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Task B-2: Status of Legislative Settings to Facilitate Public Private Partnerships in the U.S.

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Task B-2: Status of Legislative Settings to Facilitate Public Private Partnerships in the U.S.

California PATH Project

Evaluation of Open Road Electronic Toll Collection for California Applications

(Task Order 6330)

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ABSTRACT

In the search for new sources of funding, federal, state, and local government officials in the U.S. have recently been exploring public private partnerships (PPPs). While promising, PPPs are neither a panacea nor an unwarranted gamble: both shining successes and troubling failures abound. Given the large variation in the efficiency, effectiveness, equity, and feasibility of public-private highway finance partnerships in past projects, federal and state officials have been enacting legislation and statutes to both promote PPPs and to protect public interests from the potential pitfalls of PPPs.

In this paper, we review past U.S. legislation to promote and/or limit PPPs on transportation projects in order to evaluate their relationship with the recent planning and implementation of highway projects through PPPs. We also carefully examine existing state legislation that address issues on economics, public finance, and governance as well as technical details of PPPs in order to provide an overview of the status of legislative settings pertinent to PPPs in the US.

Legislation sets the ground rules by which a public agency and private firms can settle on an appropriate PPP scheme among the many different forms of PPP available for designing, constructing, operating/managing, and/or financing transportation infrastructure. Specifically, legislation sets conditions that: 1) either promote or prevent PPPs for highway projects, 2) provide foundations for contracts between a public agency and a private firm, and 3) affect risks involved in PPPs for both parties. Legislation is the higher hierarchical instructional setting that determines the level of flexibility in contract negotiation between transportation agencies and private firms and, ultimately, the success of PPPs. While states with PPP-related legislation appear to have reached consensus on several issues (such as allowing for design-build projects, long-term leases, and use of the Transportation Infrastructure Finance and Innovation Act—TIFIA—funds), there is a huge variation among the same states in how best to deal with other issues (such as restricting what types of transportation projects are eligible for PPPs). This variation in legislation reflects each state's general philosophical orientation toward PPPs: 1) aggressive (Indiana, Texas, and Virginia), 2) positive, but cautious (Arkansas and Minnesota), and 3) wary (Alabama, Missouri, and Tennessee). In addition, there are some issues and a certain level of details, such as toll rates and non-compete clauses that are more often worked out in contracts by the parties involved in projects that vary significantly in scope, scale, and setting.

Key Words: Public-private partnerships (PPPs), highway financing, legislation

Executive Summary

This report is the second in a series that examines private-public partnerships (PPP) as an alternative way to manage and finance highways in the US. This report provides an overview of Federal legislation that has paved the way in the last three decades to allow PPP projects, and also reviews individual state legislation that addresses issues on economics, public finance, and governance as well as technical aspects of PPPs. Examples of such legislation includes (1) designating specific types of funding sources, limiting type, location, or number of projects, (2) outlining the project selection and review process, and (3) assigning rights to non-compete clauses, toll rate controls, and alternate non-toll routes—essentially providing a framework for PPP projects from inception through operation. State legislation is likely the more important factor in determining the level of flexibility in contract negotiation between parties involved and whether PPP projects will come to fruition and be successful in each highway project in a given state. This report was compiled by examining and analyzing both academic and professional PPP literature as well as previous and existing Federal and state transportation and PPP legislation. The focus of this report is on description, synthesis, and interpretation; we do not reach specific conclusions regarding the wisdom of PPPs, nor do we make recommendations to Caltrans regarding the pursuit of PPPs.

With few exceptions, since the passage of the Federal Aid Highway Act of 1956, user costs for the state and interstate highway systems have been paid by the public sector, mostly from motor fuel taxes collected from drivers. As increases to fuel tax levies have proven increasingly difficult politically, inflation-adjusted highway funding has failed to pace the growth in vehicle travel. In response to a worsening financial squeeze, many state and local transportation agencies are looking to PPPs as an innovative way to address chronic funding shortfalls. However, recent, controversial concession deals in the US, such as the Chicago Skyway and the Indiana Toll Road, have sparked significant debate among the public and policymakers. While there was some opposition to these projects by taxpayers, the deals brought in significant cash flow for these two states to utilize for social services, other infrastructure improvements, debt repayment, and rainy day funds. But the long-term financial benefits of these deals for Chicago and Indiana remain very much in question, and may reveal spectacular failures that may set very unsuccessful precedents to swipe off consideration of carefully designed PPP schemes.

Twenty-three states currently have PPP-enabling legislation. Legislation sets the ground rules by which a public agency and private firms can negotiate an appropriate PPP scheme among the many different forms of PPP available for designing, constructing, operating/managing, and/or financing transportation infrastructure, in addition to no PPP. Specifically, legislation sets conditions that: 1) either promote or prevent PPPs for highway projects, 2) provide foundations for contracts between a public agency and a private firm, and 3) affect risks involved in PPPs for both parties. Legislative conditions also influence the attractiveness of PPP deals for private firms. However, when the laws are set to reduce the risks for the private sector, they often reduce the benefits for the public sector in the PPP deal.

Most evaluators of PPPs agree that appropriate legislation should be set in place prior to private sector involvement to enable the best outcome from PPPs and to protect the public interest. Legislation establishes in advance which phases of highway projects should be privatized and what types of PPP schemes highway agencies can undertake. While some details should be left to contracts between agencies and private firms for individual projects, lawmakers can institute legislation to either aggressively promote PPP projects in order to reap the financial

benefits with recognized risk, or to limit applications of PPPs in order to protect the public interest from the risks (and benefits) of PPPs. Given that voters are often wary of enacting measures that may be construed to broadly endorse privatization and risk the public interest, successful PPP legislation has been promulgated in a careful, deliberative fashion.

There are numerous risks to be carefully considered in PPP planning. Most obvious are the financial risks, which can be placed upon private entities investing in the project, or public agencies, which in turn can expose taxpayers to considerable risk. Thus, a related risk of PPPs is losing the trust of the public, or a backlash against PPPs by the public because of the risk, real or perceived, placed upon taxpayers. Such concerns have only been heightened amid the recent economic downturn and associated government efforts to fail out the banking and automobile industries. Other risks include accurate projection of future traffic flows, competition from other projects, and the environmental limitations or impacts of infrastructure construction. Uncontrollable risks include natural disasters and other unforeseen events. These risk factors are considerable, and are carefully distributed between the public and private sectors in successful PPPs.

There are important federal policies that since the late 1980s allow individual states to promulgate enabling legislation. Beginning in 1987, federal legislation has allowed toll roads and road pricing on federal highways. The 1991 *Intermodal Surface Transportation Efficiency Act* (ISTEA) included the federal pilot program for toll-based public-private partnerships, and moved forward with the *Congestion Pricing Pilot* program that allowed states to begin congestion pricing projects on a few of their Interstate highways. This limited trial program covered initial projects in California, Texas, and Florida. The *Transportation Equity Act for the 21st Century* (TEA-21) passed in 1998 included provisions that granted states the authority to levy tolls on new and reconstructed state highways, as well as new Interstate highways, through creation of the *Interstate Reconstruction and Rehabilitation Pilot Program*. TEA-21 also widely enabled the use of high-occupancy toll (HOT) lanes. The 2005 Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) federal transportation bill allowed greater use of toll finance and private sector involvement in highway procurement, while limiting the use of revenues.

Federal legislation generally provides guidelines for PPP implementation, but leaves it to officials in each state to decide whether it wants to allow PPP projects. Consequently, PPP legislation varies widely from state to state. Although officials in many state governments are expressing interest in experimenting with new PPP legislation, first-hand experience with PPP projects in the United States, particularly privately financed projects, is still limited. Of the 23 states that have PPP legislation, only 15 have made significant use of PPP schemes. Our review of existing state legislation suggests that statutes governing PPPs fall into five general categories: 1) Project Selection and Approval; 2) Procurement and Project Management; 3) Proposal Review Process; 4) Funding Requirements and Restrictions; and 5) Toll Management. Within these categories, there are more specific provisions that are often included in legislation, either to allow or disallow certain activities in the PPP process (See Table ES-1).

Table ES-1 State Legislation in Five Categories

<p>1. <u>Project Selection and Approval</u></p> <ul style="list-style-type: none"> • Allows for Unsolicited Proposals • Limits Number of Projects • Restricts Geographic Location • Restricts Mode of Transportation • Allows for Conversions of Existing Roads • Prior Legislative Approval Required • Subject to Local Veto • Restricts PPP Authority to State Agencies • Design-Build Readily Allowed? • HOT Lane Projects? • Number of Major PPP Highway Projects Since 1991 	<p>2. <u>Procurement and Project Management</u></p> <ul style="list-style-type: none"> • Allows Public Agency to Hire Own Consultants • Allows Payments to Unsuccessful Bidders • Requires Application Fees • Requires Time for Public Review • Specifies Evaluation Criteria • Structures Proposal Review Process • Protects Confidentiality of Proposals
<p>3. <u>Proposal Review Process</u></p> <ul style="list-style-type: none"> • Allows State and Federal Funds • Allows TIFIA Funds • Restricts Toll Revenues from General Fund • Allows Public Sector to Issue Revenue Bonds • Allows Public Sector to Form Nonprofits and Issue Debt 	<p>4. <u>Funding Requirements and Restrictions</u></p> <ul style="list-style-type: none"> • Allows for Multiple Types of Project Delivery • Exempts PPP Projects from State Procurement Laws • Allows for Outsourcing of Operations and Management • Requires Public to Maintain Comparable Non-Toll Routes • Requires Non-Compete Clauses • Allows for Long-Term Leases to Private Sector
<p>5. <u>Toll Management</u></p> <ul style="list-style-type: none"> • Rate-Setting Control Set in Agreement • Requires Removal of Tolls After Payment of Debt 	

While states with PPP related legislation appear to have a consensus on several issues (such as allowing for design-build projects, long-term leases, and use of funds from the Transportation Infrastructure Finance and Innovation Act—TIFIA—of 1998, which provides Federal credit assistance to major transportation projects of national importance to fill market gaps and leverage private investment), there is a huge variation among the same states on other issues (such as restricting what types of transportation are eligible for PPP projects). Further, there are some provisions that have not been widely addressed in legislation. For example, only five states—California, Colorado, Delaware, Florida, and Minnesota—address HOT Lane projects (all of which permit them). Additionally, there are policies on which only a handful of states differ from the majority. For example, all states with legislation addressing unsolicited proposals allow them, except for Indiana and North Carolina. In fact, Nevada allows *only* unsolicited proposals. Of the 21 states with legislation regarding local vetoes, only Arizona, Delaware, and Minnesota require that proposals be subject to possible vetoes. Of the twelve states with legislation addressing proposal confidentiality, only Arkansas and California protect confidentiality. Georgia is the only state to prohibit the public sector from issuing revenue bonds.

