

Draft Model Social Infrastructure PPP Bill

RELATING TO PUBLIC-PRIVATE AGREEMENTS FOR PUBLIC BUILDINGS

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF [add state name]:

1 SECTION 1. The Legislature makes the following findings:

2 (1) It is important for the economic, social, and
3 environmental well-being of the State that the people of the
4 State have an adequate quantity of quality public buildings and
5 related infrastructure.

6 (2) A program providing for private entities to enter into
7 innovative agreements with public entities to undertake the
8 design, construction, reconstruction, improvement, financing,
9 operation and/or maintenance of public buildings and related
10 infrastructure, and/or the study or planning thereof, will
11 enhance the ability of the State to achieve this objective.

12 (3) Public-private initiatives provide the public sector
13 with increased access to project opportunities and private
14 sector expertise by:

15 (a) Facilitating collaboration and cost and risk sharing
16 in public infrastructure projects between public and private
17 parties;

18 (b) Bringing innovative thinking from the private sector
19 to bear on public infrastructure needs within the State;

1 (c) Reducing the public cost of project delivery and
2 services for eligible facilities;

3 (d) Expediting project delivery;

4 (e) Encouraging life cycle efficiencies in public
5 infrastructure projects;

6 (f) Fostering flexibility in procurement methods to
7 provide the best value to the public; and/or

8 (g) Providing better use and leverage of public resources,
9 increasing private investment in public infrastructure
10 facilities, enhancing capital formation for large projects and
11 providing savings to taxpayers.

12 The Legislature intends that the powers granted to cities,
13 local agencies, counties, municipalities, special districts, any
14 department or agency of the State and any other agencies,
15 entities and authorities in this Act are in addition to any
16 other powers authorized under applicable law.

17 SECTION 2. **[Add statutory reference]** are amended by adding
18 a new chapter to be appropriately designated and to read as
19 follows:

20 "CHAPTER **[add chapter number]**

21 PUBLIC-PRIVATE AGREEMENTS FOR PUBLIC BUILDINGS

22 § -A **Definitions.** Whenever used in this chapter, unless
23 the context otherwise requires:

1 **"Develop" or "development"** means: (i) to (A) design, (B)
2 construct, reconstruct and/or improve, and (C) finance, operate
3 and/or maintain, and may include any other services related to
4 any of the foregoing; or (ii) to study and/or plan for any of
5 the activities described in subparagraph (i) of this definition.

6 **"Eligible facility"** means any existing, enhanced, upgraded
7 or new public building, or portion of such a public building,
8 developed in accordance with this Act, including, but not
9 limited to, schools, hospitals, courthouses, universities,
10 research facilities, city halls, civic centers, government
11 service facilities, police stations, correctional facilities,
12 sports facilities and affordable housing facilities, together
13 with all appurtenances thereto. Such appurtenances include, but
14 are not limited to, associated equipment, parking structures,
15 and utility, telecommunications and technology infrastructure.

16 **"Private party"** means a person, entity, or organization
17 that is not the state or federal government or any other public
18 sponsor.

19 **"Public-private agreement"** means an agreement between a
20 public sponsor and a private party for the development of an
21 eligible facility or eligible facilities in accordance with this
22 Act.

23 **"Public sponsor"** means any department or agency of the
24 state, any department or agency of a county, any cities,

1 municipalities, special districts, any public corporation
2 established under state law or county ordinance, any other
3 regional or local governmental entity, joint powers authorities
4 or any intergovernmental agency or corporation, or any two or
5 more of the foregoing working together to develop eligible
6 facilities.

7 **§ -B General Authorizations.** Notwithstanding any other
8 provision of state law, pursuant to this chapter a public
9 sponsor is authorized to:

- 10 (1) Consider and compare various methods for delivering
11 eligible facilities, including methods that are
12 alternatives to methods traditionally used by the
13 public sponsor;
- 14 (2) Enter into public-private agreements to develop
15 eligible facilities with such durations as determined
16 in the public sponsor's discretion;
- 17 (3) Enter into any agreements ancillary to public-private
18 agreements, including, but not limited to: (i)
19 agreements with financial, legal and other consultants
20 and experts inside and outside the public sector to
21 (A) assist in the study, planning, design,
22 procurement, evaluation and negotiation of public-
23 private agreements, or (B) assist in the
24 administration of public-private agreements and the

1 operation and/or maintenance of eligible facilities;
2 and (ii) agreements between the public sponsor and (A)
3 the private party, and/or (B) the private party's
4 lenders.

