days before it is set to expire, or to reimburse itself for costs incurred performing extraordinary maintenance and repair work.
SH-121	8.10 Handback Requirements 8.11 Handback Requirements Reserve	**Handback Quality.** The contract would have included a table detailing required renewal work and provided for inspection of the facility by TxDOT to monitor the condition and residual life of elements of the facility. Concessionaire would have been required to deliver the facility, at no charge to TxDOT, in the condition and meeting all of the requirements for residual life at handback specified in the contract. **Reserve Fund.** Beginning five years before the expiration of the agreement, the concessionaire would have been responsible for funding and maintaining a Handback Requirements Reserve (or a Handback Requirement) at a depository of TxDOT's choosing, in amounts specified by the contract. Interest and investment income would have been retained in the reserve. The concessionaire could have withdrawn from the reserve to pay for costs of qualified

Table 8.1 Contract Handback Provisions		
Agreement	**Section**	
		renewal work. At the expiration of the term or early termination of the contract all funds in the reserve would have become the property of TxDOT (to the extent the funds in the reserve differ from the requirements of the contract, the concessionaire would either have paid the difference or been reimbursed). If the concessionaire had chosen to use a letter of credit, it would have had to adjust the amount of the letter of credit annually to meet the requirements of the contract, and renewed the letter of credit at least 45 days before it was set to expire.
SH-130 5&6	8.10 Handback Requirements 8.11 Handback Reserve	**Handback Quality.** Substantially similar to the provisions of the SH-121 agreement.
IH-635	8.10 Handback Requirements 8.11 Handback Reserve	**Handback Quality.** Substantially similar to the provisions of the SH-121 agreement.
I-495 HOT Lanes	Section 16.09 Handback Obligations and Reserve.	**Handback Quality.** At the end of the term, the concessionaire is required to hand-back the project with a minimum of five years remaining life. If VDOT requests it at least one year prior to the end of the term, the concessionaire must convert the HOT lanes to general lanes at its expense. Beginning 20 years prior to the end of the term, VDOT and the concessionaire will begin periodic inspections of the project every five years monitoring asset conditions and useful lives, and updating the maintenance plan to reflect handback requirements. Five years prior to the end of the term, VDOT and the concessionaire will begin annual inspections to ensure the handback requirements are met. The concessionaire is required to complete all the work in the updated maintenance plan prior to the end of the term. **Reserve Fund.** Starting five years prior to the end of the term, the concessionaire is required to post a ten-year irrevocable stand-by Letter of Credit or a Performance Bond to the Department for a period of five years after expiration of the term in an amount equal to 50% of the nominal lifecycle cost expended in the previous five years of the term pursuant to the most recent maintenance plan approved by VDOT. VDOT will be able to draw on the bond to remedy failures in the handback condition of the project for the five years following the end of the term.

9. Are there reasonable approaches to the construction of unplanned facilities that have an adverse effect on the project's revenues?

Lenders and investors need to be able to make projections of revenues based on reasonable assumptions about future demand in order to finance against a long-term stream of revenues. The public sector, on the other hand, needs to be free to invest in new infrastructure in the future to meet actual growth, foreseen or unforeseen. Current PPP agreements generally do not specifically prohibit the public sector from building what have been termed "competing facilities." (There has been only one project actually built that prohibited construction of "competing facilities"—the concession agreement for the SR 91 express lanes facility in Orange County, California and that restriction no longer applies.)

Current agreements provide for possible compensation to be paid to the private operator if the construction of facilities *not planned when the agreement was executed* results in a proven reduction in revenue for the privately operated facility. As a result, private investors take into account everything that may be included in the region's long-term plans, whether currently funded or not, when making their traffic and revenue projections.

At least one transaction provided no compensation for potentially competing facilities. The Chicago Skyway agreement offered the concessionaire no protection, in light of the fact that the surrounding area is densely developed and any expansion of an existing parallel expressway would require a very costly double-decking of the facility.

New managed lanes concessions have also provided limited protection. For example, in the proposed I-635 and North Tarrant Express procurements, the scope of protection is restricted to additional main lanes within the project right of way. There is no protection from new, expanded or reconfigured frontage roads. There is no zone of protection outside the right of way, even though Texas law authorizes such protection. The concessionaire for the I-495 Capital Beltway managed lanes project in Virginia recently agreed to a similarly limited scope of protection.

Table 9.1 Statutory Provisions Relating to "Competing Facilities"

State	Statute
California	No agreement entered into pursuant to this section shall infringe on the authority of the department or a regional transportation agency to develop, maintain, repair, rehabilitate, operate, or lease any transportation project. Lease agreements may provide for reasonable compensation to the leaseholder for the adverse effects on toll revenue or user fee revenue due to the development, operation, or lease of supplemental transportation projects with the exception of any of the following:

Table 9.1 Statutory Provisions Relating to "Competing Facilities"	
State	**Statute**
	(A) Projects identified in regional transportation plans prepared pursuant to Section 65080 of the Government Code and submitted to the commission as of the date the commission selected the project to be developed through a lease agreement, as provided in this section, unless provided by the lease agreement approved by the department or regional transportation agency and the commission. (B) Safety projects. (C) Improvement projects that will result in incidental capacity increases. (D) Additional high-occupancy vehicle lanes or the conversion of existing lanes to high-occupancy vehicle lanes. (E) Projects located outside the boundaries of a public-private partnership project, to be defined by the lease agreement. However, compensation to a leaseholder shall only be made after a demonstrable reduction in use of the facility resulting in reduced toll or user fee revenues, and may not exceed the reduction in those revenues. CAL. STS. & HIGH CODE § 143(d)(3) (2007)
Colorado	A toll road or toll highway company may not enter into a noncompete agreement with a public entity if the agreement would degrade an existing roadway or either delay or prevent the construction or upgrading of a road or highway that is included in the fiscally constrained regional transportation plan required by *section 43-1-1103 (1)* or the fiscally constrained comprehensive statewide transportation plan required by *section 43-1-1103 (5)*. COLO. REV. STAT. 43-3-304 (2007) *Noncompete agreements*
Delaware	For purposes of facilitating these projects and to assist the contracting parties in the financing, development, construction leasing, maintenance and operation of such projects, the agreements may include provisions for the Department to exercise any powers conferred upon it by law, including but not limited to the lease of rights of way and airspace, granting of necessary easements and rights of access, power of eminent domain, granting of development rights and opportunities, issuance of permits or other authorizations, *protection from competition*, remedies in the event of default of either of the parties, granting of contractual and real property rights, liability during construction and the term of the lease, and the authority to negotiate acquisition of rights of way in excess of appraised value. DEL. CODE ANN. tit. 2 § 2005 (2008) *Exercise of Department's powers* (b) *Miscellaneous.* -- An agreement may include any contractual provision that is necessary to protect the project revenues required to repay the costs incurred to study, plan, design, finance, acquire, build, install, lease, operate, enforce laws, and maintain the transportation system including, but not limited to, a traffic guarantee, an equity guarantee or insurance provided that such provision will not unreasonably prohibit the development of essential public transportation systems and facilities. DEL. CODE ANN. tit *§ 2009* (2008)
North Carolina	Maintenance of nontoll routes. The Department shall maintain an existing, alternate, comparable nontoll route corresponding to each Turnpike Project constructed pursuant to this Article. N.C. GEN. STAT.§ 136-89.197 (2007).

Table 9.1 Statutory Provisions Relating to "Competing Facilities"	
State	**Statute**
Texas	A statute, S.B. 792 – which passed in 2007, amends the Texas Transportation Code to require approval from the commissioners court of the county in which the majority of the project is located that acknowledges that the comprehensive development agreement may contain penalties for the construction of future competing transportation projects that are acquired or constructed during the term of the comprehensive development agreement; and knowing of those potential penalties, agrees that the department should execute the comprehensive development agreement[7]. TEX. TRANSP. CODE ANN. § 223.210(k) (2007)

Table 9.2 Contract "Revenue Impacting Facilities" Provisions		
Agreement	**Relevant Provision**	**Methodology**
Indiana Toll Road	14.1(e), 1.1	**Competing Highway.** Concessionaire is entitled to compensation for an actual decrease in net revenue directly attributable to the opening of a "competing highway." A "competing highway" must be continuously within ten miles of the ITR for at least 20 miles. US-20 will only qualify as a "competing highway" if it is improved within the first 25 years of the concession. Additionally, all 20 miles of the upgraded US-20 need to be newly upgraded in order to satisfy the requirement, portions of US-20 that were already freeway will not count.
Pocahontas Parkway/ Transurban Concession	12.01, 13.07, 13.08, Exh. A	**Competitive Transportation Facilities.** Department shall be obligated to compensate the operator in an amount equal to the net revenue impact proximately caused by development of a Competitive Transportation Facility. Competitive Transportation Facilities are defined as any State Highway, expressway, freeway or limited access highway crossing of the James River (a) which is within three miles of the centerline of the project's bridge crossing of the James River; (b) which is first placed into service after the closing date; and (c) the operation of which could reasonably be foreseen to have a materially adverse impact on the annual amount of toll revenues.
SH-121	11.3, 11.3.2	**Competing Facilities.** These would have been defined as (1) any newly constructed, limited access main lane of a highway, (2) any newly constructed lanes of a frontage road or (3) any newly constructed grade separation at the intersection of a frontage road with another surface highway or road, which in each case TxDOT or the state or a private entity pursuant to a contract with TxDOT or the state builds

[7] S.B. 792, 80th LEG. SESS. (Tex. 2007)

Table 9.2 Contract "Revenue Impacting Facilities" Provisions		
Agreement	**Relevant Provision**	**Methodology**
		within the airspace and opens to traffic during the term, except the following: (a) The main lanes, frontage roads and, if applicable, frontage road grade separations that are part of the original scope of the Project; (b) Segment 5 in, or materially similar to, the basic configuration approved under the NEPA Approval; (c) A Capacity Improvement that Developer builds, or that Developer is obligated to build under Exhibit 18 to the Agreement but has not built; or (d) A Capacity Improvement for which TxDOT grants to Developer the exclusive right to operate, toll and maintain during the balance of the Term under the terms and conditions of the CDA Documents. **Compensation.** The compensation amount TxDOT would owe to the developer on account of the competing facility would be equal to the loss of toll revenues, if any, attributable to the competing facility less the increase in toll revenues, if any, attributable to (a) other competing facilities, and (b) future additions or expansions of access points to the main lanes of the project by TxDOT or a governmental entity that are not included as part of the work (except Segment 5), in each case if they are in operation at the time developer first delivers its claim for compensation to TxDOT.
SH-130 5&6	11.3.2	**Compensation.** The compensation amount TxDOT would owe to the developer on account of the competing facility shall be equal to the loss of toll revenues, if any, attributable to the competing facility less the increase in toll revenues, if any, attributable to (a) other competing facilities, but only to the extent that the amount of any such reduction has not been previously recognized under Section 13.2.3.4, (b) any direct southern extension to SH 130 in operation at the time developer first delivers its claim for compensation to TxDOT or (c) any prior decrease in the maximum daytime posted speed limit for passenger vehicles on all or a substantial portion of I-35 where it runs generally parallel to the facility below the maximum daytime posted speed limit on the setting date. For purposes of the foregoing clause (c), temporary decreases, lasting ten days or less, in the maximum daytime posted speed limit for construction, maintenance, expansion or diversions shall not be considered. **Competing Facilities.** Defined as any newly constructed or materially expanded highway project that is built and opened to traffic during the Term: (a) By TxDOT or the state or by a private entity pursuant to a contract with TxDOT or the state; or (b) By any other governmental entity or by a private entity