Only Mississippi disallows outsourcing of operations and management, and only Arizona and North Carolina require the public to maintain comparable non-toll routes. Only North Carolina

and Tennessee require that tolls be removed once the financing debt has been paid. Such variation in legislative specifics reflects each state's general philosophy toward PPPs: 1) aggressive (Indiana, Texas and Virginia), 2) positive, but cautious (Arkansas and Minnesota), and 3) wary (Alabama, Missouri, and Tennessee). In addition, there are some issues and a certain level of details, such as toll rates and non-compete clauses, that appear to be better decided in contracts by the parties involved in each project, reflecting the significant variation in the scope, scale, and settings of projects.

In the future, federal legislation may become more or less favorable toward highway PPPs as the current projects progress and long-term results become apparent and public agencies accumulate their experience and knowledge on PPPs. In any case, with so much flexibility at the federal level, states clearly must exercise care when crafting their own enabling legislation to ensure that they meet their needs and receive the results they desire, while protecting the public interests, in their highway PPP programs.

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1. INTRODUCTION: CONTEXT AND BACKGROUND FOR PPPS

Facing the funding shortfall and the continuous demand in construction and maintenance of highways in the nation, federal, state, and local governments in the U.S. began to look for alternative highway financing strategies outside the traditional framework of public financing. Public-private partnerships (PPPs) in combination of tolls or congestion pricing have emerged as a popular financing strategy since the 1980s in Europe (Medda et al. 2007), and more recently in the US. The recent concession deals of the Chicago Skyway (99 years, \$1.83 billion) and the Indiana Toll Road (75 years, \$3.8 billion) escalated the public debate on the appropriateness, efficacy, efficiency, effectiveness, feasibility, fairness, and equity of public-private partnerships in financing highways, which have historically been provided by the public sector without tolls except for the limited number of turnpikes and state highways after the passage of the Federal Aid Highway Act of 1956 to build the interstate highway system.

The conditions of PPP legislation at the Federal or state level determine the feasibility and likelihood of a PPP project. Lawmakers can design legislation to limit the role of the private sector, or place much of the risk of the project upon them. The key to successful legislation is to balance the rewards and risks equally. The extent of privatization of a highway is determined via legislation in regards to how comfortable state lawmakers and taxpayers are with the concept. This report will discuss the wide range of levels of enthusiasm for PPP projects, as some legislation allows only for a fixed number of trial projects, while other legislation, particularly in Europe, allows for more complex design-build-finance-operate projects. The legislation must establish from the beginning which party will be responsible for what, how each party will be protected against risk, competition issues and environmental concern. Legislation may also provide guidelines for the type of contract to be used in the project.

Our first report on public-private partnerships—*Are Public-Private Partnerships a Good Choice for U.S. Highways?*—identified several important conditions that affect PPP agreements in other studies (Bult-Spiering and Dewulf 2006; Doi 2002; Lockwood, Verma, and Schneider 2000) (Table 2-1). It is still too early to evaluate many PPP projects in the US and other countries for the two main reasons. First, many of the projects have been recently initiated and have not yet reached their agreement ending dates. Second, it is likely that the conditions that lead to a successful project vary depending on a number of factors, including the economic climate, legislative barriers, policy-makers' willingness to undertake PPPs, and the prevailing cultural attitudes toward private involvement in public sector affairs (Apogee Research 1995; Mackie and Smith 2005; Sawyer 2005; Ward and Sussman 2006).

In this paper, we review past U.S. legislation to promote and/or limit PPPs on transportation projects in order to evaluate their relationship with the recent planning and implementation of highway projects through PPPs. We also carefully examine existing state legislation that address issues on economics, public finance, and governance as well as technical details of PPPs in order to provide an overview of the status of legislative settings pertinent to PPPs in the US. In the next section, we review the significance of legislative settings in facilitating PPPs. In section three, we discuss current federal legislation for PPPs in the United States, and how this legislation shapes PPP projects. In the fourth section, we define different types of PPP legislation and examine what types, allowances and limitations are in place by state. We will look at legislation governing all stages of a PPP project, from project selection through tolling management.

2. SIGNIFICANCE OF LEGISLATIVE SETTINGS TO ENABLE PPPS

In this report, we focus our discussion on legislative conditions. In most cases, appropriate legislations should be set in place prior to the private sector involvement in designing, building, operating, maintaining, and financing transportation infrastructure on public land. Such legislations govern which part of functions to be privatized and what types of schemes highway agencies can undertake. While highway agencies are in charge of specifying details in contractual terms, policymakers pass legislations to either: (1) promote PPP schemes to aggressively pursue resulting financial benefits with recognized associated risks, or (2) limit applications of PPP to be prudent about protecting the public interest against any associated risks. In addition, governments must carefully proceed when promulgating PPP supporting legislation since the voters are often wary of governments enacting measures that may be construed to broadly endorse privatization and risk the public interest.

Legislative conditions also influence the attractiveness of PPP deals for private firms, the types and levels of risks for both public and private sectors, and actual financial benefits for the public. In France, for example, the passage of a 2004 law made possible PPP contracts beyond long-term lease agreements (Lestrange et al. 2005). With long-term lease agreements of France’s pre-2004 concession model, the private entities have some degree of protection from uncontrollable events that substantially raise the risk of the project, including changes in law insufficient traffic demand to recoup the cost. However, the newly-allowed design-build-finance-operate schemes may not provide incentives attractive enough to offset the risks that private investors have to take, or to generate sufficient interest in the program (Lestrange et al. 2005).

In another example, when it decided to contract out the management of the Virginia Dulles Toll Road, the State Corporation Commission of Virginia was required by a legislation to retain a right to set toll schedules (1992). This demands a degree of trust between the public and private entities because the profit for the private firm in this deal can be limited by the decisions of the public commission. This type of legislation may reduce the attractiveness of a project to the private sector. It should be emphasized that legislations provide a general framework or a set of ground rules within which highway agencies can use PPP strategies (or not) for the provision of highway infrastructure.

Table 2-1: Risks and Background Conditions Affecting PPP Agreements

<u>Legislative:</u>	PPP-enabling legislation allowing a speedy approval process or hefty incentives can lower the transaction and time costs associated with initiating the agreement and make the PPP more attractive to private investors. A good balance between offering private incentives and protecting the public interest is needed. Public agencies usually shield private investors from the risk of legislation turning against a project once it is underway.
<u>Contractual:</u>	The type of PPP contract used affects the opportunities for the private firm to streamline costs. Ideally, the chosen scheme would incentivize the private entity to consider the long-term effects of choices made during the project, seek to minimize its lifetime costs, provide flexibility, include opportunities for profit and efficiency gains sufficient to offset the set-up costs of the PPP, and align the motivations of the private entity with the public interest. A key part of the

	agreement hinges upon the initial value assessment of the project.
<u>Political / Public Perception:</u>	Public hostility toward PPPs and privatization can jeopardize projects. The political support for PPPs can be worsened if the public has already experienced a failed PPP for a similar type of project.
<u>Competition:</u>	If a new toll PPP facility is built too close to an existing parallel toll route, the split traffic demand may be insufficient to financially support both projects. Additionally, there will be high transaction costs involved with orchestrating cooperation between private entities where competing PPP routes intersect affect one another.
<u>Market Conditions:</u>	PPP proposals must remain competitive with other investment opportunities available to private firms. When the private market presents many attractive investment opportunities, the public sector may have to add incentives and lessen the degree of investor risk transfer in order to keep PPP projects competitive, but this may diminish the overall cost savings and increase payments from both the highway agency and the road users.
<u>Environmental Approval Issues:</u>	Many countries require environmental approvals before projects can begin construction. Because the length of time needed to obtain these approvals can be uncertain, the public sector usually retains this responsibility either for obtaining approval before soliciting private sector bids, or by offering to compensate investors for time lost due to environmental delays.
<u>Public-Private Relations:</u>	Conditions, such as rate-of-return caps, ensure that the private sector does not exploit the project in the interest of maximizing profits. However, experience to date suggests that a cooperative relationship between the public and private entities is more beneficial to a PPP's success than a meticulously worded contract.
<u>Usage:</u>	Traffic demand is generally projected to increase over time, but there is a chance that demand for travel along a new roadway may not meet projections, posing financial risks to private entities involved in both actual and shadow toll PPP schemes. The public sector sometimes offers to subsidize this risk because the private sector has little control over traffic demand.
<u>Construction:</u>	Changes in construction material and labor costs can hinder the cost effectiveness of a highway construction project.
<u>Currency:</u>	Developing countries sometimes use foreign finance institutions to fund highway PPPs. Devaluation of the home currency against the finance one can be fatal to a project under this funding scheme.
<u>Public vs. Private Sector Goals</u>	The PPP agreement must successfully balance the public sector's goal of protecting the public interest with the private sector's profit-driven motives.

Source: (Iseki, Uchida, and Taylor, 2007).

When the laws are set to reduce the risks for the private sector, it may reduce the benefits for the public sector in the PPP deal. For example, Spain gradually passed a series of laws since the 1950's to promote PPPs by increasing concession periods, protecting the concessionaires against interest rate fluctuations, and using shadow tolls to fend off motorist unrest (Bult-Spiering and Dewulf 2006). While this increased shouldering of risks by the public sector makes

PPPs more viable to private entities, it reduces the potential for savings over the traditional public procurement methods.

