

# **Overview of Key Elements and Sample Provisions State PPP Enabling Legislation for Highway Projects**

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**OVERVIEW OF KEY ELEMENTS AND SAMPLE PROVISIONS  
STATE PPP ENABLING LEGISLATION FOR HIGHWAY PROJECTS**

<b><u>No:</u></b>	<b><u>Issue:</u></b>	<b><u>Importance:</u></b>	<b><u>Sample Provision:</u></b>
1.	Does the relevant law allow solicited and unsolicited proposals for PPP projects?	Both proposal processes are important. Solicited proposals enable the responsible public entity to communicate its transportation project priorities. Unsolicited proposals, by contrast, enable the private sector to propose projects that the public entity might not otherwise have considered.	The responsible public entity will solicit proposals through a request for proposals, accompanied by material explaining the Public-Private Initiatives Program enacted hereunder and describing the selection process and criteria. The responsible public entity may identify in these requests for proposals specific systems, corridors or routes for improvement. Alternatively, potential projects may be identified and proposed by any potential contracting party. Such unsolicited proposals will also be accepted provided that they satisfy the criteria outlined in accordance with this chapter.
2.	Does the relevant law permit local, state and federal funds to be combined with private sector funds on a PPP project?	Most projects are so large that they will require access to the full range of funding options in order to finance them.	The responsible public entity, either directly or through a designated party, may apply for, receive and accept from any federal agency or any other governmental body grants or financial support of whatever nature for any purpose described in this chapter. The responsible public entity may transfer or lend the proceeds of any such grant, or utilize such proceeds available for credit enhancement, to public agencies or contracting parties, on terms and conditions complying with applicable federal and state law.
3.	Who has rate-setting authority to impose user fees and under what circumstances may they be changed or otherwise reviewed?	Both the responsible public entity and its private sector partner (by contract) should have this authority. Moreover, detailing when and by how much tolls can be modified is a critical component of the PPP agreement and will improve the project's ability to be financed on favorable terms.	Each agreement may authorize the contracting party to impose tolls or user fees for use of the transportation system constructed and/or leased by it to allow a reasonable rate of return on investment. The agreement may authorize the contracting party to collect tolls or user fees through both conventional methods and non-conventional methods including, but not limited to, automatic vehicle identification systems, electronic toll collection systems and, to the extent permitted by law, video-based toll collection enforcement. The agreement may authorize the collection of tolls and user fees by a third party.
4.	Does the relevant law permit TIFIA loans to be used on	TIFIA loans are a useful public financing tool, and should be	Any transportation project may be financed in whole or in part with grants, loans, loan guarantees, lines of credit, revolving lines of credit or other

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	PPP projects?	included as an option for individual projects.	financing arrangements available pursuant to the Transportation Infrastructure Finance and Innovation Act under 23 U.S.C. 181 <i>et seq.</i> , or any other applicable federal law.
5.	Is the number of PPP projects limited to only a few “pilot” or “demonstration” projects?	Pilot projects sometimes represent a good political compromise for states that do not have much experience with PPP projects involving highways. Pilot projects, however, may also signal to both the public and private sectors that there is a lack of long-term political and institutional commitment to getting projects done under such legislation. The pilot program approach has been used in the states of California and Washington.	No model language proposed.
6.	Are there restrictions concerning the geographic location of PPP projects?	Such restrictions may unnecessarily reduce the ability of the public and private sectors to innovate when considering potential new projects.	No model language proposed.
7.	Are there restrictions concerning the particular mode of transportation	Allowing the widest range of transportation modes to be considered encourages	“Transportation facility” means any road, bridge, tunnel, overpass, ferry, airport, mass transit facility, vehicle parking facility, port facility or similar commercial facility used for the transportation of persons or goods,

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	eligible to be developed as a PPP project ( <i>e.g.</i> , truck, passenger auto, freight rail, passenger rail)?	innovation. The Trans-Texas Corridor 35 project represents a good example of a creative multi-modal proposal.	together with any buildings, structures, parking areas, appurtenances, and other property needed to operate such facility.
8.	Is there a legal requirement to remove tolls after the repayment of project debt?	While sometimes politically desirable, this requirement eliminates one important source of financing for future transportation projects along the corridor or planned for elsewhere in the state. The Florida Turnpike Enterprise has made use of its excess tolling revenues to develop additional projects.	After expiration of the lease or ownership period of a project to or by a contracting party, the responsible public entity may continue to charge tolls or user fees for the use of the project. The responsible public entity may also delegate such authority to continue to collect tolls or user fees for the use of the project to a third party, provided that such revenues must first be used for operations and maintenance of the project and, subsequently, any revenues determined by the responsible public entity to be excess must be paid by such third party to the State's Transportation Trust Fund, the responsible public entity or the State.
9.	Does the relevant law permit the conversion of existing or partially constructed highways into toll roads?	Permitting such conversions provides additional flexibility, but may be controversial. Some state laws expressly limit conversions to projects that add capacity.	Tolls or user fees may be imposed by the operator on any free road, bridge, tunnel or overpass, provided that such road, interstate highway, bridge, tunnel or overpass is reconstructed to provide for increased capacity and the private entity obtains the necessary federal, state and local approvals.
10.	Is there a restriction that prevents the revenues from PPP projects from being diverted to the state's general fund or for other unrelated uses?	Allowing these revenues to be diverted to a state's general fund undermines support from the general public for tolls and other user fees.	A PPP agreement may provide that excess earnings be distributed to the state's transportation trust fund, to the responsible public entity, or shared with appropriate public entities.