Table 9.2 Contract "Revenue Impacting Facilities" Provisions		
Agreement	**Relevant Provision**	**Methodology**
		pursuant to a contract with the governmental entity, but only where the Texas Transportation Commission or TxDOT has discretionary authority to effectively prevent its construction or opening to traffic or to control its location; excluding, however, in each case, the following: (i) All those highway projects excluded by statutes in effect on the effective date; (ii) All highway projects included in any of the long range transportation plans and programs set forth in Exhibit 17 to the agreement; (iii) All highway projects located outside the Competing Facilities Zone set forth in Exhibit 17 to the agreement, and all projects located inside the competing facilities zone that are specifically listed as exclusions in Exhibit 17; (iv) All transportation projects and facilities that are not highway projects, including passenger and freight rail facilities; (v) Any and all frontage roads, except as otherwise set forth in Exhibit 17 to the agreement; (vi) All work and improvements on highway projects necessary for improved safety, maintenance or operational purposes; (vii) All high occupancy vehicle exclusive lane additions, or other work, on any highway project required by environmental regulatory agencies; (viii) Any work and improvements undertaken to increase traffic capacity by modifying already-constituted highway projects through the installation of traffic sensors, metering devices, Intelligent Vehicle Highway System equipment or other intelligent transportation systems, through intersection grade separations, or localized operational improvements through the restriping of traffic lanes, medians and shoulders, including restriping that adds lanes; (ix) Capacity improvements (including the addition of truck lanes) to the facility, unless such improvements are required by TxDOT change prior to the second trigger event regarding mandatory capacity improvements set forth in Section 5 of Exhibit 18 to the agreement, and are operated by TxDOT or a person other than developer; and (x) If the Trans Texas Corridor 35 is within the competing facilities zone but does not include the Facility, the development of truck lanes or other facilities on Trans Texas Corridor 35 through self-performance by developer or an affiliate.
IH-635		**Unplanned Revenue Reducing Facilities** means any newly

Table 9.2 Contract "Revenue Impacting Facilities" Provisions		
Agreement	**Relevant Provision**	**Methodology**
		constructed, limited access main lane of a highway which TxDOT, or an entity pursuant to a contract with TxDOT and on TxDOT's behalf, builds within the airspace and opens to traffic during the term, excluding, however, the following: (a) All those limited access highway projects excluded by statutes in effect on the effective date; (b) All projects included in any of the long range transportation plans and programs set forth in Exhibit 18 to the agreement; (d) The managed lanes and general purpose lanes that are part of the original scope of the project; (f) A capacity improvement that developer builds; (g) A capacity Improvement for which TxDOT grants to developer the exclusive right to operate, toll and maintain during the balance of the term under the terms and conditions of the CDA documents; (h) All work and improvements on highway projects necessary for improved safety, maintenance or operational purposes; (i) All high occupancy vehicle exclusive lane additions, or other work, on any highway project required by environmental regulatory agencies; (j) Any work and improvements undertaken to increase traffic capacity by modifying already-constituted highway projects through the installation of traffic sensors, metering devices, Intelligent Vehicle Highway System equipment or other intelligent transportation systems, through new or improved frontage roads, crossing streets or crossing street by-pass lanes, through intersection grade separations, or localized operational improvements through the restriping of traffic lanes, medians and shoulders, including restriping that adds lanes; and (k) All transportation projects and facilities that are not specifically newly constructed, limited access main lanes of a highway, including passenger and freight rail facilities and other modes of transportation not included in the project. **Compensation.** The compensation amount, if any, owing from TxDOT to developer on account of the unplanned revenue impacting facility shall be equal to the loss of toll Revenues, if any, attributable to the unplanned revenue impacting facility less the increase in toll revenues, if any, attributable to (a) the unplanned revenue impacting facility, and (b) future additions or expansions of access points to the managed lanes by TxDOT or a governmental entity that are not included as part of the work if they are in operation at the time developer first delivers its claim for compensation to TxDOT. The compensation amount also shall include (i) the loss of toll revenues due to traffic disruption during, and

Table 9.2 Contract "Revenue Impacting Facilities" Provisions		
Agreement	**Relevant Provision**	**Methodology**
		directly caused by, construction, reconstruction, renewal, replacement or expansion activities for the unplanned revenue impacting facility and (ii) the increase in developer's costs directly caused by construction or operating activities for the unplanned revenue impacting facility. The foregoing compensation amount, if any, shall be determined in the same manner, and subject to the same conditions and limitations, as for a compensation event under Section 13.2; as well as the procedures in this Section.
I-495 HOT Lanes	Section 9.02	**Project Enhancements by the Department** (c) Notwithstanding the foregoing Section 9.02(a) and (b), but subject to Section 9.02(f), if the department determines that additional traffic lanes on the Capital Beltway Corridor are in the state's best interests, the department shall consult with the concessionaire as to an appropriate strategy to implement such additional traffic lanes on the Capital Beltway Corridor or, at the department's sole discretion, permit the construction of additional lanes as part of the project with a view to minimizing any detrimental impact on the project or its ability to generate revenues, and the department will give the concessionaire the opportunity to submit a proposal to construct new HOT lanes or toll lanes at the concessionaire's sole cost as a concessionaire project enhancement so long as the concessionaire demonstrates that it has or can obtain all required regulatory approvals for such project enhancement with appropriate assistance from the department. In the event that the concessionaire determines not to pursue the construction of new HOT Lanes or toll lanes or the department does not approve such project enhancement, and the department adds additional traffic lanes (whether general purpose or tolled), such additional traffic lanes shall be a department project enhancement. (d) The department shall have unfettered rights to finance, develop, approve, expand, improve, modify, upgrade, add capacity to, reconstruct, renew and replace any existing and new transportation or other facilities. In no event shall the taking of any such action by the department constitute a default by the department under this agreement. The department shall also have the right, without liability (other than any obligation to pay any such compensation required hereby), to make discretionary and non-discretionary distributions of federal and other funds for any transportation projects (including any additional traffic lanes) and programs, and the planning thereof, and exercise all of its authority to advise and recommend on transportation planning, development and funding, and to otherwise improve the GP lanes and other roadways and structures within or adjacent to the Capital Beltway Corridor.

Table 9.2 Contract "Revenue Impacting Facilities" Provisions		
Agreement	**Relevant Provision**	**Methodology**
		(j) **Compensation.** If any department project enhancement carried out pursuant to Section 9.02(a),(b) or (c) results in concessionaire damages, such department project enhancement shall constitute a compensation event and the department shall compensate the concessionaire in accordance with Sections 13.02 and 13.03, and any positive revenue resulting from department project enhancements shall be shared equally between the concessionaire and the department, and the department's share shall be paid by the concessionaire and deposited in the project enhancement account, in accordance with Sections 13.02 and 13.03, in addition to and without regard to amounts payable under Article 5; provided, that in the case of additional traffic lanes (i) if an aggregate of two or fewer additional traffic lanes have been added, concessionaire damages shall not be payable with respect to any period after the HOT lanes project has achieved the base case second level targeted rate of return, and (ii) if an aggregate of more than two additional traffic lanes have been added, concessionaire damages shall not be payable with respect to any period after the HOT lanes project has achieved the base case third level targeted rate of return; and provided further, that nothing herein shall limit the department's ability to operate, maintain or improve the GP lanes in any respect or, except as expressly provided above, give rise to a compensation event or any payment of concessionaire damages with respect thereto.
Chicago Skyway	None	

10. What criteria should be used to select appropriate projects for PPPs?

Solicited and Unsolicited Proposals

Most states that authorize PPPs allow the responsible public entity to solicit PPPs through a formal request for proposals process. This approach assumes that the responsible public entity will evaluate its projects in the planning stage to determine which of them may be appropriate for a PPP, taking into account its project priorities, project feasibility, as well as the agency's relative capabilities to complete the project on its own.

Some states also permit consideration of unsolicited proposals. These provisions enable the private sector to propose innovative solutions to infrastructure challenges that the normal state planning processes might not have produced. The proposals must satisfy the criteria outlined in the governing statutes and regulations, and be consistent with the state's overall transportation, environmental or other plans. The public entity does not have any obligation to accept an unsolicited proposal. If the entity is interested in pursuing the proposal, applicable laws or regulations will typically require issuance of a request for competitive proposals to enable interested qualified teams to prepare meritorious competing proposals.

State laws that permit unsolicited proposals, or invite undesignated project proposals, such as Virginia's PPTA and California's (now expired) AB 680 gave rise to the earliest PPPs. Statutes authorizing unsolicited proposals prescribe the information that has to be submitted by proposers and the criteria to be applied by the public sector in approving any proposal. See Colorado, Georgia, Oregon and Virginia in Table 10.1.

Screening Processes

Georgia, North Carolina and Oregon have developed screening processes for selecting PPP projects. North Carolina's PPP guidelines, for example, provide that the North Carolina Turnpike Authority should give priority to:

- Projects for which a private partner's investment will fulfill a critical financial need.
- Projects that will address an urgent state or regional identified transportation need in a manner that will materially advance the project delivery time-frame in light of available levels of current or anticipated levels of funding and existing transportation plans.
- Projects for which planning, reliable feasibility determinations, comparable, successful prior projects or case studies demonstrate a strong potential to attract private investment.

- Projects for which there is a demonstration of clear and substantial public support.
- Projects that will benefit from innovative construction approaches that will result in shorter build time, reduced construction cost or improved function in comparison to conventional approaches.

Oregon's screening criteria are similar:

- Projects that will address an urgent or state-identified transportation need in a manner that will materially advance the project delivery time-frame in light of current or anticipated levels of funding and existing transportation plans.
- Projects that use primarily rights-of-way and publicly-owned real property that already are owned or under the long-term control of the Oregon DOT or other public entities that have authority to put the real property to the use proposed.
- Projects for which planning, reliable feasibility determinations, comparable, successful prior projects or case studies demonstrate a strong potential to attract or generate a substantial contribution of non-state or non-tax resources to pay project cost items like capital, operation and maintenance, and provide a reasonable return on that investment in terms of:
  - a private partner's investment, if any, and
  - transportation benefits to the public.
- Projects for which planning, reliable feasibility determinations, comparable, successful prior projects or case studies demonstrate a low risk of failure (in terms of the completion of infrastructure improvements and the attraction or generation of a substantial contribution of non-state or non-tax resources), practicable means of mitigating the risk of failure, or a high reward-to-risk ratio (in terms both of the benefits to the public and the private partner's investment incentive).
- Proposals that identify specific, reliable, confirmable and economically-viable, non-state or non-traditional sources of funding that will be available to supplement or replace state funding or other state resources for the project.
- Projects for which there is a demonstration of clear and substantial public support.
- Proposals that identify innovative construction approaches that will result in shorter build time, reduced construction cost or improved function in comparison to conventional approaches.

Table 10.1 Statutory and Project Guideline Selection Criteria

State	Statutes and Guidelines
Colorado	**Unsolicited and comparable proposals** (1) The department may consider, evaluate, and accept an unsolicited proposal for a public-private initiative only if the proposal complies with all of the requirements of this section. (2) The department may consider an unsolicited proposal only if the proposal: (a) Is innovative and unique; (b) Is independently originated and developed by the proposer; (c) Is prepared without department supervision;

Table 10.1 Statutory and Project Guideline Selection Criteria	
State	**Statutes and Guidelines**
	(d) Is not an advance proposal for a known department requirement that can be acquired by competitive methods unless: (I) The department has not established a timetable for satisfying the known requirement in either the state plan, as such term is defined in *section 43-1-1102 (7)*, or the statewide transportation improvement program that is the short-range element of the state plan; or (II) The proposal is likely to significantly shorten a timetable for satisfying the known requirement established in the state plan or the statewide transportation improvement program.*** (4) The department shall base its evaluation of the unsolicited proposal on the following factors: (a) Unique and innovative methods, approaches, or concepts demonstrated by the proposal; (b) Scientific, technical, or socioeconomic merits of the proposal; (c) Potential contribution of the proposal to the department's mission; (d) Capabilities, related experience, facilities, or techniques of the proposer or unique combinations of these qualities that are integral factors for achieving the proposal objectives; (e) Qualifications, capabilities, and experience of the proposed principal investigator, team leader, or key personnel who are critical in achieving the proposal objectives; and (f) Any other factors appropriate to a particular proposal.*** COLO. REV. STAT 43-1-1202 (2007)
Delaware	**Selection and approval.** (1) The projects shall be selected by a project committee, chaired by the Secretary, consisting of the Secretary, the Director of Financial Management and Budget, the Chief Engineer of the Department of Transportation, and up to 4 other persons to be appointed by the Secretary. The projects shall be selected without regard to the provisions of Chapter 69 of Title 29. Each proposal shall be weighed on its own merits and ranked according to the selection criteria stipulated in the request for proposals, provided that upon receipt of all proposals the project committee may group similar types of project proposals together for purposes of evaluation and selection, and provided further that the proposals selected by such committee from any such group of proposals must be those with the highest ranking within that group, and provided further that such committee may elect not to select any proposals from an established group of proposals, and provided further that as to similar proposals or proposals that are mutually exclusive so that the undertaking of one would preclude the need, desirability, or ability of undertaking the other, only the proposal with the highest ranking among such proposals shall be selected, and, subject to approval as set forth above, proceed to negotiations. Each of the agreements shall be negotiated individually as a stand-alone project. (2) Each selected project must be subsequently approved, within 45 days of its selection, by both (i) the directly affected metropolitan planning organization(s) and (ii) the Council on Transportation established pursuant to § 8409 of Title 29 or its successor, in that order. If a directly affected metropolitan planning organization approves a selected project, it shall be deemed to have given its approval to amend the Transportation Improvement Program to include such project. If the Council on Transportation approves a selected project, it shall be deemed to have given its approval to amend the Capital Improvements Program to include such project. Approval for each selected project by the affected metropolitan planning organization and the Council on Transportation shall be based solely upon the project's compatibility with State and regional transportation plans, compliance with applicable laws and regulations, and fiscal impact upon the State Capital Improvement Program or regional Transportation Improvement Program. If either organization disapproves a project, it shall set forth in writing its reasons for doing so. If neither approval nor disapproval is granted within 45 days after such proposal was delivered to any affected metropolitan planning organization