Our first report on public-private partnerships identified the following financial risks associated with PPP strategies for highway projects:

- (1) the environmental clearance risks arising from delays in obtaining the needed approvals,
- (2) the risk of political and public opinion delaying or requiring costly modifications to the project,
- (3) construction cost overrun risks,
- (4) risks associated with operations, and
- (5) the risk of natural disasters.

These factors should be carefully distributed between the public sector and the private sector—whichever best able to control each of these risks—taking into account a potential tradeoff between the amount of transferred risks and the attractiveness of a project. To some degree, risk sharing works best when legislation and contracts are flexible enough to allow for modifications in the event of unforeseen circumstances. At the same time, when policymakers are seriously concerned and do not desire to leave the allocation decision to highway agencies in regard to any of these risks, they can enact laws to specify a responsible party for such risks. For example, since the first and second risks are political in nature, laws can require the public agency to be responsible for these risks.

There is a fundamental trade-off between public and private sector interests that legislation need to take into account and balance out. While legislation should enable public agencies to transfer as much risk as possible to realize financial savings, it should not require a transfer of so much risk that it will lead to a significant reduction of the private sector's interest in the deal, or cause the private entity to charge exorbitant user fees to protect itself in an overly-risky transaction.

3. GENERAL DESCRIPTION OF THE HISTORY AND PRESENT STATUS OF FEDERAL LEGISLATION PERTINENT TO PPP IN THE US

For the past half-century, the federal government has funded much of the construction and maintenance of the United States' Interstate highways using fuel tax revenues. As the paying entity, it holds much of the decision-making power over policy changes affecting the nation's interstate highways. In light of the declining ability of the federal fuel tax to finance the nation's road travel needs and recognizing the dire financial state of much of the country's highway agencies, the federal government has begun to consider partial private-finance as a solution to the funding shortfall. The federal government introduced increasingly aggressive bills allowing states to develop and implement highway PPP proposals, gradually evolving from pilot programs in the late 1980's to broader enabling legislation by the mid-2000's (AECOM Consult 2007)

Since 1987, the federal legislation began to allow toll roads and road pricing on federal highways. The 1991 *Intermodal Surface Transportation Efficiency Act (ISTEA)* included the federal pilot program for toll-based public-private partnerships, and moved forward with the *Congestion Pricing Pilot* program that allowed states to begin congestion pricing projects on a few of their Interstate highways. This limited trial program covered initial projects in California, Texas, and Florida (Gougherty 2005a).

The *Transportation Equity Act for the 21st Century* (TEA-21) passed in 1998 marked a step further toward the widespread use of toll finance. Although converting existing toll-free interstate highways to toll roads is generally prohibited, the provisions in TEA-21 granted states the authority to levy tolls on new and reconstructed state highways, as well as new Interstate highways, through creation of the *Interstate Reconstruction and Rehabilitation Pilot Program* (Federal Highway Administration 2002). This pilot program authorized states to use road pricing for up to three facilities that were previously non-tolled interstate highways, but limited the use of toll revenues to directly cover upgrade costs. TEA-21 also widely enabled the use of high-occupancy toll (HOT) lanes by allowing states to designate certain HOV lanes where single-occupant cars would be permitted. Together, these policies formed the basis for concession-based PPPs, and allowed individual states to form their own enabling legislation (Gougherty 2005b).

The 2005 Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETY-LU) federal transportation bill allowed greater use of toll finance and private sector involvement in highway procurement, while limiting the use of revenues. For example, while the HOT lanes program was expanded to include all HOV lanes in the country, the bill mandates that any single-occupant cars must be charged a variable toll, and that revenues cannot be spent outside the corridor where they were generated. Also, the SAFETY-LU limits the number of congestion pricing projects where revenues may be spent on other corridors. In short, a significant limitation for PPPs is the requirement that *any new interstate highways financed by toll revenues* must give preference to public toll authorities, though this restriction does not apply to state highways (Gougherty 2005b). As a rule of thumb, states may levy any type of toll on new and reconstructed state highways, new interstate routes, and *reconstructed* toll interstate facilities, but tolls may not be charged on existing free interstate highways. Limitations on revenue generally direct states to spend the money within the tolled corridor with priority given to actual construction costs (Gougherty 2005b). In addition, the *Federal Acquisition Regulation* enforces limitations on procurement methods, as it does for most government-funded projects. Contracts must be awarded based on a competitive selection process, with the intent to provide equal opportunities to bidders and maximize cost-efficiency (Bult-Spiering and Dewulf 2006).¹

Federal legislation provides some guidelines for PPP implementation, but leaves it to officials in each state to decide whether it wants to allow PPP projects. Consequently, PPP legislation varies widely from state to state, and some states do not yet have any PPP-specific laws at all. Officials in many states that have expressed interest in experimenting with PPPs primarily seek to push much-needed highway projects forward without spending large amounts of scarce public funds. Enacting enabling legislation is the first step that state governments take toward building a highway PPP program, but the legislation must conform to federal guidelines. In addition, officials of state governments need to be aware that the legislation formation process involves significant risks associated with the choices made, such as taxation constraints, control issues, right-of-way procurement, and rejection by the public.

¹ However, this often forces states to award contracts to the lowest responsible bidder, and not necessarily the most reputable one. It is also costly in terms of time, as the bid procurement and review process can be lengthy. Arizona notably circumvented the competitive bidding requirement by prohibiting the spending of state funds on PPP projects unless the money is reimbursed later (Federal Highway Administration 1992).

While several states, such as Indiana, Texas, and Virginia, have been aggressively promoting PPPs and passing state legislation toward this new financing strategy, some people raise a serious concern regarding the protection of public interests. James L. Oberstar (D-MN), Chairman of the U.S. House of Representatives Committee on Highway and Infrastructure, and Peter DeFazio (D-OR), Chairman of the Subcommittee of Highways and Transit, in their letter to state governors on May 10, 2007, wrote, “[w]e write to strongly discourage you from entering into public-private partnerships (“PPP”) agreements that are not in the long-term public interest in a safe, integrated national transportation system that can meet the needs of the 21st Century.” To some extent, the debate and discussion that have been held in the Federal committees are characterized by different perspectives on the two extremes, strongly for or strongly against PPPs, similar to the political/ideological differences over any privatization of the production and provision of public infrastructure and services.

Some states, including California, begin cautiously, allowing only a limited number of pre-approved demonstration projects. In these instances, highway agencies are implementing PPPs on a trial basis with the intent of creating future legislation to allow more projects if the initial ones produce favorable results (AECOM Consult 2007). Lawmakers see this as a prudent strategy for initiating a PPP program, since it allows the state transportation agency to gain firsthand experience with the new finance models before making a long-term commitment to their use. Such a strategy is also more politically palatable, seeing as the public will recognize the initial use of PPPs as a temporary experiment, rather than a drastic and permanent shift in the way highway improvements are funded.

If state policymakers are pleased with the outcome of the trial program, they may then initiate a second-phase trial, or introduce more permanent legislature allowing unlimited PPP projects and clarifying the conditions of their use. This gives officials a chance to incorporate lessons learned during the trial program when making long-lasting changes to their states’ highway programs. A state government wishing to make a bolder first step might skip the trial program and use permanent legislation to initiate PPP use.

With the many types of PPP schemes available for highway finance, states have adopted a variety of enabling legislation. Some have limited themselves to models like Design-Build, which varies from traditional procurement methods by combining several contracts into one, compared to having different contracts with potentially different private parties for different stages of the project. Others have pursued a more radical departure from conventional finance methods, and adopted long-term leases and concessions that allow highway operators, regardless of whether it is public or private, to charge tolls.

In summary, the federal legislative acts—original pilot programs, ISTEA, TEA-21, and SAFETY-LU—form the legal basis for highway PPPs in the United States. States are given considerable authority to decide whether to implement tolls, adopt congestion pricing schemes, or solicit greater private sector involvement. Should current economic trends continue, state governments will face continuous funding shortfalls in future, and federal legislation may become more flexible toward highway PPPs. Federal transportation administrators under the Bush administration have issued declarative, unequivocal statements that they believe PPPs will lower the costs of highway projects and speed their completion in most cases, citing the severe lack of public transportation funds as the key motive for pursuing PPPs so aggressively (AECOM Consult 2007). The federal government has accordingly given state governments the authority to pursue highway PPPs as they see fit, and they have a lot of leeway with regard to

which models and projects they select. However, as we observe in the deals for Chicago and Indiana, the long-term financial benefits of on-going PPP projects remain very much in question. Furthermore, several early long-term concession deals, including ones in Chicago and Indiana, which were made without much PPP experience in the U.S. transportation industry, may be shaping up to be such spectacular failures that it will wipe off future possibility of effective PPP schemes with careful analysis and decision making transparency (Ortiz and Buxbaum 2008). Therefore, even with so much flexibility given at the federal level, states must exercise care when crafting their own enabling legislation to ensure that they receive the results they desire, while protecting the public interests, in their highway PPP programs. State officials must also keep in mind that full public projects are always an available option.

4. TYPES OF LEGISLATION AND THEIR EFFECTS

State laws regarding PPP highway projects vary considerably. Twenty-seven states currently do not have legislation enabling PPPs (AECOM Consult 2007). Of those that do, only fifteen have made significant use of PPP schemes (AECOM Consult 2007). Fewer still have pursued aggressive toll-financed projects, such as high-occupancy toll (HOT) lanes, which are characteristic of the more-privatized PPP models. Texas leads the way with 24 transportation (both transit and highway) concession projects as of 2006; no other state has more than 10, and most have only one or two, if any (AECOM Consult 2007). As such, first-hand experience with PPP projects in the United States, particularly private finance-driven ones, is low, though many state governments are now expressing interest in experimenting with new legislation.

Of the states that do allow some form of highway PPPs, many have done so only on a trial basis with a limited number of projects, and in some cases only one project. Table 4-1 compares the status of PPP laws in states with enabling legislation, and we examined several factors that demonstrate the extent to which each state has embraced aggressive PPP finance schemes.²

State legislatures have taken many different paths in creating PPP programs, as detailed in Section 3. Some states, such as Virginia, have laid out explicit regulations and standards for PPP facilities. Other states, like Minnesota, have only minimal statutes or provide for only a few types of projects, leaving a lot of discretion to the parties crafting the agreement between the public and private entities.