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11.	Is prior legislative approval required when an individual PPP proposal is received?	Private entities are less likely to be willing to incur significant proposal development costs due to the added uncertainty of whether legislative approval will thereafter be obtained.	No model language proposed.
12.	Are there any similar requirements that subject the PPP proposal or the negotiated PPP agreement to a local veto?	Same issue. Private entities are less likely to be willing to incur significant development costs related to their proposal and the negotiation of the PPP agreement due to the added uncertainty of whether local approval will thereafter be obtained. As an alternative, some statutes require local and regional transportation entities to provide their input when the proposal is first issued or received.	Each affected local jurisdiction that is not a responsible public entity for the respective qualifying transportation facility shall, within 60 days after receiving a request for comments from the responsible public entity, submit any comments it may have in writing on the proposed qualifying transportation facility to the responsible public entity and indicating whether the facility will address the needs identified in the appropriate state, regional or local transportation plan by improving safety, reducing congestion, increasing capacity and/or enhancing economic efficiency.

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13.	Does the relevant law permit all kinds of procurements for PPP project delivery? These might include, for example, calls for projects, competitive RFQs and RFPs, qualifications review followed by an evaluation of proposer concepts, use of design build, procurements based on financial terms such as return on equity rather than on price, long-term asset leases for some period of up to 60 years or longer from the time operations commence?	More flexibility is an important goal, so authorizing a wider range of procurement tools is helpful because it enables the responsible public entity to more easily select the one that is most appropriate for a particular project.	A responsible public entity must proceed in accordance with the guidelines adopted by it pursuant to subdivision 1. The responsible public entity may select any procurement process that it believes is likely to be advantageous to the public, based on the probable scope, complexity or urgency of a project. When the responsible public entity determines to proceed with a particular procurement process, it must follow the guidelines adopted by it pursuant to this subdivision.
14.	Are there explicit exemptions/supplemental procurement authority from the application of the state's general procurement laws?	Such a provision is important because it provides certainty to the participants that the alternative procurement process they are using is legitimate and is not subject to subsequent legal challenges.	The responsible public entity may contract with the proposer for a public-private initiative based upon the proposal without subjecting such contract to public bid as otherwise would be required.

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15.	Does the relevant law authorize the public sector to grant long-term leases/franchises for the construction, operation and maintenance of toll facilities?	The Chicago Skyway and Trans-Texas Corridor 35 projects, are leading examples of lease/concession-type models.	The private entity may own, lease or acquire any other right to use or develop and/or operate the qualifying transportation facility.
16.	Does the public sector have the authority to issue toll revenue bonds or notes?	Some PPP statutes contain this provision; many states also grant this authority in other statutes. Regardless of its location, this is an important financing and project delivery tool.	The responsible public entity may issue revenue bonds to pay all or a portion of the cost of a qualifying transportation facility or to refund any previously issued bonds.
17.	Does the public sector have the authority to form nonprofits and let them issue debt on behalf of a public agency?	The use of nonprofit corporations (sometimes referred to as “63-20 Corporations”) in structuring public-private infrastructure financings has attracted a great deal of attention. Its use is being promoted as a way to preserve the ability for a project to be financed with tax-exempt bonds, while maintaining for both the public and private participants most of the benefits of private development. Examples include Virginia’s	The board is authorized to establish, create and approve nonprofit entities and bonds issued by or on behalf of such nonprofit entities for the purpose of financing, constructing, operating or maintaining a toll highway, to accept the assets of any such nonprofit entity, to obtain an option to acquire the assets of any such nonprofit entity by paying such bonds, to appoint or approve the appointment of members of the governing board of any such nonprofit entity, and to remove the members of the governing board of any such nonprofit entity for cause.