Table 10.1 Statutory and Project Guideline Selection Criteria	
State	**Statutes and Guidelines**
	or the Council on Transportation, such proposal shall be deemed approved by those organizations. Moreover, in the event that a project is disapproved as provided above, the Department may resubmit the plan or revise version thereof no sooner than 60 days after notification that the plan has been disapproved by either party. (3) The Secretary shall promptly notify the Co-chairs of the Joint Bond Bill Committee of the Delaware General Assembly when a project has been duly selected by the project committee. After the Co-chairs' receipt of such notice, the Co-chairs shall meet and either approve or reject the project. Upon their approval of the project, it shall be deemed as an amendment to the Capital Improvements Program for the fiscal year in which the approval is granted. DEL. CODE ANN. tit. 2 2003 (2008)
Florida	**Public-private transportation facilities.** Before approval, the department must determine that the proposed project: (a) Is in the public's best interest; (b) Would not require state funds to be used unless the project is on the State Highway System; (c) Would have adequate safeguards in place to ensure that no additional costs or service disruptions would be realized by the traveling public and residents of the state in the event of default or cancellation of the agreement by the department; (d) Would have adequate safeguards in place to ensure that the department or the private entity has the opportunity to add capacity to the proposed project and other transportation facilities serving similar origins and destinations; and (e) Would be owned by the department upon completion or termination of the agreement. FLA. STAT. ANN § 334.30 (2008).
Georgia	**Unsolicited Proposals.** The department may consider an unsolicited proposal only if the proposal: (1) Is unique and innovative in comparison with and is not substantially similar to other transportation system projects already in the state transportation improvement program within the department or, if it is similar to a project in the state transportation improvement program, that such project has not been fully funded by the department or any other entity as of the date the proposal is submitted. Unique or innovative features which may be considered by the department in evaluating such a proposal may include but not be limited to unique or innovative financing, construction, design, or other components as compared with other projects or as otherwise defined by department rules or regulations;*** (h) The department shall base its evaluation of the original proposal or comparable proposals on the following factors: (1) Unique and innovative 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 proposer as described in the proposal 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 in achieving the proposal objectives; and (6) Any other factors appropriate to a particular proposal. **Solicited Procedures for Public Private Initiative Proposals**

Table 10.1 Statutory and Project Guideline Selection Criteria	
State	**Statutes and Guidelines**
	The Department upon notice to the Governor may solicit for a public-private initiative proposal. All proposals must comply with the requirements of Code Section 32-2-79 and the Board Rule and Policy. Prior to soliciting proposals for Public Private Initiatives the Department will determine which projects are best suited for solicitation using the following screening process. **Screening Process For Determining Solicited Projects.** The procedure for determining the best suited projects for a solicited PPI will be as follows: 1. The Department will create a list of potential projects through brainstorming sessions. 2. The Department will have a 30 day public comment period to accept suggestions on solicitation of projects via the website: www.dot.state.ga.us/ppi. The Department may also elect to notify organizations that can provide valuable input to the process. 3. Based on the Department's screening criteria and consideration of the public comments, the Department will determine which projects are feasible for either a conceptual or detailed solicitation. The Department will advertise for solicited proposals for those projects that have been identified as feasible.
North Carolina	**Proposal Solicitation and Alternative Contracting Guidelines.** Laws applicable to the Authority; exceptions (c) Alternative Contracting Methods. -- Notwithstanding the provisions of subsection (b) of this section, the Authority may authorize the use of alternative contracting methods if: (1) The authorization applies to an individual project; (2) The Authority has concluded, and documented in writing, that the alternative contracting method is necessary because the project cannot be completed utilizing the procedures of Article 2 of this Chapter within the necessary time frame or available funding or for other reasons the Authority deems in the public interest; (3) The Authority has provided, to the extent possible, for the solicitation of competitive proposals prior to awarding a contract; and (4) The approved alternative contracting method provides for reasonable compliance with the disadvantaged business participation goals of G.S. 136-28.4. North Carolina has adopted guidelines on this area, which provide that: In selecting projects for which to solicit proposals NCTA will give precedence to projects that will satisfy one or more of the following: • Projects for which a private partner's investment will fulfill a critical financial need. • Projects that will address an urgent state-or regional identified transportation need in a manner that will materially advance the project delivery time-frame in light of available levels of current or anticipated levels of funding and existing transportation plans. • Projects for which planning, reliable feasibility determinations, comparable, successful prior projects or case studies demonstrate a strong potential to attract private investment. • Projects for which there is a demonstration of clear and substantial public support. • Projects that will benefit from innovative construction approaches that will result in shorter build time, reduced construction cost or improved function in comparison to conventional approaches. N.C. TURNPIKE AUTH. POLICY ON PPPS (2006) available at http:www/ncturnpike.org/pdf/PPP_Policy.pdf.

11. How can competition be assured, and the procurement process be made fair and transparent?

Transparency in public contracting is always a key issue. States address transparency and proposal disclosure in statutes and regulations that relate both to the procurement process, and the public meetings that are a vital part of the comprehensive planning process.

PPP Procurement Processes

PPPs require flexibility in the procurement process because PPP agreements include provisions for design, operations, maintenance, and financing, in addition to construction. Public agencies need to be able to select a procurement process that is most appropriate for a particular project. For example, PPP procurements might include calls for projects, competitive review of proposer qualifications to undertake the project, competitive review of conceptual project and financial proposals, and selection based on best overall value, not lowest price. Best overall value would include short and long-term benefits of the competing proposals.

To effectuate such procurements, exemptions from certain provisions of traditional low-bid "design-bid-build" procurement laws are provided. In evaluating proposals and awarding a contract, the government sponsor needs to be able to take into account not just the proposed capital cost, but also the value of the commitments made by the private partner, risks associated with the proposal, and public policy issues.[8]

State PPP laws, regulations and guidelines typically call for a two-step procurement process using procedures modeled after practices and procedures that have been used successfully at the federal level.[9] Proposers must first demonstrate their qualifications to undertake a project based on relevant experience in development, design, construction, financing and/or operation of projects with attributes similar to the project being procured, the financial resources they bring to the undertaking, and their legal structure. Then project owners issue a request for proposals to the shortlist of qualified firms, receive and evaluate proposals, and make an award to the firm that submitted the best value proposal.

Low-bid procurement processes, involving award of construction contracts based solely on price, generally contemplate that bids will be made public upon opening. However, where proposals are evaluated based on a range of technical issues – as well as price – the evaluation process can take several days, even

[8] Virginia's Public-Private Partnerships Act lists non-price factors that may be considered in evaluating proposals. VA. CODE ANN. §56-573.1 (2008).
[9] Federal Acquisition Regulations for Construction and Architect-Engineer Contracts, 48 CFR 36.301 (2007)

weeks. In order to maintain the integrity of the process – especially where a second round of "best and final offers" may be sought – it is critical that the agency be able to maintain the confidentiality of the proposals during the review process.[10] Many agencies make the RFP public, including proposed contract terms. Following actual execution of the contract, almost all agencies make the procurement documents immediately available to the public on their websites. Documents include the final executed contracts, the proposals and relevant valuation information with the exception of proprietary data, such as private companies' financial statements.

Where unsolicited proposals are put out for competition, competitors need to know enough about the initial proposal to address essentially the same project. States have taken a variety of approaches with respect to how much of the initial proposal is described in the request for competition. To encourage innovative proposals, sponsoring agencies need to be able to protect the unique intellectual property of the initial proposal from unfair use by other firms preparing competitive proposals.

State Requirements the Projects Benefit the Public

Many state laws enabling PPPs contain explicit requirements that the sponsoring public agencies consider the public interest when deciding whether to pursue a project. Florida law explicitly requires that PPPs serve the public interest. The Florida DOT has authority to impose on proposers whatever requirements it determines are in the public interest. Georgia DOT is charged with determining whether each proposal benefits the public. Virginia's authorizing legislation charges responsible public agencies with making sure the proposal serves the public purpose of the PPTA. Texas provides project-specific guidelines in requests for proposals to maximize the performance of projects and the overall benefit to the state. Oregon DOT's evaluation criteria evaluate transportation benefits to the public at large, benefits to local communities, community support and public involvement initiatives. These provisions are identified in Tables 11.1 and 11.2.

Public Involvement and Support

States engage the public in their planning processes through public hearings and give the public opportunities to comment on proposed transportation projects at various stages in their development. Georgia law creates several opportunities for stakeholders to comment. In the unsolicited process, there is a 15-day comment period prior to the approval of the letter of intent to negotiate, and before executing the contract for a PPP. The department publishes a notice for public comment in a newspaper of general circulation and/or legal organ, as well as on the department's website. The Georgia DOT also provides a 30-day public

[10] See, e.g., Texas TRANSP. CODE ANN. § 223.204 (2007); OR REV. STAT §367.806(2007).

comment period when deciding which projects are feasible for solicitation as PPPs.

Virginia's requirements for public notice and comment under the PPTA are codified in VA. CODE. ANN. § 56-573.1:1 . Additional detail on the 60-day public comment process can be found in the Virginia PPTA Implementation Guidelines.[11] Oregon's program requires that prior to the conclusion of the evaluation process, ODOT solicit comments and share information about the proposal with local governments, metropolitan planning organizations and area commissions on transportation. In their evaluation guidelines, Georgia, Virginia, and Oregon all stress the importance of public support for the success of a proposal. States also provide opportunities for public comment on these proposals via the NEPA process.

Table 11.1 Statutory Solicited Proposal Requirements

State	Statute or Guidelines
California	Notwithstanding Chapter 10 (commencing with Section 4525) of Division 5, or Part 2 (commencing with Section 10100) or Part 3 (commencing with Section 20100) of Division 2 of the Public Contract Code, the governmental agency soliciting proposals and entering into agreements with private entities for the studying, planning, design, developing, financing, construction, maintenance, rebuilding, improvement, repair, or operation, or any combination thereof, by private entities for fee-producing infrastructure projects shall ensure that the contractor is selected pursuant to a competitive negotiation process. The competitive negotiation process shall utilize, as the primary selection criteria, the demonstrated competence and qualifications for the studying, planning, design, developing, financing, construction, maintenance, rebuilding, improvement, repair, or operation, or any combination thereof, of the facility. The selection criteria shall also ensure that the facility be operated at fair and reasonable prices to the user of the infrastructure facility services. The competitive negotiation process shall not require competitive bidding. The competitive negotiation process shall specifically prohibit practices that may result in unlawful activity including, but not limited to, rebates, kickbacks, or other unlawful consideration, and shall specifically prohibit governmental agency employees from participating in the selection process when those employees have a relationship with a person or business entity seeking a contract under this section that would subject those employees to the prohibition of Section 87100. Other than these criteria and applicable provisions related to providing security for the construction and completion of the facility, the governmental agency soliciting proposals is not subject to any other provisions of the Public Contract Code or this code that relates to public procurements. CAL. GOV'T CODE§ 5956.5 (2007).

