

Title 23: HIGHWAYS

Part 5: DEPARTMENT OF TRANSPORTATION HEADING: PL 1987, C. 141, PT. A, §2 (RPR)

Chapter 410: DEPARTMENT OF TRANSPORTATION HEADING: PL 1987, C. 141, PT. A, §2 (RPR)

Subchapter 5: PUBLIC-PRIVATE PARTNERSHIPS

§4251. Public-private partnerships; transportation projects

1. Definitions. As used in this subchapter, unless the context otherwise indicates, the following terms have the following meanings.

A. "Agreement" means a contract between the department and a private entity to create a public-private partnership that allows for private sector participation in the financing, development, operation, management, ownership, leasing or maintenance of a transportation facility and that sets forth rights and obligations of the department and the private entity in that partnership. [2009, c. 648, Pt. A, §1 (NEW) .]

B. "Project" means the initial capital development of a transportation facility. [2009, c. 648, Pt. A, §1 (NEW) .]

C. "Proposal" means a conditional offer of a private entity that, after review, negotiation, documentation and legislative approval, may lead to an agreement as provided in this subchapter. [2009, c. 648, Pt. A, §1 (NEW) .]

D. "Transportation facility" means a facility that is or if developed would be within the jurisdiction of the department including a highway, bridge, railroad line, pier, airport, trail, ferry vessel, building or other improvement. [2009, c. 648, Pt. A, §1 (NEW) .]

[2009, c. 648, Pt. A, §1 (NEW) .]

2. Applicability. This subchapter applies to a proposal or agreement for a private entity to form a public-private partnership when the department estimates that the initial capital cost of a project is \$25,000,000 or more or when the proposal includes placing tolls on existing transportation facilities that were not previously subject to tolls. Nothing in this section is intended to prohibit or otherwise affect programs that do not meet the criteria of this subsection.

[2009, c. 648, Pt. A, §1 (NEW) .]

3. Authorization. Notwithstanding any other provision of law, the department is authorized to receive or solicit proposals to form a public-private partnership with respect to a transportation facility. Proposals must be reviewed in accordance with this subchapter. Upon approval of the Legislature as provided in this subchapter, the department may enter into an agreement.

[2009, c. 648, Pt. A, §1 (NEW) .]

4. Standards for review. Before submitting a proposal to the Legislature for approval the department must find that the proposal meets the following standards.

A. The purpose of and need for the transportation facility must be consistent with the long-term planning of the department. [2009, c. 648, Pt. A, §1 (NEW).]

B. The private entity must have the financial, technical and operational capacity to discharge the responsibilities set forth in the proposal cost-effectively and responsibly as determined by the department. This capacity must include, but is not limited to, meeting department prequalification standards for professional engineering services and general contracting. [2009, c. 648, Pt. A, §1 (NEW).]

C. The proposed transportation facility must be owned, controlled, operated and maintained in a manner satisfactory to the department. [2009, c. 648, Pt. A, §1 (NEW).]

D. The proposal must be cost-effective in the long term. [2009, c. 648, Pt. A, §1 (NEW).]

E. The proposal must limit the use of state capital funding to less than 50% of the initial capital cost of the transportation facility and to the extent practicable minimize the use of transportation funding sources such as the Highway Fund, general obligation bonds supported by the Highway Fund, the TransCap Trust Fund under Title 30-A, section 6006-G and program funding provided by the Federal Highway Administration. [2009, c. 648, Pt. A, §1 (NEW).]

F. If the proposed transportation facility is to be supported by tolls or other user fees, the private entity must provide a traffic and revenue study prepared by an expert acceptable to the department and national bond rating agencies. The private entity must also provide a finance plan consistent with the traffic and revenue study that identifies the proposal costs, revenues by source, financing, major assumptions, internal rate of return on private investments and whether any government funds are assumed to deliver a cost-feasible project and that provides a total cash flow analysis beginning with implementation of the project and extending for the term of the agreement. [2009, c. 648, Pt. A, §1 (NEW).]

G. The proposal must demonstrate safeguards adequate to ensure that no significant additional costs or service disruptions would be borne by the traveling public and residents of the State if the private entity defaults or cancels the agreement. [2009, c. 648, Pt. A, §1 (NEW).]

H. The proposal must include a provision that any contractor performing construction work required by the agreement must furnish performance and payment bonds or irrevocable letters of credit in an amount equal to the cost of the construction work. Any action on such a payment bond or irrevocable letter of credit is subject to the requirements of Title 14, section 871, subsection 4. [2009, c. 648, Pt. A, §1 (NEW).]

I. The proposal and the transportation facility must comply with all requirements of applicable federal, state and local laws and department rules, policies and procedures. [2009, c. 648, Pt. A, §1 (NEW).]

J. The proposal must identify the law enforcement jurisdictions and responsibilities relative to the transportation facility. [2009, c. 648, Pt. A, §1 (NEW).]

K. The proposal must provide that all reasonable costs of substantially affected local governments and utilities related to the transportation facility are borne by the private entity or are otherwise provided for to the satisfaction of the department. [2009, c. 648, Pt. A, §1 (NEW).]