Statutes governing PPPs fall into five main categories:

1. Project Selection and Approval
2. Procurement and Project Management
3. Proposal Review Process
4. Funding Requirements and Restrictions
5. Toll Management

The following sections describe provisions include in each of these categories include the following provisions.³

² For a summary of California's current PPP legislation and past legislative actions, please see Appendix I.

³ These elements were originally developed by the law firm of Nossaman, Guthner, Knox, & Elliott, LLP. Sample statutes addressing these points are available at http://www.fhwa.dot.gov/ppp/pdf/legis_key_elements.pdf (last accessed on June 19, 2009), in the Nossaman document entitled "Overview of Key Elements and Sample Provisions." Additional information for state-

4-1. Project Selection and Approval

Unsolicited projects. Two states, Indiana and North Carolina, restrict PPP projects solely to solicited projects, while Nevada allows only unsolicited projects. The remaining states have either no express provision on allowing for unsolicited projects or explicitly provide for both solicited and unsolicited projects. Allowing for unsolicited projects can create a more effective transportation network, as the private sector is often more innovative than the public sector in

coming up with ideas for PPP projects. At the same time, however, states must ensure that they are reviewing only feasible unsolicited projects. States can require application fees or deposits in order to ensure this. Allowing for both solicited and unsolicited projects still provides a way for the public sector to ask the private sector to present proposals for needed infrastructure improvements.

1. Project Selection and Approval

- Are unsolicited proposals allowed?
- Do the statutes authorize only a limited number of projects?
- Are there restrictions on the geographic location of projects?
- Are PPP facilities limited to only certain types of transportation?
- Can existing roads be converted to tollways?
- Is prior legislative approval required for PPP projects?
- Do the statutes provide for a local veto of approved PPP projects?
- Are local entities authorized to enter into PPP agreements without the approval of the state department of transportation?

Limited number of projects. As a first step in developing a PPP program, some states, including Arizona, Missouri, and North Carolina, have provided for only a limited number of PPP projects in their statutes. This criterion is useful for determining how robust and permanent a state's PPP-enabling legislation is. These statutes do provide an affirmative first step towards promoting PPP projects, and also provide the time for an agency to gain experience in contracting for PPPs without taking significant risks for the public interest.

At the same time, they also signal that lawmakers have reservations about dedicating a

state to the PPP process for the long term, discouraging private interests from developing a PPP network in a state. This approach is not recommended for the long term, as states have ways of managing the number and location of PPP projects other than strictly limiting the number of projects through legislation. The project selection must be based on a solid assessment of economic gain in each PPP project, and should not be limited by an arbitrary number of projects. If states receive more PPP proposals, which will likely increase economic efficiency, than what the statute provides, it can be difficult to encourage the legislature to timely amend the statutes to provide for additional projects.

by-state information can be found at <http://www.ppptoolkit.fhwa.dot.gov/statestory.aspx> (last accessed on June 19, 2009), unless otherwise noted.

Table 4-1: Project Selection and Approval

Code	Provisions	AL	AK	AZ	CA	CO	DE	FL	GA	IN	LA	MD	MN	MO	MS	NV	NC	OR	SC	TN	TX	UT	VA	WA
1-a	Allows for Unsolicited Proposals			Y	Y	Y	Y	Y	Y	N	Y	Y	Y	Y	Y	Y	N	Y			Y	Y	Y	Y
1-b	Limits Number of Projects		Y	Y	N	N	N	N	N	Y	N	N	N	Y	N	N	Y	N	N	Y	N	N	N	N
1-c	Restricts Geographic Location		Y	N	Y	N	N	Y	N	Y	N	N	N	Y	Y	N	Y	N	N	Y	Y	N	N	N
1-d	Restricts Mode of Transportation	Y	N	Y	N	Y	N	N	N	Y	Y	N	Y	Y	Y	Y	Y	N	Y	Y	N	N	N	N
1-e	Allows for Conversions of Existing Roads		N		Y	N			Y	Y	Y	Y	Y	N	N	N	Y			N	Y	Y	Y	Y
1-f	Prior Legislative Approval		N		Y	N	Y	Y	N	Y	Y	N	N	N	N	N	N	N	N	Y	N	N	N	Y
1-g	Subject to Local Veto		N	Y	N	N	Y	N	N	N	N	N	Y	N	N	N	N	N	N		N	N	N	N
1-h	Restricts PPP Authority to State Agencies	Y	Y		N	Y	Y	Y	Y	Y	Y	Y	N	Y	N	N	Y	Y	Y	Y	N	Y	N	Y
1-i	Design-Build Readily Allowed?	Y		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y		Y	Y	Y	Y	Y	Y	Y	Y	Y
1-j	HOT Lane Projects?				Y	Y	Y	Y					Y											
1-k	Number of Major PPP Highway Projects Since 1991	0	1	2	7	4	0	5	0	1	0	0	1	0	0	2	1	1	5	0	3	2	4	1

*A cell left blank indicates state legislation does not make an explicit provision regarding that category.

*Nevada allows unsolicited proposals only.

*1-k is from page 63 of FHWA Guidebook (AECOM Consult 2007).

*Information for California in table 4-1 is from January 2009 legislation.

Geographic restrictions. Just as some states have limited the number of projects a state can approve, so too have some states placed geographic restrictions on where PPP projects can be located. California's PPP program mandates that two of the four PPP projects allowed by statute be located in Northern California, with the remaining two in Southern California. North Carolina requires that at least one of the three approved projects be located in a rural county, and at least one of the three in an urban county. These provisions, while they may represent a political compromise, are not recommended, as they force public agencies to pursue projects in areas where they may not be needed. There is no direct connection between geographic locations and potential economic gain in the application of PPPs in projects. Therefore, the project selection should not be limited by geographic locations.

Limitations on types of transportation. In order for states to promote innovative ways of funding projects and to avoid needing to amend legislation each time a new type of transportation project is proposed for a PPP, states should provide language allowing for a broad range of transportation-related PPP projects, from ferries to HOT lanes, unless clear costs and/or negative impacts are identified for particular types of projects. Unfortunately, many states allow only a few types of projects in their transportation-related PPP statutes at this point. Ten states provide various limitations on the types of transportation projects allowed. For example, Alabama allows PPPs for toll roads, toll bridges, ferries, and causeways only, leaving out many types of non-tolled facilities such as truck lanes or rail improvements. It is better for states to provide for a wide range of projects in their PPP statutes, through either a long list of transportation projects allowed by the statute or a broad definition of "transportation facility."

Converting existing roads to tollways. Although federal law prohibits the conversion of existing free interstate highway facilities to toll roads, state highways are exempt from this law. The presence of legislation enabling such conversions of state highways indicates that the government is interested in using PPPs not only to finance construction contracts (green fields projects), but standalone maintenance and operation contracts (brown fields projects) as well. While we often find discussion to mix adoption of tolls and PPPs, these two issues are fundamentally separate, as there is no strong link between financing and the organization of infrastructure provision (OECD 2008). Thus, it is not necessary to relate an application of tolls to PPP legislation.

Apart from PPPs, an application of tolls should be considered for any facility where it increases the efficiency to the use, finance, maintenance, and management of existing facilities while it does not cause significant adverse effects on equity. Five states have restrictions on converting existing roads to tollways, with six others silent on the matter. Colorado, for example, allows only for existing HOV lanes to be converted into HOT lanes. Although allowing for existing fee-free roads to be converted into toll roads can be very unpopular with users, it can increase the efficiency of the use and also provides more flexibility to public agencies when crafting PPP agreements. In June 2007, Texas restricted the ability of public agencies to convert free roads to tolled roads as part of an anti-privatization bill (Barlas 2007). In the long run, however, it is a better idea to allow for these conversions and provide the public with a way to comment on such proposals, in addition to a careful analysis of economic efficiency in these projects.

Prior legislative approval. Six states require various forms of legislative approval before PPP projects can move forward. Delaware requires that the co-chairs of the state General Assembly's bond committee meet to approve or disapprove PPP proposals. Washington provides for the state finance committee to approve a project in the absence of a public benefit corporation (for example, a port authority or other infrastructure authority). Georgia does not require that the legislature approve the project, but does require that the project's sponsors present the legislature and the governor with a copy of the letter of intent to negotiate a PPP deal. Such requirements can chill private participation in PPPs, as allowing for a legislative veto *late in the process* dramatically increases the risk that a project will not be approved. States must be careful to weigh the public interest in managing public agency participation in PPP projects with the discouragement that such legislative approval provides. Removal of the need for legislative approval of each individual project both streamlines the PPP application process and demonstrates the state government's trust in its PPP agreement guidelines. It also provides reassurance to private contractors that the projects will be approved as long as they conform to the established PPP laws, thus lessening the political and approvals risks commonly associated with highway PPPs. As an exception, some states wish to retain legislative approval requirements during their trial programs as a way to gain experience and refine their PPP guidelines early on.

Local veto. Just as in the legislative approval setting, allowing for local residents to veto plans for a PPP project introduces substantial risk for final project approval. Three states, Arizona, Delaware, and Minnesota, allow for some form of local veto of a project. In Arizona, the approval of the local governing body is needed if a PPP project will connect with a local road, while in Minnesota the governing body of any municipality or county where a PPP proposal is located can veto the project within 30 days. Just as with legislative approval, these requirements are not recommended, unless there is any clear identification of adverse impacts on local communities. If a state is concerned about including local input on a PPP proposal, it can mandate that local or regional transportation agencies be involved with the PPP planning process for projects within its jurisdiction.

Restricts PPP Authority to State Agencies. Promotion of PPPs assumes that a responsible agency already possesses or will obtain sufficient capacity and knowledge that is necessary to properly implement PPPs. While a network issue associated with fragmented adoption of PPPs and potential application of toll financing has to be carefully examined, there is no fundamental difference between local government and state government as long as both have the same level of capacity and knowledge for PPPs. On the other hand, statutes like this could operate as a safety mechanism in which a state department can make it sure that local adoption of PPP will not cause serious network problems. In reality, it often takes some time for any government which does not have any prior experience in PPPs to gain capacity and knowledge, it is recommended to have a central unit of employees that are equipped with a set of skills in PPPs and serve not just for a transportation service but for other public services (OECD 2008).