[11] Virginia PPTA Implementation Guidelines (2005), available at http://www.virginiadot.org/business/resources/PPTAGuidelines.pdf

Table 11.1 Statutory Solicited Proposal Requirements	
State	**Statute or Guidelines**
Colorado	(1) Notwithstanding any other law, the department may: (b) Solicit proposals for public-private initiatives as competitive sealed proposals pursuant to *section 24-103-203, C.R.S.*; (c) Consider and accept unsolicited proposals pursuant to *section 43-1-1203*; COL. REV. STAT §43-1-1202(1)(b) (2007)
Delaware	(1) The Secretary shall solicit proposals through a request for proposals pursuant to Chapter 69, Title 29, accompanied by material explaining of the Public-Private Initiatives Program enacted hereunder and describing the selection process and criteria. The Secretary may identify in these requests for proposals specific systems, corridors or routes for improvement. (2) Alternatively, potential projects may be identified and proposed by any potential contracting party. Such unsolicited proposals will also be accepted provided they satisfy the criteria outlined in accordance with this chapter. In the event that an unsolicited proposal is deemed in compliance with this chapter and accepted for review, the Secretary shall publicly announce, not less than once a week for 2 consecutive weeks in a newspaper published or circulated in each county of the State, the acceptance of the unsolicited proposal along with a detailed description of the unsolicited proposal, and shall provide 60 days within which other interested parties may submit proposals relating to the same subject. DEL. CODE ANN, title 2 §2003(c)(1)-(2) (2008)
Florida	Before approval, the department must determine that the proposed project: (a) Is in the public's best interest; (b) Would not require state funds to be used unless the project is on the State Highway System; (c) Would have adequate safeguards in place to ensure that no additional costs or service disruptions would be realized by the traveling public and residents of the state in the event of default or cancellation of the agreement by the department; (d) Would have adequate safeguards in place to ensure that the department or the private entity has the opportunity to add capacity to the proposed project and other transportation facilities serving similar origins and destinations; and (e) Would be owned by the department upon completion or termination of the agreement. FLA. STAT. ANN. §334.30(1) (2008)
Georgia	The department shall base its evaluation of the original proposal or comparable proposals on the following factors: (1) Unique and innovative 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 proposer as described in the proposal 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 in achieving the proposal objectives; and (6) Any other factors appropriate to a particular proposal. GA. CODE ANN. § 32-2-79 (2008)

Table 11.1 Statutory Solicited Proposal Requirements	
State	**Statute or Guidelines**
Mississippi	A governmental entity shall publish a request for competing proposals and qualifications in a newspaper having a general circulation within such governmental entity or, if the governmental entity is the Mississippi Transportation Commission, shall publish the request in a newspaper having a general circulation at the seat of government and, if the governmental entity has a Web site, shall post the request on such Web site. Such request shall include the criteria used to evaluate the proposals, the relative weight given to the criteria and a deadline by which proposals must be received.
Oregon	(3) In evaluating unsolicited proposals and in selecting projects for which to solicit proposals under *OAR 731-070-0240*, ODOT will give precedence to proposals and projects that will satisfy one or more of the following policies: (a) Projects that will address an urgent or state-identified transportation need in a manner that will materially advance the project delivery time-frame in light of current or anticipated levels of funding and existing transportation plans. (b) Projects that use primarily rights-of-way and publicly-owned real property that already are owned or under the long-term control of ODOT or other public entities that have authority to put the real property to the use proposed. (c) Projects for which planning, reliable feasibility determinations, comparable, successful prior projects or case studies demonstrate a strong potential to attract or generate a substantial contribution of non-state or non-tax resources to pay project cost items like capital, operation and maintenance, and provide a reasonable return on that investment in terms of: (A) A private partner's investment, if any; and (B) Transportation benefits to the public. (d) Projects for which planning, reliable feasibility determinations, comparable, successful prior projects or case studies demonstrate a low risk of failure (in terms of the completion of infrastructure improvements and the attraction or generation of a substantial contribution of non-state or non-tax resources), practicable means of mitigating the risk of failure, or a high reward-to-risk ratio (in terms both of the benefits to the public and the private partner's investment incentive). (e) Proposals that identify specific, reliable, confirmable and economically-viable, non-state or non-traditional sources of funding that will be available to supplement or replace state funding or other state resources for the project. (f) Projects for which there is a demonstration of clear and substantial public support. (g) Proposals that identify innovative construction approaches that will result in shorter build time, reduced construction cost or improved function in comparison to conventional approaches. OR. ADMIN. R. 731-070-005 to 360 (2008) and OR. ADMIN. R. 731-070-0020 (2008) General Selection Policies
Virginia	The Department may solicit proposals. An SFP (Solicitation for Proposal) may invite private entities to propose to develop and/or operate either projects of their own choosing or Department specified transportation facilities in specific locations. Whether an SFP is for a general solicitation or for a specific project, proposers are encouraged to propose innovative solutions to the needs of the

Table 11.1 Statutory Solicited Proposal Requirements	
State	**Statute or Guidelines**
	state and local transportation plans. SFPs will outline the minimum qualifications and project selection criteria including any unique capabilities or qualifications which would be required of the proposer. The SFP will outline the independent process(es) for environmental review and compliance and will include requirements that, (1) any improvements must comply with the terms and conditions of the environmental review(s), and (2) reimbursement for any at-risk preliminary work performed by the proposer is contingent on completion of the environmental review process and any specific provisions within an executed interim or comprehensive agreement. Pre-proposal conferences may be held, as deemed appropriate, and notice of such will be provided in the SFP. Proposers will be instructed as to the format in which to submit proposals and what minimum information and materials, must be submitted in order for the proposal to be considered complete. Proposals will be evaluated in a six-step process: 5.1.1 Phase One: Quality Control 5.1.2 Phase Two: Independent Review Panel 5.1.3 Phase Three: Oversight Board Recommendation 5.1.4 Phase Four: Submission and Selection of Detailed Proposal. 5.1.5 Phase Five: Negotiations 5.1.6 Phase Six: Interim and/or Comprehensive Agreement According to: 6.0 Proposal Evaluation and Selection Criteria 6.1 Qualifications and Experience 6.2 Project Characteristics 6.3 Project Financing 6.4 Public Support Virginia PPTA Implementation Guidelines §3.1 (2005), *available at http://www.virginiadot.org/business/resources/PPTAGuidelines.pdf.*

Table 11.2 Statutory Unsolicited Proposal Requirements	
State	**Statute**
Colorado	The department shall base its evaluation of the unsolicited proposal on the following factors: (a) Unique and innovative methods, approaches, or concepts demonstrated by the proposal; (b) Scientific, technical, or socioeconomic merits of the proposal; (c) Potential contribution of the proposal to the department's mission; (d) Capabilities, related experience, facilities, or techniques of the proposer or unique combinations of these qualities that are integral factors for achieving the proposal objectives; (e) Qualifications, capabilities, and experience of the proposed principal investigator, team leader, or key personnel who are critical in achieving the proposal objectives; and

Table 11.2 Statutory Unsolicited Proposal Requirements	
State	**Statute**
	(f) Any other factors appropriate to a particular proposal. COLO. REV. STAT §42-1-1203(4) (2007)
Georgia	The department shall base its evaluation of the original proposal or comparable proposals on the following factors: (1) Unique and innovative 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 proposer as described in the proposal 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 in achieving the proposal objectives; and (6) Any other factors appropriate to a particular proposal. GA. CODE ANN. §32-2-79(f). (h) (2008)
Oregon	ODOT will consider an unsolicited proposal only if the proposal: (a) Is unique or innovative in comparison with and is not substantially duplicative of other transportation system projects included in the state transportation improvement program within the Department or, if it is similar to a project in the state transportation improvement program, the project has not been fully funded by ODOT or any other public entity as of the date the proposal is submitted, or the proposal offers an opportunity to materially advance or accelerate the implementation of the project. Unique or innovative features which may be considered by ODOT in evaluating such a proposal may include but are not limited to unique or innovative financing, construction, design, schedule or other project components as compared with other projects or as otherwise defined by ODOT rules or regulations; *** Includes all information required by and is presented in the format set in *OR. AMIN. R. 731-070-0050* (2008) (4) Submission of Unsolicited Conceptual Proposal
Virginia	The PPTA permits responsible public entities to receive, evaluate and select for negotiations unsolicited proposals from private entities to develop and/or operate qualifying transportation facilities. The Department will evaluate unsolicited proposals whenever received so long as the proposals meet the requirements of the Act and these guidelines. Generally, the Department will give priority to the evaluation of solicited proposals. Upon receipt of an unsolicited proposal and a subsequent determination by the Department that the unsolicited proposal, as submitted or amended, meets quality control criteria, the requirements of law and these guidelines, the Department will post a notice as noted earlier in these guidelines, in consultation with the Secretary, in a public area it normally uses for posting of public notices and will publish the same notice in one or more newspapers or periodicals of general circulation as appropriate to notify proposers who might be interested. ** The Department will make available the entire proposal except for those portions that would clearly and adversely affect the financial, competitive, or bargaining position of the Department and/or the proposer as determined by the Department at its sole discretion.

12. How can the public sector be protected in the event of the private partner's default or bankruptcy?

PPP agreements typically enumerate the events that would constitute a default on the part of the concessionaire, including failure to meet completion deadlines in the contract, failure to comply with operating standards, failure to make payments when due, violation of representations and warranties, breaches of express covenants, and events of bankruptcy. The occurrence of such defaults – absent a timely cure by the concessionaire or its lenders – would then permit the public owner to exercise any one of a broad array of remedies. Remedies typically include acting to remedy the default and charging the cost back to the concessionaire, seeking monetary damages, exercising equitable remedies, and ultimately terminating the contract.

The public entity can also make claims against any security provided by the concessionaire under the contract, including performance bonds (for construction and/or operation), parent guarantees and letters of credit for specific obligations (routine O&M, renewal and replacement work and handback work). The public entity may also have recourse to reserves required under the contract. In addition, the owner may be able to impose liquidated damages for specific events related to delays or underperformance.

The owner's interests in a default situation will often be aligned with those of the concessionaire's lenders. Lenders have strong incentives to avoid a contract termination by the government owner. In order to protect their interests, agreements generally require that the lenders be given notice of the occurrence of a default and an opportunity to cure it themselves or provide a substitute operator satisfactory to the owner.

Continuation of Toll for Benefit of Secured Parties

Concession contracts typically provide that the public sponsor can terminate the agreement and either contract with another entity to operate the facility or step in and operate the facility itself if the concessionaire materially defaults in carrying out its obligations or becomes bankrupt or insolvent. As a result, some state statutes address the issue of whether the governmental entity or a substitute operator can continue to impose user fees after termination of the original agreement, as well as the use of such tolls to satisfy the liens of the original concessionaire's lenders.[12]

Termination for Public Convenience

Some public agencies expressly retain the right to terminate a contract "for public convenience" when they deem it advisable, as a result of changed circumstances or a change in public policy. These provisions, however, generally require that the public sector pay "fair value" to the private operator, as would be the case in a condemnation proceeding.

[12] See, e.g., VA CODE ANN §56-568 (2008).