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		Pocahontas Parkway and South Carolina's Southern Connector.	
18.	Does the relevant public agency have the authority to hire its own technical and legal consultants?	The ability to hire outside experts to assist the responsible public entity in preparing implementation guidelines and evaluating PPP proposals is critical . It also represents one good indicator for the private sector that the responsible public entity intends to dedicate the human and financial resources that are required to successfully deliver a PPP project in a timely manner.	The responsible public entity is authorized to employ or contract for the services of consulting engineers, attorneys or other experts as are necessary in its judgment to carry out its powers and duties hereunder.
19.	Does the relevant law permit the public sector to make payments to unsuccessful bidders for work product contained in their proposals?	The flexibility to make such payments encourages the private sector to devote the resources that are required to develop innovative proposals for PPP projects as well as their financing.	The responsible public entity may pay an unsuccessful private entity that submits a response to a request for proposals a stipulated amount of the final contract price for any costs incurred in preparing that proposal in return for the right to use any work product contained in the proposal, including the technologies, techniques, methods, processes and information contained in the project design.
20.	Can the agency charge application fees to offset its proposal review costs?	Application fees help the responsible public entity defray some of the costs it incurs in reviewing unsolicited proposals developed by the private sector.	To offset a portion of the costs of initiating this program and reviewing proposals received for projects under this chapter, the responsible public entity is authorized to assess a non-refundable Proposal Review Fee for each proposal not to exceed \$ 50,000.00.

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21.	Does the relevant law allow adequate time for the preparation, submission and evaluation of competitive proposals? Note that the responsible public entity should have the authority to establish these deadlines on a case-by-case basis depending on the complexity and scope of the initial proposal or other factors that might promote competition (e.g., more review time during holiday periods).	The responsible public entity should have discretion to set this period of time. Proposals for some projects such as corridor-wide improvements are more complicated than other proposals. As a general rule, the more complicated the project being proposed, the more time should be allowed for competitors to prepare their competing submissions.	Upon acceptance of an unsolicited proposal, the responsible public entity must publicly release a detailed description of the unsolicited proposal and provide 90 days within which other interested parties may submit proposals relating to the same subject, or such additional time as may be designated by the responsible public entity.
22.	Is the public sector required to maintain comparable non-toll routes when it establishes new toll roads?	Such a blanket requirement reduces the flexibility of the responsible public entity in obtaining proposals for new or expanded projects.	No model language proposed.
23.	Are there any non-compete clause prohibitions?	These should vary on a project-by-project basis. For example, the Chicago Skyway concession contains no restrictions on competing toll roads while the SR 125 project being developed in California does have such a	In a PPP agreement, the responsible public entity may include protection from competition provisions or agree to provide a traffic guarantee to the private entity, provided that it will not unreasonably prohibit the development of essential public transportation systems and facilities.

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		provision.	
24.	Is the authority to enter into PPPs restricted to the state DOT or state turnpike authority or may regional or local entities also do so?	This varies on a state-by-state basis depending on local conditions.	Any private entity seeking authorization under this chapter to develop and/or operate a transportation facility must first obtain the approval of the responsible public entity. Such private entity may initiate this approval process by submitting an unsolicited proposal or the responsible public entity may request that such proposals be submitted to it. A "Responsible public entity" for these purposes means a public entity, including local governments and regional authorities, that has the power to develop and/or operate the qualifying transportation facility.
25.	Does the relevant law specify evaluation criteria for PPP proposals received under a given procurement approach?	Some PPP statutes contain general criteria that are then elaborated in internal implementation guidelines.	The responsible public entity shall base its evaluation of an 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; and (c) Potential contribution of the proposal to the responsible public entity's mission.
26.	Does the relevant law specify the structure and participants for the review process involving PPP proposals?	Same comment as above. The review process details can be set forth in the PPP law or in internal guidelines. The private sector and the public may have more confidence in the selection process if this process is detailed in advance.	The projects shall be selected by a project committee, chaired by the Secretary of Transportation, consisting of the Secretary, the Director of Financial Management and Budget, the Chief Engineer of the Department of Transportation, and up to four other persons to be appointed by the Secretary.
27.	Does the relevant law protect	These provisions require a	The responsible public entity shall take appropriate action, as more

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	the confidentiality of PPP proposals and any related negotiations in the period prior to execution of the PPP agreement?	delicate balancing between competing considerations. On the one hand, disclosure of proposed projects is necessary for them to gain public legitimacy. On the other hand, the private sector will be unwilling to participate if certain information about them and their business secrets must be disclosed.	specifically set forth herein and in its guidelines, to protect confidential and proprietary information provided by the private entity pursuant to a proposal filed with it or in connection with the negotiation of a PPP agreement. In order for confidential and proprietary information to be excluded from disclosure, the private entity must (i) invoke such exclusion upon submission of the data or other materials for which protection from disclosure is sought; (ii) identify the data or other materials for which protection is sought; and (iii) state the reasons why protection is necessary. However, nothing in this subdivision shall be construed to prohibit the release of procurement records as otherwise required by law. Procurement records may not be interpreted to include proprietary, commercial or financial information, balance sheets, financial statements, or trade secrets that may be provided by the private entity as evidence of its qualifications.
28.	Does the relevant law provide for the ability of the public sector to outsource long-term operations and maintenance and other asset management duties to the private sector?	The authority to include these types of projects provides additional flexibility.	The responsible public entity may use a PPP agreement with a private entity to construct, maintain, repair, operate, extend or expand a qualifying transportation facility.