Five states, Minnesota, Nevada, Texas, Virginia, and just recently, California, allow for public agencies other than a state agency to enter into PPP agreements, while the other states either allow only the state agency to participate in PPPs or have no expressed provision. Minnesota allows "road authorities" to enter into PPP projects, which is any public agency with the authority to construct roads, from the state department to town boards. If public agencies

other than the state Department of Transportation have the expertise to enter into these types of agreements, a state should provide them with the expressed ability to do so. For example, if a city owns and maintains a facility, it should be granted the ability to enter into a PPP agreement to maintain the facility or for construction of improvements. If, however, the state DOT is the main road-building agency in a state or the only agency equipped to manage the PPP process, it would be wise to grant it the sole ability to enter into PPP agreements.

Design-Build Readily Allowed. Design-Build is one of the most limited forms of PPP, as it varies only slightly from the traditional Design-Bid-Build model. Because this model only combines contracts for design and construction that would normally be issued separately, the public likely views it as more of a streamlining of the contracting process rather than a step toward privatization. As such, the political risks of Design-Build agreements are low, and many states readily allow their highway agencies to pursue this PPP model.

With less than half of the states in the country presently allowing highway PPP projects, and even fewer pursuing the riskier concession models, it is uncertain whether most states are willing to attempt the Build-Operate-Transfer or Design-Build-Finance-Operate schemes. Thirty-one of the forty-four major highway PPP projects undertaken in the United States since 1991 have been Design-Build (AECOM Consult 2007). PPP legislation must carefully balance the desire to protect government agencies from risks while still keeping proposals attractive to the private sector when compared to the other investment opportunities available on the private market. Trying to offload too many risks to the private sector or not providing enough government-backed incentives will diminish private interest in a state's PPP proposals.

HOT Lane Projects. The presence of HOT lane projects is an indication that a state is amenable to charging tolls on their highways, which is a common method of revenue collection under the more private PPP models. Many states have HOT lane projects in place or under consideration, and these variable toll facilities are the only allowable way to toll existing free HOV lanes (Gougherty 2005b). It should be noted that many states have traditional, non-HOT toll lanes, and these are not accounted for in the "HOT Lane Projects" column.

Number of Major PPP Highway Projects Since 1991. The number of high-value projects in a state is another good measure of the amount of faith the government has in PPP finance for its highways. Instead of measuring a state's embracement of PPPs in terms of number of projects adopted, counting only the high-value projects identifies the states that have demonstrated willingness to shoulder a large amount of risk in each PPP agreement. Interestingly, when projects costing less than \$53 million are removed, states with numerous low-value PPPs, such as Texas, begin to appear more leery of private finance (AECOM Consult 2007). Accordingly, states whose legislation is more cautious toward the widespread adoption of PPPs begin to look bolder because the few projects undertaken have had high price tags.

4-2. Proposal Review Process

Streamlined approvals processes increase the attractiveness of a project by reducing anticipated delays. Streamlining the contracting process is usually desirable because it reduces the amount of time and resources that both the public and private sectors must spend on bidding. Officials in

Ireland noticed a drop of PPP proposals because the government demanded that private entities create overly-elaborate submissions with no guarantee of winning the contract (Reeves 2005). But in crafting terms more attractive to potential bidders, governments must ensure that the bidding process remains fair and open to public participation (Iseki, Uchida, and Taylor Under review).

2. Proposal Review Process

- Can the public entity hire its own consultants?
- Is the public entity required to reimburse unsuccessful bidders?
- Can the public entity require application fees?
- Do the statutes require time for public review?
- Do the statutes specify evaluation criteria for the public entity to use?
- Do the statutes specify the structure of the review process?
- Is the public entity required to protect the confidentiality of PPP proposals?

Public agencies hiring their own

consultants. When a public agency can hire its own consultants to assist in preparing guidelines and reviewing proposals, all parties to a PPP benefit. No states currently limit the ability of public agencies to hire such outside consultants, but eight states do not have a specific provision authorizing the use of these consultants. In order to encourage public agencies to develop relationships with key advisors who can help bring PPP projects to reality, States should pass affirmative legislation allowing engineers, attorneys, or others to help.

Allowing payments for unsuccessful

bidders. To encourage private firms to submit both solicited and unsolicited proposals, three

states, Delaware, Indiana, and Texas, have statutes requiring payments to unsuccessful bidders, to reimburse them for the costs of compiling a proposal and other work provided. Georgia, Louisiana, and Maryland, on the other hand, take the opposite approach and explicitly prevent public agencies from reimbursing bidders, even if these agencies do use some of the work that the private agency put forth. Allowing public agencies to pay unsuccessful bidders for their work may encourage better projects by stimulating more bids as long as public agencies carefully monitor the contents and quality of submitted proposals, so that private firms do not get paid multiple times for the same or similar proposals. In general, statutes that allow for these payments are recommended.

Requirement of application fees. Allowing public agencies to collect application fees can help offset the costs of soliciting PPP proposals, reviewing unsolicited proposals, and managing the proposal process. Further, these fees likely increase the likelihood that the proposals offered to public agencies will be made in good faith. Eleven states grant public agencies the ability to charge application fees. Delaware is the only state to put a cap on its fee, a cap of \$50,000. Nevada calls for a “reasonable” fee, a nebulous definition that leaves a lot of discretion to the public entity. Using such language is recommended, as it gives the public agency flexibility to charge more in fees for more involved projects, and also allows the amount charged for a fee to be indexed for inflation without needing to amend it through the legislative process.

Requiring time for public agency review. Since the length of time it takes to review a project depends upon how complex it is, it is difficult to set a standard amount of time public

agencies must take in order to review a proposal. States have implemented a broad range of statutes in this area. Georgia provides the longest period of time, 135 days, for public agencies to review the proposal and solicit competing proposals. Colorado requires 14 days, but then allows public agencies to provide more time, depending upon the complexity of the project. Just as in the requirement of application fees context, states should provide for at least a minimum length of time for public agencies to review proposals but then allow for agencies to grant more time for review of complex projects.

Table 4-2: Proposal Review Process

Code	Provisions	AL	AK	AZ	CA	CO	DE	FL	GA	IN	LA	MD	MN	MO	MS	NV	NC	OR	SC	TN	TX	UT	VA	WA	
2-a	Allows Public Agency to Hire Own Consultants		Y			Y		Y	Y	Y		Y			Y	Y	Y	Y			Y	Y	Y	Y	
2-b	Allows Payments to Unsuccessful Bidders						Y		N	Y	N	N									Y				
2-c	Requires Application Fees						Y	Y	Y		Y	Y		Y		Y		Y			Y		Y	Y	
2-d	Requires Time for Public Review			Y	Y	Y	N	N	Y	Y	Y	Y		Y	Y			Y			Y		Y	Y	
2-e	Specifies Evaluation Criteria		N		N	Y	Y	Y	Y	Y	Y	Y	N	N	N	Y	N	N	N	N	N	N	N	Y	Y
2-f	Structures Proposal Review Process		N		Y	N	Y	N	Y	Y	Y	Y	N	N	Y	N	N	Y	N	Y	Y	Y	Y	N	Y
2-g	Protects Confidentiality of Proposals		N		N		Y		Y	Y	Y	Y		Y				Y			Y		Y	Y	

***A cell left blank indicates state legislation does not make an explicit provision regarding that category.

Specification of evaluation criteria. Ten states provide at least minimal guidance for public agencies for setting standards related to evaluation of proposals. The guidance that most of these statutes give is very broad in nature, like the statutes in Louisiana, Maryland, and Nevada, which ask public agencies to determine the “public need” for the project, the interconnections between the new facility and existing facilities, the estimated cost of the project, and the ability of the group proposing the project to meet its proposed timeline. Texas, in contrast, directs the state Department of Transportation to develop evaluation criteria. Such broad standards are generally useless for public agencies, as nearly any project could be justified on these grounds.

On the other hand, providing detailed evaluation criteria may dissuade private firms from proposing projects that are innovative or outside the normal course of PPP projects a state has constructed. These criteria may include the capability of the sponsoring agency to effectively manage the project, the transparency of the procurement process, capabilities of the project delivery team, and proposed use of new technology to improve the cost-effectiveness of the project (AECOM Consult 2007). In general, all cases are so unique that they may require different considerations. In this sense, a statute can provide general guidelines and a minimum set of factors that must be carefully evaluated, such as a project’s innovative methods or broader socioeconomic merits.

Specification of review process. Nine states specify the structure of the PPP proposal review process. In Washington, in order to move forward with projects with costs over \$300 million, public agencies must, by statute, form an advisory committee made up of members of participating public agencies “offering a diversity of viewpoints.” Georgia requires an evaluation committee made up of members from the governor’s office, a designee with a finance background, and the head of the state Department of Transportation. Providing for the structure of these committees or any other method for reviewing proposals before proposals are received is a good way to legitimize the approval process and remove any questions about the process before the first proposal is received. States can structure these review committees in whatever way they see fit, but should include people with backgrounds in finance, project management, engineering, and other related fields.

Protecting the confidentiality of PPP proposals. In order to protect the intellectual property of firms making proposals, ten states have confidentiality statutes allowing for firms to protect sensitive information, such as financial information about a firm or its proprietary work product, from the public record on a project. In Missouri, all proposals made to the state are considered a “closed record.” Maryland requires that proposers identify the portions of their proposals that the proposers deem confidential and asks them to justify why such information should be kept secret. Maryland’s approach may be best, as it provides for flexibility in the process for determining what parts of a proposal should be kept from the public and from the private firm’s competitors. On the other hand, states must also remember that providing adequate information to the public is important in any PPP process gaining public legitimacy. States need to keep this balance in mind when protecting sensitive information.

4-3. Funding Requirements and Restrictions

State and federal funding for PPP projects. Giving public agencies flexibility in funding projects is essential to creating an efficient PPP program, especially when the costs of these projects are enormous. At the same time, however, restricting public agencies from using public monies to help fund private operations is a way of insulating legislators from the riskiness of these projects (Gougherty 2005b).