Table 12.1 Contractual Bankruptcy and Default Provisions		
Agreement	**Relevant Provision**	**Methodology**
Indiana Toll Road	16.1(b) Remedies upon concessionaire default. 16.1(a) outlines what events constitute default, bankruptcy is included in the list.	Upon concessionaire default, the Authority may, after providing notice to the concessionaire and the leasehold mortgagee, pursue any of the following remedies: Terminate the agreement with 60 days prior notice for failure to comply with the operating standards if the failure creates a safety hazard, impairment of the toll road's operation or its use for transportation purposes. Terminate the agreement, subject to the concessionaire's 60 day right to cure, for any other default. Make payment on the concessionaire's behalf and demand payment from the concessionaire within three business days. Attempt to cure faults by the concessionaire and demand reimbursement for the costs of such attempts, plus a 15% administrative fee, within three business days. Seek specific performance, injunction or other equitable remedies Seek to recover its losses arising from the default and exercise any recourse available to any person who is owed damages or a debt; Take and hold any of the concessionaire's goods situated on the toll road to compel payment Close any and all portions of the toll road; and Exercise any of its other rights and remedies provided for hereunder or at law or equity.
Pocahontas Parkway/ Transurban Concession	Section 17.02 Remedies Section 17.01 covers Operator default, subsection (e) deals with bankruptcy.	Upon concessionaire default, VDOT may, after providing notice to the concessionaire and the collateral agent, pursue any of the following remedies: Terminate the agreement with 60 days prior notice for failure to comply with the operating standards if the failure creates a safety hazard, impairment of the project's operation or its use for transportation purposes. Terminate the agreement, subject to the concessionaire's 60 day right to cure, for any other default. Make payment on the concessionaire's behalf and demand payment from the concessionaire within three business days. Attempt to cure faults by the concessionaire and demand reimbursement for the costs of such attempts, plus a 15% administrative fee, within three business days. Seek specific performance, injunction or other equitable remedies

Table 12.1 Contractual Bankruptcy and Default Provisions		
Agreement	**Relevant Provision**	**Methodology**
		Seek to recover its losses arising from the default and any amounts due and payable under the contract (including the concessionaire's obligation to pay interest at the bank rate from the date a payment is due until paid) and exercise any recourse available to any person who is owed damages or a debt; Terminate the concessionaire's right of possession of the project, re-enter and repossess the Project with or without terminating the Agreement Take and hold any of the Concessionaire's goods situated on the project to compel payment Close any and all portions of the project; and Exercise any of its other rights and remedies provided for hereunder or at law or equity.
SH-121	17.3 TxDOT Remedies for Developer Default	Upon concessionaire default, TxDOT could have terminated the agreement and taken possession and control of the project. If the concessionaire had closed the project or lanes of the project in violation of the contract, TxDOT could have entered and taken control of the project to reopen and continue operation, until either the concessionaire cured its breach or TxDOT terminated the contract. As long as TxDOT had acted in good faith in taking possession and control of the project, it would not have been liable for mistaken belief in a concessionaire's breach. If the concessionaire had failed to meet any safety standard or perform safety compliance, TxDOT could have undertaken or direct the concessionaire to undertake any work required to ensure compliance with safety standards. If TxDOT had performed work reasonably necessary to the ensure compliance with safety standards, the concessionaire would have been required to reimburse TxDOT its costs. If the concessionaire performed the work under written protest, and the work had later been found to be unnecessary, the work would have been treated as a TxDOT change order. If TxDOT had determined that the concessionaire had failed to meet safety standards and the failure had resulted in an emergency or danger to persons or property, and that the concessionaire had not been diligently taking all steps to deal with the danger or emergency, TxDOT could have either (a) taken action to rectify the danger or emergency and demanded reimbursement from the concessionaire, or (b) suspended construction and closed the portions of the project affected by the emergency or danger. If the concessionaire had failed to cure a default within the cure period, TxDOT could have stepped in to pay and perform all of the concessionaire's obligations that were in default. In doing so,

Table 12.1 Contractual Bankruptcy and Default Provisions		
Agreement	**Relevant Provision**	**Methodology**
		TxDOT could have employed security guards, architects, engineers and other contractors, drawn on performance and payment bonds and other forms of security, executed applications, certificates and other documents, taken control of and continued work on the project, directed and instructed contractors and suppliers, made payments to and resolve claims of contractors, subcontractors and suppliers, taken any other action necessary for the curing and prosecuted and defended any action incident to the work undertaken. Concessionaire would have reimbursed TxDOT for its costs related to curing, and granted TxDOT and its agents a right of entry into the project for such purposes. TxDOT's right's to terminate or suspend its obligations, or to step in to cure, would have been subject to the rights of the concessionaire's surety, lenders, and collateral agent to cure or assume and complete the work. Concessionaire defaults that were not completely cured within the cure period would have entitled TxDOT to draw on any letter of credit, guaranty or other performance security. TxDOT would have applied the proceeds to the satisfaction of developer's obligations under the contract, including payments due to TxDOT.
SH-130 5&6	17.3 TxDOT Remedies for Developer Default	Substantially similar to the provisions of the SH-121 contract.
635	17.3 TxDOT Remedies for Developer Default	Substantially similar to the provisions of the SH-121 contract.
I-495 HOT Lanes	Section 17.02 Department Remedies upon Concessionaire Default.	Upon concessionaire default, VDOT may, after providing notice to the concessionaire and the collateral agent, pursue any of the following remedies: Terminate the agreement, subject to the concessionaire's 60 day right to cure, for any default. Make payment on the concessionaire's behalf and demand payment from the concessionaire within five days. Attempt to cure faults by the concessionaire and demand reimbursement for the costs of such attempts, including VDOT's allocable administrative costs, within five days. Seek specific performance, injunction or other equitable remedies Seek to recover its losses arising from the default and any amounts due and payable under the contract (including the concessionaire's obligation to pay interest at the bank rate from the date a payment is due until paid) and exercise any recourse available to any person

Table 12.1 Contractual Bankruptcy and Default Provisions

Agreement	Relevant Provision	Methodology
		who is owed damages or a debt; Terminate the concessionaire’s right of possession of the project, re-enter and repossess the project with or without terminating the agreement Take and hold any of the concessionaire's goods situated on the project to compel payment Close any and all portions of the project; and Exercise any of its other rights and remedies provided for hereunder or at law or equity.

13. How do PPPs impact existing employees in concessions of existing assets?

PPPs for existing facilities may shift jobs from the public sector to the private sector. Public employees may enjoy a level of job security, wages, and benefits that might not be available in private sector employment. Private concessionaires may not be subject automatically to the same regulations on wage rates, benefits, and employing minority and women-owned businesses. Concessionaires may also choose to reduce staffing levels to increase the efficiency of their operations.

Both the Chicago Skyway and the Indiana Toll Road agreements included provisions that were meant to limit the impact on employees. Chicago required the concessionaire to comply with a living wage requirement, pay prevailing wages for all construction activities, and make its best effort to interview – though not necessarily offer employment to – all Chicago Skyway employees for jobs before the toll road was transferred. Once the concessionaire commenced operation, five employees chose to maintain employment with the Chicago Skyway, while 100 took other city jobs. Those employees that took other city jobs retained their previous benefits.

The State of Indiana also used concession provisions to help protect the workforce on the Indiana Toll Road. According to the Indiana DOT, all employees of the Indiana Toll Road (about 550 employees at the time the lease agreement commenced) were interviewed by the concessionaire. About 85 percent of the employees transitioned to the concessionaire, but did so at equal or higher pay. According to an official with the concessionaire, the average wages of an Indiana Toll Road employee increased from $11.00 per hour to between $13.55 and $16.00 per hour. Those that moved to the concessionaire were paid for outstanding vacation time they had accrued, up to 225 hours. Although they were no longer part of the State's pension plan, these employees were offered a 401(k) plan by the concessionaire. According to the Indiana Department of Transportation, about 130 employees took other jobs with the State. Those that retained employment with the State maintained all outstanding vacation and sick time.

The proposed Pennsylvania Turnpike Concession Agreement would have required the concessionaire to take the following actions with respect to existing Turnpike employees:

(1) make offers of employment (based on the same salary and other terms and conditions of employment enjoyed prior to the closing) to each employee covered by a collective bargaining agreement (which includes any meet and discuss units and memoranda of understanding) that is in good standing at closing;
(2) use its best efforts to interview all employees that are not covered by a collective bargaining agreement, but the concessionaire would not have been obligated to hire such employees;
(3) establish and maintain a defined benefit pension plan for each former Turnpike employee that was hired by the concessionaire providing retirement benefits

substantially identical in amount and paid in substantially identical terms to the retirement benefits provided to the employee immediately prior to the closing;

(4) establish and maintain a defined contribution retirement plan for each former Turnpike employee hired by the concessionaire providing for benefits, rights and features substantially identical to the benefits, rights and features provided to the employee immediately prior to the closing;

(5) provide the active and post-retirement health and welfare benefits set forth in the collective bargaining agreements to individuals covered by the collective bargaining agreements;

(6) provide post-retirement health and welfare benefits to employees who are offered employment under (2) above, that are substantially identical to the post-retirement health and welfare benefits the individual was entitled to receive as an employee of the Turnpike Commission, through the end of the collective bargaining agreement with the longest term; and

(7) develop a post-closing transition plan with respect to employees reasonably acceptable to the Commonwealth for the orderly and continued operation of the Turnpike.

The concessionaire would not have been obligated to provide any specific benefits to any newly hired employees who were not Turnpike employees at the time of the closing, unless otherwise required by law or an applicable collective bargaining agreement.

The State of Illinois passed legislation requiring the prospective concessionaire of the Midway Airport in Chicago and the City of Chicago to ensure certain employee protections. The requirements include:

(1) The lessee must offer employment under substantially similar terms and conditions to the employees of the lessor who were employed at the airport at the time of the lease;

(2) The lessor must offer employment in another department, division, or unit of the lessor, under substantially similar terms and conditions, to employees of the lessor who were employed at the airport at the time of the lease;

(3) As to airport employees not members of an existing bargaining unit, the lessee shall negotiate in good faith with any union that seeks to represent its employees for a labor neutrality and card check procedure agreement which provides for the determination of the existence of majority support for a bargaining agent by means of a card check procedure and which prohibits coercion or intimidation of employees by either the employer or the union; and

(4) As to airport employees who were members of a bargaining unit, the lessee and any subcontractor retained by the lessee to perform such work at the airport shall be required to pay to those employees an amount not less than the economic

equivalent of the standard of wages and benefits enjoyed by the lessor's employees who previously performed that work.[13]

Non-Discrimination, WMBE and Prevailing Wage Requirements

PPP projects that receive any public funds are must generally comply with other state law requirements applicable to public works projects, such as prevailing wage and women and minority business enterprise requirements. PPP projects that receive federal funds or TIFIA credit support for construction are likewise subject to all otherwise applicable federal requirements, such as Buy America and Davis Bacon.

Table 13.1 Contractual Non-discrimination Provisions

Agreement	**Section Number**	**Provision**
Indiana Toll Road	Section 11.2. Non-Discrimination.	(a) **Federal Non-Discrimination Laws**. The Concessionaire shall comply with all applicable federal Laws regarding non-discrimination. (b) **State Non-Discrimination Laws**. Pursuant to IC 22-9-1-10 and the Civil Rights Act of 1964, the Concessionaire and its Contractors shall not discriminate against any employee or applicant for employment in the Toll Road Operations. The Concessionaire and its Contractors shall not discriminate with respect to the hire, tenure, terms, conditions or privileges of employment or any matter directly or indirectly related to employment, because of race, color, religion, sex, disability, national origin or ancestry.
Pocahontas Parkway/ Transurban Concession	Section 11.01 Obligation to Refrain from Discrimination.	(a) The operator covenants and agrees that it shall not discriminate and it shall require all contractors not to discriminate against any person, or group of persons, on account of age, sex, marital status, race, creed, color, national origin, religion or the presence of any sensory, mental or physical handicap in the permitting, design, acquisition, construction, maintenance, operation or management of the Project, nor shall the operator establish or permit any such practice or practices of discrimination or segregation with reference to the selection, use, hiring, firing, promotion or termination of employees, contractors, subcontractors and vendors or with reference to the use, occupancy or enjoyment of or access to or toll rates charged for use of the project; provided, however, that the prohibition against discrimination on the basis of sensory, mental or physical handicap shall not apply if the particular disability prevents the proper performance of the particular person involved.

[13] See Illinois Local Government Facility Lease Act, 50 ILL. COMP. STAT, 615/1 (2007).

Table 13.1 Contractual Non-discrimination Provisions		
Agreement	**Section Number**	**Provision**
SH-121	10.8 Non-Discrimination; Equal Employment Opportunity	10.8.1 Developer shall not, and shall cause the contractors to not, discriminate on the basis of race, color, national origin, sex, age, religion or handicap in the performance of the Work under the CDA Documents. Developer shall carry out, and shall cause the contractors to carry out, applicable requirements of 49 CFR Part 26. Failure by developer to carry out these requirements is a material breach of this agreement, which may result in a default termination event and the termination of this agreement and the lease or such other remedy permitted hereunder as TxDOT deems appropriate (subject to developer's and lenders' rights to notice and opportunity to cure set forth in this agreement). 10.8.2 Developer shall include the immediately preceding paragraph in every contract (including purchase orders and in every contract of any developer-related entity for work), and shall require that they be included in all contracts at lower tiers, so that such provisions will be binding upon each contractor. 10.8.3 Developer confirms for itself and all contractors that developer and each contractor has an equal employment opportunity policy ensuring equal employment opportunity without regard to race, color, national origin, sex, age, religion or handicap; and that developer and each contractor maintains no employee facilities segregated on the basis of race, color, national origin, sex, age, religion or handicap. Developer shall comply with all applicable Equal Employment Opportunity and nondiscrimination provisions, including those set forth in Exhibit 8 to this agreement, and shall require its contractors to comply with such provisions.