L. The proposal and transportation facility are in the best interest of the public. [2009, c. 648, Pt. A, §1 (NEW).]

[2009, c. 648, Pt. A, §1 (NEW) .]

5. Proposal and selection processes; solicited and unsolicited. The department may request proposals from private entities for a public-private partnership for a transportation facility or may accept unsolicited proposals pursuant to this subsection.

A. If the department receives an unsolicited proposal and determines that it meets the standards in this subchapter, the department shall publish a notice of the receipt of the proposal on the department's publicly accessible website or through advertisements in newspapers. If a notice is published exclusively in newspapers, the notice must appear in 2 or more public newspapers circulated wholly or in part in the State and in one public newspaper circulated wholly or in part in the county where the proposed transportation facility is to be located if any such newspaper is circulated in that county. The notice must provide that the department will accept, for 120 days after the initial date of publication, proposals meeting the standards in subsection 4 from other private entities for transportation facilities that satisfy the same basic purpose and need. A copy of the notice must be mailed to each local government in the area affected by the proposal. [2009, c. 648, Pt. A, §1 (NEW) .]

B. After the proposal or proposals have been received, and any public notification period has expired, the department shall rank the proposals in order of preference. In ranking the proposals, the department may consider factors that include, but are not limited to, professional qualifications, general business terms, innovative engineering or cost-reduction terms, finance plans and the need for state funds to deliver the project and discharge the agreement. The department shall undertake negotiations with the private entity submitting the 1st-ranked proposal. If the department is not satisfied with the results of the negotiations, the department may, at its sole discretion, terminate negotiations with that entity and the department may negotiate with the other entities in order of the ranking of their proposals. If only one proposal is received, the department shall negotiate in good faith and, if the department is not satisfied with the results of the negotiations, the department may, at its sole discretion, terminate negotiations. [2009, c. 648, Pt. A, §1 (NEW) .]

C. The department may require that the private entity assume responsibility for all costs incurred by the State or local governments before execution of the agreement, including costs of retaining independent experts to review, analyze and advise the department with respect to the proposal. [2009, c. 648, Pt. A, §1 (NEW) .]

[2009, c. 648, Pt. A, §1 (NEW) .]

6. Tolls; fares. An agreement may authorize the private entity to impose tolls or fares for the use of the transportation facility. The following provisions apply to such an agreement.

A. The agreement must be consistent with the traffic and revenue study required under subsection 4, paragraph F. [2009, c. 648, Pt. A, §1 (NEW) .]

B. The agreement must ensure that the transportation facility and any related toll facility are properly operated and maintained in accordance with department standards or standards generally accepted in the transportation industry. [2009, c. 648, Pt. A, §1 (NEW) .]

C. The agreement must include provisions governing changes in tolls or fares. [2009, c. 648, Pt. A, §1 (NEW) .]

D. The department may require provisions in the agreement that ensure that a negotiated portion of revenues from a toll-generating or a fare-generating transportation facility is returned to the department over the life of the agreement. [2009, c. 648, Pt. A, §1 (NEW) .]

[2009, c. 648, Pt. A, §1 (NEW) .]

7. Exercise of powers. If the department exercises its power of eminent domain for the development and construction of a transportation facility pursuant to this subchapter, the department must retain ownership rights and interests taken. The State may provide maintenance, law enforcement and other services with respect to a transportation facility owned by a private entity when the agreement provides for reasonable reimbursement for such services.

[2009, c. 648, Pt. A, §1 (NEW) .]

8. Term of agreement. An agreement may not exceed a term of 50 years unless the Legislature, upon the recommendation of the Commissioner of Transportation, approves a longer term.

[2009, c. 648, Pt. A, §1 (NEW) .]

9. Legislative approval. If the department determines that a public-private partnership proposal and draft agreement meets the standards of this subchapter, the department shall submit to the Legislature a bill that authorizes the agreement. The bill must include a statement that the proposal meets the standards in subsection 4, a summary of the substance of the draft agreement and a description of the nature and amount of state investment, if any, including effects on programmed capital work.

[2009, c. 648, Pt. A, §1 (NEW) .]

10. Confidentiality of proposals and negotiations. All records, notes, summaries, working papers, plans, interoffice and intraoffice memoranda or other materials prepared, used or submitted in connection with any proposal considered under this subchapter are confidential and not subject to public review until the department determines that the proposal meets the standards of this subchapter or until the proposal is finally rejected by the department.

[2009, c. 648, Pt. A, §1 (NEW) .]

11. Report of proposals. By February 1st, annually, the department shall provide to the joint standing committee of the Legislature having jurisdiction over transportation matters a report summarizing all proposals that the department has determined meet the standards of this subchapter or that have been finally rejected during the previous calendar year.

[2009, c. 648, Pt. A, §1 (NEW) .]

12. Rules. The department may adopt rules to implement this subchapter. Rules adopted pursuant to this subsection are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

[2009, c. 648, Pt. A, §1 (NEW) .]

SECTION HISTORY

2009, c. 648, Pt. A, §1 (NEW) .

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