Fourteen states have provisions in their PPP statutes allowing for public agencies to use both state and federal funding for PPP projects. The Delaware statute is among the best, authorizing the state Department of Transportation to “use any federal, state, or local funds” to finance projects, explicitly allowing public agencies to use any of these sources without limits. Further, the Delaware statute allows the state DOT to apply for federal funding which the DOT can then give as grants or loans to PPP projects. States should provide for this type of flexibility in their PPP statutes to avoid judicial challenges to financing plans. At the same time, states also need to be aware of the requirements that certain federal funding programs require, such as adherence to Davis-Bacon labor rules, “Buy America” requirements, and others (AECOM Consult 2007). Adopting PPPs for federal interstate projects may also trigger other federal regulations limiting the use of private debt or equity (Gougherty 2005b).

3. Funding Requirements and Restrictions

- Can both state and federal funds be used for PPP projects?
- Can federal TIFIA funds be used for PPP projects?
- Do the statutes prevent revenues from PPPs from being transferred to the state’s general fund?
- Can public entities issue revenue bonds to fund PPP projects?
- Are public agencies authorized to form nonprofit entities and issue debt?

Use of federal TIFIA funds. Funds granted through the federal Transportation Infrastructure Financing and Innovation Act, or TIFIA funds, are another source of funding for public agencies to utilize. The TIFIA program provides subordinated credit assistance for projects that are national or regional in origin, thus making them valuable for very large, complicated projects that require funding outside of the normal PPP financing process.⁴ Needless to say, just as states should provide for the ability of public agencies to pursue federal, state, and local funding sources, so too should they promote the use of this unique federal program. Ten states provide public agencies with the expressed ability to pursue TIFIA funds, many of them incorporating language authorizing TIFIA into the statutes allowing for federal and state funds for PPP projects.

⁴ http://www.innovativefinance.org/topics/finance_mechanisms/federal_loans/tifiasp (last accessed on June 19, 2009.)

Table 4-3: Funding Requirements and Restrictions

Code	Provisions	AL	AK	AZ	CA	CO	DE	FL	GA	IN	LA	MD	MN	MO	MS	NV	NC	OR	SC	TN	TX	UT	VA	WA
3-a	Allows State and Federal Funds		Y			Y	Y	Y	Y	Y	Y				Y	Y	Y	Y		Y	Y	Y	Y	Y
3-b	Allows TIFIA Funds		Y				Y		Y	Y	Y						Y	Y			Y		Y	Y
3-c	Restricts Toll Revenues from General Fund		N	Y	Y	Y	Y	Y		Y	N	N	N	N	Y		Y	Y			Y	Y	N	Y
3-d	Allows Public Sector to Issue Revenue Bonds		Y			Y		Y	N	Y	Y		Y	Y	Y		Y	Y	Y	Y	Y	Y		Y
3-e	Allows Public Sector to Form Nonprofits and Issue Debt					Y			Y					N				Y	Y		N		Y	N

***A cell left blank indicates state legislation does not make an explicit provision regarding that category.

Restricting PPP-related revenues from a state’s general fund. Not all PPP projects provide toll revenue for states to use, but allowing states to redirect toll facility revenues into their general fund is controversial. States allowing the state treasury to divert funding from any tolled facilities (not just PPP facilities) to pay for other non-transportation services can undermine support for tolled facilities in general, but diversion of this kind is a more politically popular way for cash-strapped states to raise funds for other services. In the case of the Indiana Toll Road, part of the \$3.85 billion concession fee is transferred to fund a 10-year highway modernization project (Poole 2007). Some consider this Indiana case an innovative transportation financing. But others express a serious concern due to the expedited spending of the concession fee in the short term in exchange of a private management of the toll road for the next 75 years, which poses a significant level of uncertainty to the public. In the case of the Chicago Skyway, the \$1.9 billion concession fee was used for providing other city public services, such as social services, and reducing debt (Seliga 2007; Brown 2007). Controversy arose because some of this money was used for non-transportation purposes, but only after the outstanding Skyway debt had been repaid (Ortiz and Buxbaum 2008). This diversion of the fund was made available for other services because the bridge was a city asset (Johnson, Luby, and Kurbanov 2007).

Eleven states restrict tolled PPP facility revenues from the state’s general fund. Arizona restricts toll revenues in a PPP agreement to a highway user fund and regional road fund. Virginia does not limit these excess funds from going to public transportation funds but only instructs that the funds “may” go to the general transportation fund or the private entity to help pay off the debt. Ideally, states should keep transportation revenues separate from other funding sources unless alternative arrangements were made clear to the legislature and public.

Issuing toll revenue bonds for PPP projects. Only one state, Georgia, does not allow public entities to issue toll-backed revenue bonds to support PPP projects, and seven other states have no statutes explicitly allowing for them included with their PPP statutes, but may include this authority elsewhere. Utah, one of the thirteen states allowing for revenue bonds, in its PPP statutes allows for a tollway development agreement to have requirements for performance security including performance-based bonds. In the spirit of allowing PPPs to have flexibility when arranging financial structures, the authority to sell such revenue bonds should be explicitly granted to public agencies by statute.

Public agencies forming nonprofits to issue debt. An additional way for public agencies to issue debt to help fund PPPs is for public agencies to form “63-20 corporations.” These projects refer to IRS Rule 63-20, allowing not-for-profit corporations to issue tax-exempt debt on behalf of public agencies and private firms that are engaged in PPP deals, by leveraging future toll revenues, farebox revenues, or future lease payments.⁵ The Pocahontas Parkway project in Virginia utilized this type of financing; where over \$350 million in revenue-backed tax-exempt bonds were sold by a not-for-profit corporation set up for the sole purpose of funding the project. The use of these 63-20 funds was approved by the state of Virginia and had no impact on the state’s bond credit ratings.⁶ While states will be limited by their bonding capacity to the number

⁵ http://www.fhwa.dot.gov/PPP/defined_dbfo_6320.htm (last accessed on June 19, 2009.)

⁶ <http://www.fhwa.dot.gov/innovativefinance/ifa62.htm#tech> (last accessed on June 19, 2009.)

of PPP projects they can finance with 63-20 corporations, this setup still provides a way to fund transportation projects without advancing scarce public funds.

New Jersey, a state with no current PPP program, is exploring the possibility of creating public nonprofit corporations to issue debt instead of full privatization of the state's toll roads, which was politically unpopular (Barlas 2007). Currently, Missouri, Texas, and Washington prevent the use of 63-20 corporations. Texas explicitly excludes nonprofits from issuing debt in this way, and Washington requires that any PPP-related debt be issued by the State Treasurer. Only Colorado, Georgia, South Carolina, and Virginia explicitly allow for non-profits to issue debt.

Considering the IRS support of this way of issuing debt, it is somewhat surprising that a state would prohibit the use of 63-20 corporations. It is a process by which states can generate funding to update infrastructure without impacting their bond credit ratings or detracting from the budget. Fifteen states have not put an express provision in their legislature regarding whether the public sector can form non-profits and issue debt, leaving the option open. States should enable their public agencies to take advantage of this IRS ruling as a way to limit direct public funding of a project, especially given the success of Virginia in its Pocahontas Parkway. For successful use of 63-20 financing, it must be understood that the nonprofit corporation will not just be a passive financing conduit, but will have long-term construction and operating responsibilities. Contracts should grant the 63-20 corporation an appropriate measure of supervision and control throughout the life of the project.⁷

4-4. Procurement and Project Management

4. Procurement and Project Management

- Do the statutes provide for all types of project delivery (design-build, etc.)?
- Are PPP projects exempt from state procurement laws?
- Can public entities outsource project operations and management?
- Are public entities required to maintain comparable non-toll routes?
- Are non-compete clauses required for PPP projects?
- Can public agencies enter into long-term leases of PPP facilities to the private sector?

Providing for multiple types of project delivery. Allowing states to enter into a wide assortment of PPP arrangements better matches the flexibility needed to create an efficient PPP process. States that allow for only a few types of agreements necessarily limit the types of proposals they will receive. Only Alaska and Arizona have limits on the types of arrangements PPP proposals can take, and both of these states have thus far only authorized three PPP facilities by statute.

States should instead provide for all types of procurement processes, develop appropriate guidelines to shape these processes, and allow transportation agencies

flexibility to adopt the best financing scheme for a project. Virginia's PPP legislation has allowed many different kinds of projects to move forward, from design/build agreements for tolled expressways between interstates to expansion of existing roads for truck lanes (Gougherty 2005a).

⁷ For further discussion of 63-20 corporations, see Hedlund (2007).

Exemption from state procurement laws. States that choose to exempt PPP projects from procurement laws benefit the project by relieving private agencies from meeting labor, bidding, and other procurement-related requirements that public agencies must meet when building transportation facilities. Allowing exemption from procurement requirements may mean that innovative procurement methods will withstand legal challenges. Nine states exempt PPP projects from procurement laws while nine do not. Florida explicitly requires these projects to use state general procurement laws. These exemptions come at the cost of circumventing a public bidding process that ensures legitimacy of the process and obtain the best available deal from the private sector for the public benefits. States need to strike a balance between ensuring the validity of the procurement process and allowing for innovative ways of sponsoring PPP projects through lifting some state procurement requirements.