Table 13.2 MBE/WBE/DBE Requirements		
Agreement	**Section Number**	**Provision**
Indiana Toll Road	Section 11.6. MBE/WBE Requirements.	The concessionaire shall comply with the requirements of IC 4-13-16.5 and 25 IAC 5 to maximize the utilization of minority and women business enterprises ("M. /W.B.E.s") in the procurement and contracting processes. The concessionaire agrees to a goal for participating minority business enterprises of 6% and women's business enterprises of 6%. All M/WBEs must be certified by the Indiana Department of Administration, Minority and Women Business Enterprises Division. This policy shall be stated in all contracts related to the toll road, circulated to all employees of the concessionaire in affected departments, and made known to minority and women business enterprises.

Table 13.2 MBE/WBE/DBE Requirements		
Agreement	**Section Number**	**Provision**
Pocahontas Parkway/ Transurban Concession	Section 11.03 Small, Women-Owned and Minority Business Reporting (SWAM).	The operator is strongly encouraged to pursue, invite and develop the participation of certified SWAM and/or DBE vendors in the performance of its services hereunder. The parties agree to a long-term goal of 20% SWAM participation. The operator is required to report monthly, through the Department's Civil Rights Division, actual payments, retainage, minority status, and the work type of all subcontractors and suppliers. Information necessary for reporting DBE utilization and SWAM may be obtained from the Department's Civil Rights Office. The operator must maintain records and documents of payments to SWAM and DBEs for three years following performance of the relevant contract.
SH-121	Section 10.9 Disadvantaged Business Enterprise	10.9.1.1 TxDOT's Disadvantaged Business Enterprise (DBE) Special Provisions applicable to the Project are set forth in Exhibit 15. The purpose of the DBE Special Provisions is to ensure that DBEs shall have an equal opportunity to participate in the performance of contracts financed in whole or in part with federal funds. Developer shall comply with all applicable requirements set forth in the DBE Special Provisions and TxDOT's Disadvantaged Business Enterprise Program adopted pursuant to 49 CFR Part 26, and the provisions in Developer's approved DBE Performance Plan, set forth in Exhibit 16. 10.9.1.2 Except for the NTTA Tolling Services Agreement, developer shall include provisions to effectuate the DBE Special Provisions in every contract to which it is a party (including purchase orders and task orders for work), and shall require that they be included in all contracts at lower tiers (including purchase orders and task orders for work), so that such provisions will be binding upon each contractor. 10.9.2 DBE Participation Goals 10.9.2.1 The goal for DBE participation in the work required under this Agreement for professional services and construction of the project shall be 12.12%. 10.9.2.2 Developer shall exercise good faith efforts to achieve such DBE participation goal for the project through implementation of developer's approved DBE Performance Plan. 10.9.2.3 Developer agrees to use good faith efforts to encourage DBE participation in the O&M work. 10.9.3 Cancellation of DBE contracts. Developer shall not cancel or terminate any contract with a DBE firm except in accordance with all requirements and provisions applicable to cancellation or termination of contracts with DBE firms set forth in the DBE Special Provisions in Exhibit 15.

14. How can compliance with existing and future environmental standards be assured?

Environmental impacts are a consideration in any infrastructure project. Depending on their scope and financing, PPP projects may be subject automatically to the requirements of the National Environmental Policy Act (NEPA). New federalized projects must be constructed in accordance with NEPA. Use of TIFIA financing, commonly used in toll road projects to reduce the cost of debt and improve financial feasibility will subject the project to NEPA. In addition to NEPA, states have their own environmental laws and regulations, and in many cases incorporate environmental requirements into the statutes authorizing PPPs.

Obtaining NEPA approval is the responsibility of the public agency, though private parties may assist in providing information or studies that support NEPA review. Under FHWA's design-build rule (Design Build Contracting, 23 C.F.R. §636 (2007)), construction may not commence until the Record of Decision under NEPA is issued.

Typically, concessionaires are expressly required to comply with existing laws and regulations in force at the inception of their contract, including NEPA and other environmental laws. They also may be required to obtain other environmental-type permits – such as the Section 404 Permit from the Corps of Engineers – that can only be obtained after final design work is completed. Concessionaires are required to comply with changes in laws as well, which would include any changed environmental standards that applied to new construction or continuing operations. Depending on the agreement some of the cost of this compliance may be shifted to the project owner.

Table 14.1 Statutory Environmental Requirements

State	Statute or Guidelines
California	Contents of agreements between agency and private entity. The agreement between the governmental agency and the private entity shall include, but need not be limited to, provisions to ensure the following: (1) Compliance with the California Environmental Quality Act (Division 13 (commencing with *Section 21000) of the Public Resources Code*). Neither the act of selecting a proposed project or a private entity, nor the execution of an agreement with a private entity, shall require prior compliance with the act. However, appropriate compliance with the act shall thereafter occur before project development commences. CAL. GOV'T CODE § 5956.6.
Delaware	(d) In addition to alleviating the strain on the public treasury and allowing the State to use its limited resources for other needed projects, public-private initiative projects also do all of the following: (6) Require continued compliance with environmental requirements and applicable state and federal laws that all publicly financed projects must address. DEL. CODE ANN. tit. 2 § 2001(2008)
Florida	Public-private transportation facilities. (3) Each private transportation facility constructed pursuant to this section shall comply with all requirements of federal, state, and local laws; state, regional,

Table 14.1 Statutory Environmental Requirements	
State	**Statute or Guidelines**
	and local comprehensive plans; department rules, policies, procedures, and standards for transportation facilities; and any other conditions which the department determines to be in the public's best interest. FLA. STAT. ANN. §§ 334.30 (2008).
Georgia	Authority to contract with proposer for public-private initiative; funding; rejection (a) Such contracts shall be in compliance with all other applicable federal and state laws, including, but not limited to, *Code Sections 13-10-40*, 13-10-60, and 32-2-70, and each specific contract shall be specifically approved by affirmative vote of the State Transportation Board and concurrence by the Governor. GA. CODE ANN. §§ 32-2-80 (2008**).**
Minnesota	Subd. 8. Application of other law. A private operator must have environmental, navigational, design, or safety approvals as if the toll facility were constructed or operated by a road authority. MINN. STAT. §160.85 (2007) AUTHORITY FOR TOLL FACILITY
Oregon	The Legislative Assembly finds that: (9) Joint endeavors of public and private entities do the following: (c) Require continued compliance with environmental requirements and applicable state and federal laws that all publicly financed projects must address. OR. REV. STAT. § 383.001(2005) Initiation of project; fees; rules; conditions for authorization; studies. (2) The department shall adopt rules pursuant to which it will consider authorization of a tollway project. The rules shall require consideration of: (b) The probable impact of the proposed tollway project on local environmental, aesthetic and economic conditions and on the economy of the state in general. OR. REV. STAT. §383.015 (2005).
Virginia	Approval by the responsible public entity D. For qualifying transportation facilities that have approved or pending state and federal environmental clearances, secured significant right of way, have previously allocated significant state or federal funding, or exhibit other circumstances that could reasonably reduce the amount of time to develop and/or operate the qualifying transportation facility in accordance with the purpose of this chapter, the guidelines shall provide for a prioritized documentation, review, and selection process. VA. CODE ANN. § 56-560 (2007**)**.

Table 14.2 Contractual Environmental Provisions	
Agreement	**General Obligations of Developer**
SH-121	7.1.3 Comply with, and require that all contractors comply with, all requirements of all applicable laws, including environmental laws and the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.), as amended; 7.10 Environmental compliance throughout the course of the design work and construction work, developer shall perform or cause to be performed all environmental mitigation measures required under the environmental

Table 14.2 Contractual Environmental Provisions	
Agreement	**General Obligations of Developer**
	approvals, including the NEPA Approval and similar governmental approvals for the project, or under the CDA documents, and shall comply with all other conditions and requirements of the environmental approvals in accordance with Section 4 of the technical provisions. 8.1.4 Environmental Compliance. Throughout the operating period, developer shall perform or cause to be performed all environmental mitigation measures required under the environmental approvals, including the NEPA Approval and similar governmental approvals for the project, or under the CDA documents, and shall comply with all other conditions and requirements of the environmental approvals. Refer to Section 4 of the technical provisions for further provisions, requirements and obligations regarding environmental compliance.
SH-130 5&6	7.10.1 Throughout the course of the design work and construction work, developer shall perform or cause to be performed all environmental mitigation measures required under the environmental approvals, including the NEPA approval, the Section 404 Permit and similar governmental approvals for the facility, or under the FCA documents, and shall comply with all other conditions and requirements of the environmental approvals in accordance with Section 4 and Table 4-1 of the technical requirements. 8.1.4 Environmental Compliance. Throughout the operating period, developer shall perform or cause to be performed all environmental mitigation measures required under the environmental approvals, including the NEPA Approval and similar Governmental Approvals for the Facility, or under the FCA documents, and shall comply with all other conditions and requirements of the environmental approvals. Refer to Section 4 of the technical requirements for further provisions, requirements and obligations regarding environmental compliance.
IH-635	7.10 Environmental Compliance. Throughout the course of the design work and construction work, developer shall perform or cause to be performed all environmental mitigation measures required under the environmental approvals, including the NEPA Approval and similar other governmental approvals for the project, or under the CDA documents, and shall comply with all other conditions and requirements of the environmental approvals in accordance with Section 4 of the technical provisions. 8.1.4 Environmental Compliance. Throughout the operating period, developer shall perform or cause to be performed all environmental mitigation measures required under the environmental approvals, including the NEPA approval and similar governmental approvals for the project, or under the CDA documents, and shall comply with all other conditions and requirements of the environmental approvals. Refer to Section 4 of the technical provisions for further provisions, requirements and obligations regarding environmental compliance.

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Governor Timothy M. Kaine, State of Virginia
Matthew Garrett, Director, Oregon Department of Transportation
D.J. Gribbin, Director, Macquarie (USA)
Mark Florian, Managing Director, Goldman, Sachs & Co.
John H. Foote, Senior Fellow, Harvard University
Bryan Grote, Principal, Mercator Advisors LLC
Karen J. Hedlund, Esq., Partner, Nossaman, LLP, Arlington

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Honorable Tyler Duvall, U. S. Department of Transportation, Assistant Secretary for Transportation Policy
Honorable Frank Busalacchi, Wisconsin Department of Transportation
Frank Wilson, President and CEO, Metropolitan Transit Authority of Harris County
Karen J. Hedlund, Esq., Partner, Nossaman, LLP, Arlington
Dennis Enright, Principal, NW Financial Group
Alistair Sawers, Transportation and Project Finance Specialist, RBC Capital Markets
Robert Poole, Director, Transportation Studies, Reason Foundation

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Honorable Edward G. Rendell, Governor, State of Pennsylvania
Hon. Terri J. Austin, Chair, Indiana House Roads and Transportation Committee
Hon. Alan Lowenthal, Chair, California Senate Transportation and Housing Committee
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Todd Spencer, Owner-Operator, Independent Drivers Association
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Exhibit A

State PPP Statutes

State	Statute	Comments
1. AK	ALASKA STAT. §§ 19.75.111, .113, .211, .221, .330, .332, .334, .336, .338, .340, .241, .915, .920, .980 HTTP://WWW.LEGIS.STATE.AK.US/CGI-BIN/FOLIOISA.DLL/STATTX06/QUERY=19!2E75!2E111/DOC/{@9161}.	In 2003, the Knik Arm Bridge and Toll Authority (KBATA) was created by Alaska Statute 19.75 2003, The statute authorizes the KBATA to utilize a PPP to finance, design, construct, operate and maintain the Knik Arm bridge to connect the Municipality of Anchorage and the Matanuska-Susitna Borough. http://www.knikarmbridge.com/documents/HB0471Z_000.pdf An amendment passed in 2006, allows the Knik Arm Bridge to be financed, designed, constructed, maintained and/or operated under a PPP arrangement.
2. CA	CAL. STS. & HIGH. CODE §§ 143, 149 to 149.6, 149.7 http://www.leginfo.ca.gov/cgi-bin/displaycode?section=shc&group=00001-01000&file=90-155.6. CAL. GOV. CODE §§ 5956 to 5956.10 http://www.leginfo.ca.gov/cgi-bin/displaycode?section=gov&group=05001-06000&file=5956-5956.10.	The legislation authorizing Caltrans to enter into PPP pilot toll road projects (known as AB 680) was repealed in 2003. AB 1467, enacted in 2006, amended §143 to authorize four pilot projects, two in northern California and two in southern California, for goods movement, and allows tolls to be charged only to commercial vehicles with three or more axles. AB 1467 also added §149.7, which authorizes regional transportation agencies to develop and operate high-occupancy toll lanes, including a value pricing program and exclusive or preferential lane facilities, subject to approval by the Transportation Commission. This legislation (also known as AB 2660) authorizes PPPs for a range of "fee-producing infrastructure projects," but explicitly excludes the use of toll roads on state highways.
3. CO	COLO. REV. STAT. §§ 43-1-1201 to 43-1-1209; 43-4-801 to 43-4-812; 43-3-201 to 43-3-416 http://198.187.128.12/colorado/lpext.dll/Infobase4/6703c?fn=document-frame.htm&f=templates&2.0. HB 08-1354 http://www.leg.state.co.us/CLICS/CLICS2008A	Allows solicited and unsolicited proposals for PPPs. Created a statewide tolling enterprise to finance, build, operate and maintain toll highways. Operated as a government-owned business within the Colorado DOT. Provides PPP authority to Colorado DOT for specific projects including turnpikes and HOT lanes. On May 14, 2008, the legislature passed and sent to the Governor HB 08-1354, which would allow Regional Transportation Districts to issue private activity bonds and lend or grant money or property to a private business in connection with the construction of a mass transportation project financed by the PABs proceeds. H.B. 08-1354, 66th Gen. Assemb. 2nd Reg. Sess. (Colo. 2008)

State	Statute	Comments
	/csl.nsf/fsbillcont3/5EA1856BEB382D9A872573FC0067B4D2?Open&file=1354_enr.pdf	
4. DE	DEL. CODE ANN. tit. 2, §§ 2001 to 2012 (2008) http://delcode.delaware.gov/title2/c020/index.shtml	Authorizes solicited and unsolicited proposals for PPP projects, including highways and bridges.
5. FL	FLA. STAT. ANN. §§ 334.30, 338.22 to 338.251 (2007) http://www.flsenate.gov/Statutes/index.cfm?App_mode=Display_Index&Title_Request=XXVI#TitleXXVI. Amended by HB985 (2007): http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h0985er.doc&DocumentType=Bill&BillNumber=0985&Session=2007	The original 1953 statute established the Florida Turnpike Enterprise, which is operated like a private-sector business within the Florida DOT. The statute allows Florida DOT to receive or solicit proposals for PPPs. Governor Crist signed a bill in 2007 that expands Florida's PPP contracting authority, permitting the Florida Department of Transportation ("FDOT") to use PPPs for both new toll facilities and long-term leases of existing toll facilities. Legislative approval is required for leases of existing toll facilities. Additionally, this law now explicitly authorizes transactions based on shadow tolls and availability payments. Under the statute, FDOT is authorized to receive solicited and unsolicited proposals for projects in its 5-year work program and, if the project increases capacity and costs more than $500 million, its 10-year Strategic Intermodal Plan. If FDOT receives an unsolicited proposal, it must provide 120 days for other proposers to submit competing proposals. The statute also requires the Turnpike Enterprise to index toll rates to the Consumer Price Index or similar indices and to adjust rates to updated indices at least every 5 years. For PPP toll projects, contracts must entitle the toll authorities to a negotiated portion of toll revenues. In contrast, for leases of existing toll facilities, toll authorities are entitled to a portion of "excess" toll revenues and to an upfront payment upon closing. Florida's new law provides flexibility regarding surety bonding requirements. Instead of requiring 100% bonding, the law balances the cost of various tools (bonds, letters of credit, guarantees, etc.) against the cost of obtaining this security and the risk of default to ensure efficient project pricing. The law includes a 50 year limit on the duration of any concession, which Florida's Secretary of Transportation can increase to 75 years without legislative approval.

State	Statute	Comments
6. GA	GA. CODE. ANN. §§ 32-2-78 to 32-2-80 http://www.lexis-nexis.com/hottopics/gacode/.	Public Private Initiatives (PPI's) are the Georgia equivalent of PPPs. First authorized in 2003, the Georgia Department of Transportation (GDOT) can use PPIs to partner with private/corporate businesses to finance, design, construct, operate and maintain transportation projects throughout the State. Georgia's PPI law was amended in May of 2005 to authorize GDOT to solicit its own proposals in addition to considering unsolicited proposals if they meet specified criteria. Competing proposals may be submitted within 135 days from the date the unsolicited proposal is received by GDOT. Both unsolicited and solicited proposals go through a detailed procurement process that includes a structured evaluation, culminating in execution of a Letter of Intent (LOI) between GDOT and the private developer. This may be followed by negotiation of a Developer Services Agreement (DSA) and/or a Project Framework Agreement (PFA) leading to a final comprehensive PPI agreement (CPPI) covering final design services and finance, construction, maintenance and/or long-term operation of the transportation facility.
7. MD	MD. CODE REGS. 11.07.06 HTTP://WWW.DSD.STATE.MD.US/COMAR/SUBTITLE_CHAPTERS/11_CHAPTERS.HTM. MD. CODE ANN. TRANSP. § 8-204 http://www.michie.com/maryland/lpext.dll?f=templates&fn=main-h.htm&cp=mdcode. TRANSPORTATION PUBLIC-PRIVATE PARTNERSHIP (TP3) GUIDELINES, http://www.mdta.state.md.us/mdta/servlet/dispatchServlet?url=/About/tp3guidelines.jsp.	Chapter 11.07.06 of the Maryland Code of Regulations establishes a transportation public-private partnership program. According to a 1996 Attorney General opinion referenced in the annotations to this statute, the Maryland Transportation Authority has authority to construct toll roads using certain forms of PPPs. See MD 81 Op. Att'y Gen. (issued 2/2/96).

State	Statute	Comments
8. MN	MINN. STAT. §§ 160.84 to 160.93 (2007) http://www.revisor.leg.state.mn.us/revisor/pages/statute/statute_chapter_toc.php?chapter=160. S.F. Res. 3058, 35th Leg. 3rd Engrossment (Minn. 2007) https://www.revisor.leg.state.mn.us/bin/bldbill.php?bill=S3058.3.html&session=ls85 H.F.Res. 2800, 85th Leg., 4th Engrossment (Minn. 2007) https://www.revisor.leg.state.mn.us/bin/bldbill.php?bill=H2800.4.html&session=ls85	Authorizes solicited and unsolicited PPPs for toll facilities. Authorizes HOT lanes. Toll facilities are limited to bridges, causeways, highways and appurtenant structures. In May 2008, 2007 Minn. S.F. 3058 was passed and signed by the Governor. This law will allow for imposition of fees on HOV lanes and dynamic shoulder lanes. On February 22, 2008, the Minnesota legislature overrode the Governor's veto of 2007 Minn. H.F. 2800, which added §160.845 and §160.98, which restrict the tolling and privatization of bridges and roads.
9. MS	S.B. 2375, 2007 Leg., Reg. Sess. (Ms. 2007). http://billstatus.ls.state.ms.us/2007/pdf/history/SB/SB2375.htm#title. H.B. Res. 3, 2008 Leg. 1st Extraordinary Sess. (Miss. 2008). http://billstatus.ls.state.ms.us/20081E/pdf/history/HB/HB0003.xml	In April, 2007, the Mississippi legislature enacted and the Governor approved a bill (SB 2375) that allows governmental entities to build toll roads and bridges in partnership with private sector. The statute applies only to new roads, and provides that that free alternatives exist and that tolls end after 30 years. In June 2008, the Act was amended to extend the maximum concession period from 30 years to 50 years, providing for electronic toll collection enforcement and an exemption from real property taxes. H.B. 3, 2008 Leg. 1st Extraordinary Sess. (Miss. 2008) available at http://billstatus.ls.state.ms.us/documents/20081E/pdf/HB/0001-0099/HB0003SG.pdf
10. NC	N.C. GEN. STATE. §§ 136-89.180 to 136-89.198 http://www.ncleg.net/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_136/Article_6H.html.	The North Carolina Turnpike Authority ("NCTA") is authorized to design, purchase, construct, operate and maintain six designated projects and to study, plan, develop and undertake preliminary engineering on up to nine projects. The Authority's enumerated powers also include the ability use alternative contracting methods for individual projects, provided that the Authority has made written findings that the alternative contracting method is necessary to complete the project in a timely manner, within available funding, or for other reasons determined to be in the public interest.

State	Statute	Comments
11. OR	OR. REV. STAT. §§ 367.800 to 367.826. http://www.leg.state.or.us/ors/367.html. OR. REV. STAT. §§ 383.001 to 383.019 http://www.leg.state.or.us/ors/383.html. http://www.leg.state.or.us/bills_laws/ (SB 1022 is found at 2007 Chapter 531)	The Oregon Innovative Partnerships Program (OIPP) statutes authorize the Oregon Department of Transportation (ODOT) to enter into a wide range of agreements with private and public entities with respect to transportation projects. The statute defines transportation project broadly as "any proposed or existing undertaking that facilitates any mode of transportation." ODOT is granted broad authority to solicit or accept unsolicited concepts or proposals for transportation projects with private and public entities, evaluate the concepts or proposals and select potential projects. As part of the evaluation, ODOT is required to consult with any appropriate local government, metropolitan planning organization or area commission on transportation. Following evaluation and selection of potential transportation projects, ODOT may negotiate and enter into an agreement with the private or public entity for implementing the selected transportation project. ODOT may not enter into an agreement until the agreement is approved by the Oregon Transportation Commission. The statute exempts transportation projects undertaken under the innovative partnership program from most of the requirements of the state procurement law. In addition, the statute establishes a State Transportation Enterprise Fund to pledge moneys to secure debt obligations, authorizes bonding of transportation project revenues, expands the ability of the Oregon Transportation Infrastructure Fund to assist in financing and allows transportation projects to be financed by funds or property contributed by private or public entities. In 2007, SB 1022 made all tolls subject to approval by the Oregon Transportation Commission, added several definitions to this statute, added a provision on the authority of tollroad operators, and provisions related to electronic tolling and toll enforcement. This bill also repealed OR. REV. STAT. § 381.025-383.386 (which dealt with toll enforcement).
12. PR	P.R. LAWS ANN. tit. 9, §§ 2001 to 2021	These sections establish a toll transportation facility authority with broad powers to authorize private participation in public highway projects.
13. TX	TEX. TRANSP. CODE ANN. §§ 223.001 to 223.209; 227.001 to 227.083; 228.001 to 228.254; 370.001 to 370.365 http://tlo2.tlc.state.tx.us/statutes/tn.toc.htm. TEX. TRANSP. CODE ANN. §§451.801-	In 2003, the Texas legislature adopted HB 3588, a comprehensive bill expanding TxDOT's authority to enter into public-private partnership agreements, called Comprehensive Development Agreements or "CDAs" for the development of toll projects and the Trans Texas Corridor. HB 3588 also authorized the creation of regional mobility authorities, which are local agencies, empowered to develop transportation projects, either traditionally or through CDAs. In 2005, the legislature provided more specific requirements governing CDA provisions, authorized TxDOT to enter into pass-through toll agreements and, inter alia, facilitating the development of projects through concession model CDAs.