Table 4-4: Procurement and Project Management

Code	Provisions	AL	AK	AZ	CA	CO	DE	FL	GA	IN	LA	MD	MN	MO	MS	NV	NC	OR	SC	TN	TX	UT	VA	WA
4-a	Allows for Multiple Types of Project Delivery		N	N	Y	Y	Y	Y	Y	Y	Y	Y		Y	Y		Y	Y		Y	Y	Y	Y	Y
4-b	Exempts PPP Projects from State Procurement Laws		N		N	Y	Y	Y	Y	Y	N	N	N	Y	Y		Y	Y	N	Y	Y	N	Y	Y
4-c	Allows for Outsourcing of Operations and Management	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	Y
4-d	Requires Public to Maintain Comparable Non-Toll Routes			Y	N	N	N	N	N	N	N	N	N	N			Y	N	N		N	N	N	
4-e	Requires Non-Compete Clauses	Y	N	N	Y	N	N	Y	N	N	N	N	N	N	Y		Y	N	N	N	Y	N	N	N
4-f	Allows for Long-Term Leases to Private Sector	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y			Y	Y	Y	Y

***A cell left blank indicates state legislation does not make an explicit provision regarding that category.

Outsourcing of project management and operations. The Chicago Skyway PPP project and the Trans-Texas Corridor both provide for long-term leases of the project to private agencies, effectively outsourcing both the management of the project and its operations. The Chicago Skyway project was the first long-term lease of an existing toll road in the U.S, which was built and operated by the City of Chicago. In this project, an international group entered into a 99-year lease with the city to operate the structure. Such agreements represent another form of PPP project, one that requires no new construction—brownfield projects—but can take advantage of private sector efficiencies in managing and operating an existing facility in exchange of compensation for private sector either by payment from public agency or revenue from direct user tolls.

All states that authorize the use of PPPs for transportation facilities except South Carolina provide for this type of arrangement. Delaware puts a 50-year cap on the length of these leases and Indiana provides for leases of up to 75 years in length. Such blanket legislative restrictions are not advised, and a decision of a lease term should be made by transportation agencies and private firms based on financial and economic assessments. At the same time, it is true that the level of uncertainty and risk significantly increases for longer term contracts to make financial and economic assessments of a project very difficult (Iseki, Uchida, and Taylor Under review). Therefore, legislators can cap the term if they are seriously concerned—especially when a state wishes to make a lease concession agreement its first foray into PPP usage.

Maintaining comparable non-toll routes. When PPPs provide for tolled facilities, Arizona and North Carolina require that public agencies maintain existing non-toll routes. Arizona and North Carolina, not coincidentally, are two of the states with the least experience in developing transportation facilities using PPP projects. While keeping non-toll routes and regular lanes parallel to toll routes and lanes is often used to gain the political and public acceptance for new road pricing schemes in their early stage, there is no economic reason to require non-toll routes and lanes. None of the states with more extensive PPP experience require comparable non-toll routes; as such routes divert some traffic away from toll routes and reduce toll revenues, which discourage private investment on such facilities. These requirements also lessen the ability of public agencies to pursue projects in areas where it is infeasible to keep both toll roads and competing non-toll facilities open. Although these requirements may placate the public afraid of having no choice but to drive on tolled facilities, the fundamental concept of tolls or any road pricing is that drivers are paying for the costs that they incur to the society. To protect the public from outrageous tolls, toll caps can be introduced within a contract but not in legislation. In addition, experience has shown that even U.S. drivers will pay to use superior transportation facilities (Kalauskas, Taylor, and Iseki 2009).⁸

Non-compete clauses prohibited. Non-compete clauses may be necessary for some projects and not for others. These clauses may include other requirements that a minimum number of users travel on the facility, in effect limiting the ability of public agencies to develop alternative routes. Non-compete clauses can have a significant effect on traffic demand on a PPP facility, toll revenues, and profits for private management firms. With non-compete clauses, an increase in traffic demand directly leads to an increase in cash flows for private management firms. In a situation where there is no alternative road, non-complete clauses create a geographic monopoly

⁸ For example, Orange County’s SR-91 Express Lanes, San Diego’s I-15 HOT Lanes, and Minnesota’s I-394.

situation, which allows faster and/or larger toll increases. Because of restrictive non-compete clauses in the contract, California had to buy back its lease of the express lanes of SR-91 when the state DOT wanted to expand the highway capacity between Riverside and Orange Counties (Sullivan 2003; Swan and Belzer 2008). Indiana accepted non-compete clause which, combined with a loose toll cap, may allow the concessioner to raise the toll higher faster than inflation (Swan and Belzer 2008).

Just as with the requirements that states maintain non-toll routes, the ability to insert non-compete clauses into a PPP agreement seems to come with PPP experience. Three states with minimal PPP development, Alabama, California, and North Carolina, do not allow for a PPP project to infringe upon the ability of public agencies to develop nearby roads. States with more extensive PPP experience, Delaware, for example, allow non-compete clauses to be included in PPP agreements where appropriate. Whether or not to allow non-compete clauses depends on various factors, such as present and future traffic demand, geographic conditions of facility sites, and potential facilities that compete PPP projects, which vary by project. Therefore, it is recommended not to have non-compete clauses in the legislative level.

Allowing long-term leases of PPP projects. Just as with outsourcing project management and operations, states should also allow for public agencies to enter into long-term leases of asset management functions for projects constructed through PPP agreements such long-term leases are assessed as the best option, taking into account financial and economic uncertainty, risks, costs and benefits. All states except California (which has no statute explicitly allowing for this) permit these types of arrangements. Alabama limits these contracts to a term of 20 years, while Louisiana explicitly allows private entities to contract with third parties to maintain PPP facilities. Virginia requires private agencies to submit asset management contracts to a competitive bidding process unless these contracts are part of a comprehensive agreement.

4-5. Tolling Management

<p>5. Tolling Management</p> <ul style="list-style-type: none"> • Which party has the rate-setting control? • Is the public entity required to remove tolls after the debt has been paid?

Specifying party with rate-setting control.

In principle, taking into account that operating environment and future demand significantly vary for different facilities, the toll rate should be negotiated and determined in a contract for each case. Most of the existing PPP agreements actually include rate of return caps to ensure that the private firms do not gain too much profit at

the expense of roadway maintenance, construction quality, or reasonable user fees (Iseki, Uchida, and Taylor Under review). Agreements typically require any profits beyond the cap to be returned to the state highway fund (Federal Highway Administration 1992). Only when the state government has a concern regarding the capability of a public entity in charge of this negotiation and procurement of services should it specify the maximum rate. Alternatively, the state government can also set the maximum rate for profit for contractors in order to avoid the public's resistance toward PPP projects. At the same time, these maximum rates should not be so low that they discourage private firms from bidding for projects.

These agreements should also authorize the PPP project to utilize many different types of toll collection, from traditional tollbooths to video-based collection processes. In six states, the public entity directly controls the toll rate that can be collected. Fifteen other states provide for

the rate to be set by contract, and some of these also provide for a maximum rate of toll increase. In Minnesota, one of the fifteen allowing the agreement to determine toll increases, by statute a toll facility development agreement must establish a reasonable rate of return on investment, which essentially requires that toll increases be built into an agreement. In Florida, toll rates must be indexed to the Consumer Price Index or another inflation-based index and private entities can request to increase the rates by more (Florida Department of Transportation 2008).⁹

The public and private partners should have the ability to agree to a sensible rate of return in a PPP agreement, weighing the public interest in having a stable toll rate against the financial interests of the private entities. At the same time, these agreements must be carefully crafted, as embedded toll increases in Illinois and Indiana projects have led to windfall profits for leaseholders (AECOM Consult 2007). Another provision in these laws might provide for actions to take in the event of windfall profits caused by high facility demand.

Requirement of toll removal after debt satisfaction. North Carolina and Tennessee require that tolls be removed from PPP facilities upon the satisfaction of the debt that they financed. This was likely a politically popular maneuver, but one that does not serve to create a more efficient transportation network. Revenues collected from tolled transportation facilities after debt satisfaction can go towards funding other improvements and maintenance to the transportation network. Public funding shortfalls for transportation is an issue that is not likely to go away, and these tolls can be used to fund additional projects. Instead of requiring that tolls should be dropped after debt satisfaction, states should explicitly allow for continued tolling, to allow private entities to ensure their rate of return is met and to provide funding for subsequent transportation facilities.

⁹ <http://www.dot.state.fl.us/publicinformationoffice/pdf/2008%20Final%20Summary%20vetoes.pdf> (Last accessed on June 19, 2009.)

Table 4-5: Toll Management

Code	Provisions	AL	AK	AZ	CA	CO	DE	FL	GA	IN	LA	MD	MN	MO	MS	NV	NC	OR	SC	TN	TX	UT	VA	WA
5-a	Rate-Setting Control Set in Agreement	N	N	Y	Y	Y	Y	Y	Y	N	Y	Y	Y	Y		Y	N	Y	N	N	Y	N	Y	Y
5-b	Requires Removal of Tolls After Payment of Debt		N	N	N	N	N		N	N	N	N	N	N	N		Y	N	N	Y	N	N	N	N

***A cell left blank indicates state legislation does not make an explicit provision regarding that category.

5. CONCLUDING REMARKS

PPP legislation aims to both protect public agencies and taxpayers while promoting environments that attract private investment in public roadways. While federal legislation has set the stage to make PPPs possible, their desirability is very much dependent upon the legislative setting in individual states. As such, effective state legislation strikes a balance that allows private agents to profit, protects taxpayers, and allows public agencies a reasonable amount of control over public-private projects over time. Legislation thus sets the basis for PPPs and has to be in place before they can go forward. Having carefully crafted legislation in place has been shown to limit problematic projects that require renegotiations or abandonment that can cost taxpayers dearly.

The research finds that the legislative landscape for PPPs varies widely from state to state. In many cases, states are divided in whether they allow or prohibit certain aspects in the PPP process. For example, 13 states have legislation limiting the mode of transportation eligible for PPPs, while 10 states have no restrictions. In many cases, most states take a similar position on legislative specifics. For example, no state prohibits Design-Build projects, nor does any state prevent a public agency from hiring its own consultants or from entering into a long-term lease. Similarly, all states that have statutes requiring application fees, and all existing legislation allows state and federal funding, as well as TIFIA funds, to be used on projects.

In contrast, some provisions have not been widely addressed in legislation at all. For example, only five states—California, Colorado, Delaware, Florida, and Minnesota—address HOT Lane projects (all of which permit them). In addition, there are policies on which most state legislation is congruent, but on which a few states differ. For example, all states with legislation addressing unsolicited proposals allow them, except for Indiana and North Carolina. Nevada, in fact, *requires* unsolicited proposals. Of the 21 states with legislation regarding local vetoes, only Arizona, Delaware, and Minnesota require that proposals be subject to a local plebiscite. Of twelve states with legislation addressing proposal confidentiality, only Arkansas and California protect confidentiality. Georgia is the only state to disallow the public sector from issuing revenue bonds. Only Mississippi disallows outsourcing of operations and management, and only Arizona and North Carolina require the public to maintain comparable non-toll routes. Only North Carolina and Tennessee require that tolls be removed once the financing debt has been paid. These exceptions to the rule likely reflect each state’s general philosophy toward PPPs, which we would characterize as follows:

1. **Aggressive** (Indiana, Texas, and Virginia),
2. **Positive, but cautious** (Arkansas and Minnesota), and
3. **Wary** (Alabama, Missouri, and Tennessee).

That we observe so many examples of individual states going against the grain in promulgating PPP legislation perhaps reflects the current period of experimentation with PPPs. As the experience with PPPs grows over time, it’s possible that we will see some convergence in PPP enabling legislation as a consensus on best practices emerges. In the meantime, variety is the rule. For example, requiring non-toll alternatives or the removal of tolls are ways to appease taxpayers. In this report, we have discussed many ways in which states have attempted to use legislation to finance projects through PPPs; some have proven successful, others less so. For example, Virginia’s use of the IRS 63-20 ruling allowing states to form non-profits and issue tax-exempt bonds is one method to skirt traditional public financing; it’s likely that other states will consider using this ruling to their advantage. By stipulating toll-removal requirements in PPP

projects, North Carolina and Tennessee are foreclosing the possibility of generating transportation revenues from tolls in the years ahead. Likewise, the extraordinarily long-term deals, such as a 99-year lease on the Chicago Skyway and a 75-year lease on the Indiana Toll Road, limit the ability of future public officials to negotiate with private firms over the operation of a critical piece of transportation infrastructure. These examples suggest that PPPs offer significant potential benefits to government agencies, but present significant risk and uncertainty as well. As to whether PPPs for highway projects are a good idea, the devil, as they say, is in the details.

6. ACKNOWLEDGMENT

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Appendix I: California Legislation for Public Private Partnerships for Transportation Projects

California has issued four legislations related to public private partnerships for transportation projects that have become law with the Governor's approval, including Senate Bill (SB) 4 that was signed by Governor Schwarzenegger on February 20, 2009.¹⁰

This appendix lists the current and past legislations passed in California to facilitate partnerships with the private sector for the private capital investment and expertise for future transportation infrastructure projects in the state in reverse chronological order.

1. Senate Bill (SB) 4, Second Extraordinary Session (Cogdill) Chapter 2, Statutes of 2009

This legislation has been approved by Governor Schwarzenegger on February 20, 2009. It provides the legislative authority to regional transportation agencies and Caltrans to enter into an unlimited number of Public-Private Partnerships (PPP) until January 1, 2017. This legislation removed the constraints under the prior legislation on the number and type of projects that public agencies in California may undertake, and require the projects to address mobility, operations, safety, and quantifiable air quality benefits.

This bill eliminated prohibition of amendment of lease agreements by the Legislature and the provision in AB 1467 that requires approval or rejection of the Legislature in 60 legislative days. Instead, this bill requires all lease agreements to be approved by the California Transportation Commission as well as reviewed by the Legislature and the Public Infrastructure Advisory Commission. Under this legislation, regional transportation agencies can accept unsolicited proposals, while awarding contracts to such an unsolicited bidder requires at least another responsible bid to be reviewed. An award of contract is based on either the lowest bid or best value criterion.

SB 4, Second Extraordinary Session also provides the legislative authority until January 1, 2014, for the state to have a total of up to 15 design-build demonstration projects, combining:

- the maximum of five projects (local street or road, bridge, tunnel, or public transit projects) for the local transportation agencies, and
- the maximum of ten projects (state highway, bridge, or tunnel projects) for Caltrans.

This bill provides in demonstration projects an opportunity to examine the benefits and challenges of design-build contracting in evaluation criteria, such as reduction in project costs, expedition of project time, or design features that the traditional design-bid-build method does not achieve.

This bill requires transportation entities to report to the California Transportation Commission, which is required to provide a mid-term and a final report to the Legislature, regarding the design-build process. The bill also specified a procedure for bidding submission, including a requirement for design-build entities to provide a statement of qualifications to the transportation entity.

¹⁰ Source: http://www.dot.ca.gov/hq/innovfinance/Public-Private%20Partnerships/PPP_main.html. (last accessed on June 19, 2009.) There are more proposals for PPP legislation or other innovative finance legislation. However, because of various reasons, such as premature proposals, political opposition, and funding issues, such proposals do not make it through the passage, or even do not reach a discussion and voting in the state congress.

2. Assembly Bill (AB) 521 (Runner) Chapter 542, Statutes of 2006

This assembly bill was approved by Governor Schwarzenegger on September 28, 2006. This legislation modified provisions in AB 1467 to allow the California State Legislature to act within 60 legislative days after submittal of a Public-Private Partnerships (PPP) negotiated lease agreement. The rejection of agreement requires the passage of a resolution by both houses of the Legislature within this specified time period.

3. Assembly Bill (AB) 1467 (Nunez) Chapter 32, Statutes of 2006

This assembly bill was approved by Governor Schwarzenegger on May 19, 2006, and became in effect on January 1, 2007. This legislation authorized the Department of Transportation (Caltrans) and “regional transportation agencies to enter into comprehensive development lease agreements with public and private entities, or consortia of those entities for certain transportation projects that may charge certain users of those projects tolls and user fees, subject to various terms and requirements” until January 1, 2012.

The number of projects under these provisions is limited to 4, with 2 in each of northern California and southern California, and would be selected by the California Transportation Commission with a primary focus on improvement of goods movement. This legislation also provides authority to regional transportation agencies, in cooperation with Caltrans, to apply to the commissions to develop and operate high-occupancy toll (HOT) lanes. Such projects include the “administration and operation of a value pricing program and exclusive or preferential lane facilities for public transit.”

This legislation requires all negotiated lease agreements to be submitted to the Legislature for approval, which will be given by the enactment of a statute. It also requires a responsible agency to have at least one public hearing at a location at or near the proposed facility and receive public comments on the proposed lease agreement. A lease agreement for the legislature’s review should be submitted with public comments from public hearings.

4. Assembly Bill (AB) 680 (Baker) Chapter 107, Statutes of 1989

This assembly bill was approved by Governor Wilson on July 10, 1989. This legislation authorized the Department of Transportation (Caltrans) to have four transportation demonstration projects, including at least one in northern California and one in southern California, involving agreements with private entities for the construction and lease of transportation infrastructure for up to 35 years. This bill authorized the agreements to allow the private entity to charge tolls for the use of the privately constructed facilities.

This legislation sought the following through approved public private partnership projects:

- 1) private sector efficiencies in designing and building transportation projects,
- 2) identification of capital funds needed for transportation projects in the state,
- 3) reduction in the level of congestion in existing transportation corridors,
- 4) continued compliance with environmental requirements and state and federal laws applicable to all publicly financed projects, and
- 5) provision of alternative traveling routes to the public.

Table A-I-1: Current CA Legislative PPP Guidelines Summary

Code	Provisions	CA	Note
1-a	Allows for Unsolicited Proposals	Y	
1-b	Limits Number of Projects	N	
1-c	Restricts Geographic Location	Y	
1-d	Restricts Mode of Transportation	N	
1-e	Allows for Conversions of Existing Roads	Y	
1-f	Prior Legislative Approval Required	Y	
1-g	Allows for Local Veto	N	
1-h	Restricts PPP Authority to State Agencies	N	
1-i	Design-Build Readily Allowed?	Y	
1-j	HOT Lane Projects?	Y	
1-k	Number of Major PPP Highway Projects Since 1991	7	
2-a	Allows Public Agency to Hire Own Consultants	Unspecified	
2-b	Allows Payments to Unsuccessful Bidders	Unspecified	
2-c	Requires Application Fees	Unspecified	
2-d	Requires Time for Public Review	Y	
2-e	Specifies Evaluation Criteria	N	
2-f	Structures Proposal Review Process	Y	
2-g	Protects Confidentiality of Proposals	N	

Table A-I-1: Current CA Legislative PPP Guidelines Summary and Recommendations (Continued)

Code	Provisions	CA	Note
1-a	Allows for Unsolicited Proposals	Y	
1-b	Limits Number of Projects	N	
1-c	Restricts Geographic Location	Y	
1-d	Restricts Mode of Transportation	N	
1-e	Allows for Conversions of Existing Roads	Y	
1-f	Prior Legislative Approval Required	Y	
1-g	Allows for Local Veto	N	
1-h	Restricts PPP Authority to State Agencies	N	
1-i	Design-Build Readily Allowed?	Y	
1-j	HOT Lane Projects?	Y	
1-k	Number of Major PPP Highway Projects Since 1991	7	
2-a	Allows Public Agency to Hire Own Consultants	Unspecified	
2-b	Allows Payments to Unsuccessful Bidders	Unspecified	
2-c	Requires Application Fees	Unspecified	
2-d	Requires Time for Public Review	Y	
2-e	Specifies Evaluation Criteria	N	
2-f	Structures Proposal Review Process	Y	
2-g	Protects Confidentiality of Proposals	N	
3-a	Allows State and Federal Funds	Unspecified	
3-b	Allows TIFIA Funds	Unspecified	
3-c	Restricts Toll Revenues from General Fund	Y	

3-d	Allows Public Sector to Issue Revenue Bonds	Unspecified	
3-e	Allows Public Sector to Form Nonprofits and Issue Debt	Unspecified	Allowing states to form non-profits and issue tax-exempt bonds is one method to skirt traditional public financing.
4-a	Allows for Multiple Types of Project Delivery	Y	
4-b	Exempts PPP Projects from State Procurement Laws	N	
4-c	Allows for Outsourcing of Operations and Management	Y	
4-d	Requires Public to Maintain Comparable Non-Toll Routes	N	
4-e	Requires Non-Compete Clauses	Y	
4-f	Allows for Long-Term Leases to Private Sector	Y	Extremely long-term leases limit the ability of future public officials to negotiate with private firms over the operation of a critical piece of transportation infrastructure.
5-a	Rate-Setting Control Set in Agreement	Y	
5-b	Requires Removal of Tolls After Payment of Debt	N	