State	Statute	Comments
	451.812 H.S. 3588, 78TH LEG. REG. SESS. (TEX. 2008) S.B. 792, 80TH LEG. SESS. (TEX. 2007)	In June of 2007, Governor Rick Perry signed SB 792, a bill that places certain restrictions on PPP projects. Key provisions of SB 792 include: • a two-year moratorium on entering into CDAs that provide for the operation of toll roads and collection of tolls by private entities, subject to exceptions for a number of projects in the procurement stage; • a term limit of 52 years for CDAs; • sunset provisions, providing TxDOT's authority to enter into CDAs will expire on August 31, 2009, subject to certain exceptions; • requirements that affect CDA provisions concerning the development of competing facilities; • a requirement that regional tollway authorities provide customer service and other toll collection and enforcement services for a toll project within its region; and • authorization for regional tollway authorities to enter into CDAs In addition, SB 792 establishes a process for allocating certain projects between local toll project entities and TxDOT. The process generally commences with the two parties negotiating business terms which are to be the basis for a market valuation of the project and provides the local toll project entity with the first option to develop the project. If the local toll project entity wishes to exercise this option, it must commit to develop additional projects or make a payment in an amount equal to the value of the project to be used by TxDOT to finance construction of additional transportation projects in the region.
14. VA	VA. CODE ANN. §§ 56-556 to 56-575 http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+TOC56000000022000000000000.	Virginia adopted one of the earliest PPP transportation programs in the United States, the Public-Private Partnership Transportation Act ("PPTA") in 1995. The PPTA allows private entities to develop and/or operate qualifying transportation facilities through both solicited and unsolicited proposals. It permits the private entity and the public sponsor to use any legally available financing techniques, such as issuing debt and entering into concession agreements. Since the PPTA's enactment, Virginia has completed three PPP projects with approximately a dozen other projects in various stages of procurement and development.

State	Statute	Comments
15. WA	WASH. REV. CODE §§ 47.29.010 to 47.29.900; 47.46.010 to 47.46.900 http://apps.leg.wa.gov/rcw/default.aspx?Cite=47. H.B. 1094, 60TH LEG., 2007 REG. SESS. (WASH. 2007) http://apps.leg.wa.gov/documents/billdocs/2007-08/Pdf/Bills/Session%20Law%202007/1094-S.sl.pdf	The Washington legislature determined that the state's 1993 PPP statute (§§ 47.46.010 to 47.46.900), was not meeting the expectations of the public and private sectors, and revamped its PPP law with § 47.46.29. The new PPP enabling legislation (passed in May of 2005 as H.B. 1541) is limited to Washington DOT projects and requires prior legislative approval. Revenue-negative transit projects can be pursued under this statute, but if they are to be operated as public facilities, § 47.29.060 (b) (3) requires that any indebtedness must be issued by the state treasurer for the transportation project. § 47.29.110 requires that: Unless otherwise provided in the omnibus transportation budget the funds spent by the department under this section in connection with the project must be repaid from the proceeds of the bonds or other financing upon the sale of transportation project bonds or upon obtaining other financing for an eligible project, as allowed by law or contract. The commission may not accept or consider any unsolicited proposals before July 1, 2009. § 47.29.170. The Washington legislature passed HB 1094, effective May 15, 2007, which amends the last sentence of 47.29.170 to substitute "July 1, 2009" for "June 30, 2007."

Exhibit B
List of Referenced PPP Agreements

Agreement	Formal Name
Indiana Toll Road	Indiana Toll Road Concession and Lease Agreement, between the Indiana Finance Authority and ITR Concession Company, LLC. April 12, 2006. In January of 2006, Statewide Mobility Partners (SMP), a joint venture between Cintra Concesiones de Infraestructuras de Transporte SA (Cintra) and Macquarie Infrastructure Group (MIG), won the bidding for a contract to operate and maintain the Indiana Toll Road for 75 years, with a winning bid of 3.8 billion dollars. The revenues from the upfront payment will be used to pay outstanding toll bonds and fund the “Major Moves” transportation program. Thirty-four percent of the funding going to the “Major Moves” program will be invested in the seven counties where the facility is located to address equity concerns, based on the fact that 66 percent of the traffic comes from out-of-state drivers, so those revenues can be invested in other areas of the State.
Chicago Skyway	Chicago Skyway Concession and Lease Agreement, between the City of Chicago and the Skyway Concession Company, LLC, October 28, 2004. The Skyway Concession Company, LLC (SCC) paid the City of Chicago $1.83 billion dollar lump sum payment for a 99-year operating lease. SCC will be responsible for all operating and maintenance costs of the Skyway but has the right to all toll and concession revenue.
Pennsylvania Turnpike	In September 2007, the state solicited qualifications from companies interested in the management of the Pennsylvania Turnpike. After narrowing down the most qualified companies, the Commonwealth provided the selected teams with information on the project to evaluate the Turnpike and submit a bid. Initial bids were received from three teams on May 9, 2008. On May 16, 2008, Pennsylvania Transportation Partners won the status of preferred partner with a bid of $12.8 billion; $700 million more than the next-highest bidder. However, legislative approval was not provided for this project.
Pocahontas Parkway/ Transurban	Amended and Restated Comprehensive Agreement to Develop and Operate the Route 895 Connector between Virginia Department of Transportation and Transurban (895) LLC. Virginia Department of Transportation negotiated and closed an asset transfer and refinancing of this project with Transurban LLC under a 99-year P3 concession agreement in 2006. The project consists of the Pocahontas Parkway (also known as the Route 895 Connector toll road) in the Richmond area. The new $611 million financing paid back the original bonds and recouped for VDOT all its prior capital, operating and maintenance expenses and provided for the construction of a connector to the Richmond International Airport. http://www.pocahontas895.com/home.html
SH-121/ Cintra	Details of the cancelled Cintra proposal are available at: http://www.dot.state.tx.us/services/texas_turnpike_authority/sh121_prop_files.htm

Agreement	Formal Name
SH-121/ NTTA	Project Agreement, SH-121 Toll Project, between Texas Department of Transportation and North Texas Tollway Authority. In February 2007, the Texas Transportation Commission approved the award of a second toll concession agreement, this time for the SH 121 project (a just completed segment and an extension to be completed) in the North Dallas area. The TTC selected Cintra-led consortium that agreed to pay: an upfront concession payment of $2.1bn; $560 million for construction of the extension; $700m in lease payments over the next 49 years; and $1.7 billion for operation and maintenance. Texas intended to use the initial money generated to fund other road projects in the region. In March, however, TxDOT agreed to delay the signing of the contract so that the North Texas Tollway Authority (NTTA), which runs the Dallas North Tollway and President George Bush Turnpike, could present an alternative submission to build and operate SH 121 to NTTA developed a competing proposal that would offered TxDOT 3.3 billion, with an upfront payment of 2.5 billion and 833 million to be paid over the course of the lease. On Aug. 23, 2007, the Texas Transportation Commission rescinded and terminated the comprehensive development agreement with Cintra to develop SH 121. On Oct. 18, 2007, TxDOT entered into a tolling agreement with NTTA to develop SH 121. The full NTTA-TxDOT Agreement is available for download at: http://www.dallasnews.com/sharedcontent/dws/img/11-07/1109Project-Agreement-121.pdf
SH-130 5&6	Facility Concession Agreement, SH-130 Segments 5 and 6 Facility, between Texas Department of Transportation and SH 130 Concession Company, LLC. This is Texas' first toll concession agreement under the Trans Texas Corridor Program and the first US toll concession agreement in over a decade, for a 41-mile greenfield toll road between San Antonio and Austin negotiated with Cintra-Zachry. The $1.3 billion private investment, includes a $25m upfront concession payment which will be used for other projects in the Austin-San Antonio region and gives the state a share of the toll revenue over the next 50 years estimated at approximately $1.6bn. The 50-year comprehensive development agreement is a design, build, finance, operate and maintain (DBFOM) agreement. Available for download at: http://www.dot.state.tx.us/services/texas_turnpike_authority/sh130_info.htm
IH-635	Comprehensive Development, IH-635 Managed Lanes Project, between Texas Department of Transportation and (this procurement is still underway) The $1+ billion IH 635 Managed Lanes Project in Dallas consists of the construction of managed lanes, reconstruction of general purpose lanes, construction of new and reconstruction of existing frontage roads, installation of necessary tolling infrastructure, establishment of tolling operations and operations and maintenance of approximately 25 miles of the IH 635 and IH 35E corridors in Dallas County. TxDOT has available up to US$700m in public funds to contribute to the project. In September of 2007, TxDOT issued an RFP to the shortlisted teams led by Dragados/Zachry, Cintra and Fluor/Transurban. Proposals are expected in [August of 2008*]. More information is available at: http://www.txdot.gov/services/texas_turnpike_authority/i635_proposal.htm*
North Tarrant Express	The North Tarrant Express Project involves approximately 36 miles of managed lanes, additional general purpose lanes and frontage roads in the Fort Worth area. The first segment along IH 820, estimated at more than US$ 6 00m, is being proposed as a concession project. In addition to the concession agreement for the initial segment, the

Agreement	Formal Name
	successful proposer will be awarded a pre-development agreement for the remaining segments of the project. TxDOT issued a request for qualifications in December 2006 and shortlisted four teams in May 2007. An RFP was issued in March 2008.
Dulles Greenway	The Dulles Greenway is a privately owned toll road built under the Virginia Highway Act of 1988, which made it subject to regulation by the Virginia State Corporation Commission. The act is available at: http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+TOC56000000020000000000000 Information on the most recent SCC toll adjustment is available at: http://scc.virginia.gov/newsrel/e_dulgren_07.aspx
I-495 HOT Lanes	Amended and Restated Comprehensive Agreement Relating to the Route 495 HOT Lanes in Virginia Project, between Virginia Department of Transportation and Capital Beltway Express, LLC. The Interstate 495/Capital Beltway High Occupancy Toll (HOT) Lanes project will add two new HOV/Bus/HOT lanes in each direction between the Springfield Interchange and just north of the Dulles Toll Road. HOV-3, motorcycles, buses and emergency vehicles will use the HOV/Bus/HOT lanes free of charge. Tolls will be based on demand, also called congestion pricing. They will change throughout the day according to real-time traffic conditions to manage the number of cars in the HOV/Bus/HOT lanes and reduce congestion. Under this comprehensive agreement, VDOT will own and oversee the HOT lanes and Fluor-Transurban will construct and operate them. Available for download at: http://www.virginiadot.org/projects/resources/ARCA_with_ExhibitA-Defintions.pdf
SR-91	Development Franchise Agreement for the State Route 91 Median Improvements, between California Private Transportation Corporation and the State of California Department of Transportation. California Private Transportation Company and Granite Construction Company entered a $50 million design-build contract for the Route 91 High Occupancy/Toll Road Project. This project constituted the first fully automated toll road in the United States, and was authorized through a franchise agreement with the California Department of Transportation, pursuant to public-private partnership legislation (AB 680). The project involved construction of four lanes in the median of SR 91 from Riverside County through the SR 55 interchange, with related structures, equipment and systems. The contractor's designer converted the existing 100% design for HOV lanes in the same area to a design for an automated toll road. The project was completed in 1996, ahead of the contractual completion deadline, and remains in operation as a toll road. In April, 2002, the Orange County Transportation Authority (OCTA) reached an agreement to purchase the private toll road project for $207.5 million. OCTA took possession of the Toll Road on January 3, 2003. More information about this agreement is available at: http://www.innovativefinance.org/projects/highways/91.asp
SR-125.	This project, made possible through an innovative public-private partnership, will complete the missing link in San Diego's third north-south freeway corridor and provide a new 12.5-mile highway alignment from SR 905 near the International Border to SR 54 near Sweetwater Reservoir. The South Bay Expressway connects the only commercial port of entry in San Diego to the regional freeway network. The $140 million TIFIA loan

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	provided to the concessionaire was the first-ever provided for a private toll road development. The 38-year loan has a fixed rate borrowing cost equal to 30- year treasuries. This project used a competitive (best value) bid, design-build procurement process in which the same designer, design subcontract, and design price were mandated to each proposer. The designer was a joint venture composed of subsidiaries of the project sponsors
Knik Arm Crossing	The Knik Arm Crossing Project is planned to be a toll bridge of about two miles across Knik Arm to join the Port of Anchorage and Port MacKenzie areas and approximately 18 miles of associated approach and other roadways. Approximately $129 million in public funds has been allocated to the project. The total construction cost is estimated at $400-$600 million. In April 2007 KABATA shortlisted two teams, one led by Macquarie and one led by Bouygues. The project is currently on hold.