5 (4) Work together with other public sponsors to develop
6 eligible facilities through public-private agreements;

7 (5) Bundle two or more eligible facilities for delivery
8 pursuant to one public-private agreement;

9 (6) Procure services, award agreements, administer
10 revenues, appropriate funds and take such other action
11 as may be required in connection with the development
12 of eligible facilities through public-private
13 agreements;

14 (7) Exercise the power of eminent domain to acquire
15 property, rights of way, or other rights in property
16 that are necessary to develop an eligible facility
17 under this chapter, regardless of whether the property
18 will be owned in fee simple by the public sponsor or
19 whether such property will be leased to the private
20 party to develop in connection with the public-private
21 agreement;and

22 (8) Adopt rules, regulations or guidelines to implement
23 and exercise the authority granted to the public
24 sponsor under this chapter.

1 **§ -C Funding and Financing.** (a) Any lawful source of
2 funding and financing, or combination thereof, may be utilized
3 for the development of an eligible facility under this chapter.

4 (b) A public-private agreement may require the private
5 party to arrange for all or a portion of the financing required
6 for the eligible facility. Public sponsors may elect in their
7 discretion to participate with the private party in any gains
8 realized through the refinancing of the eligible facility, as
9 determined by the public sponsor in its discretion.

10 (c) The public sponsor may accept from the United States,
11 any state, or any of their respective agencies, or from any
12 regional or local governmental entity, such funds or credit
13 assistance as are available to it for carrying out the purposes
14 of this chapter, whether the funds are made available by grant,
15 loan, guaranty, line of credit or other financing agreement. The
16 public sponsor may enter into such agreements and other
17 agreements with the United States, any state, or any of their
18 respective agencies, or with any regional or local governmental
19 entity, as may be necessary, proper, and convenient for carrying
20 out the purposes of this chapter.

21 (d) The public sponsor may accept from any source any
22 grant, donation, gift, or other form of conveyance of land,
23 money, other real or personal property, or other valuable thing

1 made to the public sponsor for carrying out the purposes of this
2 chapter.

3 (e) Public sponsors may impose and collect user fees,
4 consumption charges, rents or similar charges from users of
5 eligible facilities, increase such fees, rents and charges and
6 use lawful measures to enforce such fees, rents and charges
7 and/or authorize a private party or another public entity to
8 impose, collect, increase and enforce such fees, rents and
9 charges to the same extent as available to the public sponsor.
10 The use, application and sharing of such collected fees, rents
11 and charges by the public sponsor or the private party shall be
12 as determined by the public sponsor in its discretion.

13 **§ -D Ad Valorem and Property Taxes.** Property developed
14 or held by a private party under a public-private agreement
15 shall be exempt from any and all state and county ad valorem and
16 property taxes that otherwise might be applicable.

17 **§ -E Procurement Process.** (a) Notwithstanding any other
18 provision of state law, the public sponsor is authorized to use
19 such procurement methods and processes that the public sponsor
20 determines are appropriate to solicit private parties and award
21 public-private agreements pursuant to this chapter, including,
22 but not limited to, any of the following or combination of the
23 following, at the public sponsor's discretion:

1 (1) Calls for project proposals, whereby the public
2 sponsor describes the eligible facilities that private
3 parties are invited to submit proposals to develop;

4 (2) Competitive solicitations using requests for
5 qualifications, short-listing of qualified proposers,
6 requests for proposals, pre-proposal meetings with
7 individual short-listed proposers, and revised
8 proposals;

9 (3) Unsolicited proposals, provided that if the public
10 sponsor determines there is sufficient merit to pursue
11 any unsolicited proposal, reasonable opportunity for
12 other entities to submit competing proposals for
13 consideration and possible contract award is provided;
14 and

15 (4) Negotiations with proposers prior to award.

16 (b) For any procurement in which the public sponsor issues
17 a request for qualifications, request for proposals or similar
18 solicitation document, the request shall generally set forth the
19 factors that the public sponsor will evaluate when reviewing the
20 submittals. The public sponsor may, in its discretion,
21 determine which factors it will consider and the relative weight
22 of such factors in the evaluation process to obtain the best
23 value for the public sponsor.

1 (c) The public sponsor is authorized to pay stipends or
2 payments for work product on terms and conditions and in such
3 amounts as determined in the public sponsor's discretion in the
4 following circumstances, or such other circumstances that the
5 public sponsor determines to be appropriate in its discretion:
6 (i) to short-listed proposer(s) if the public sponsor cancels
7 the procurement prior to the due date for proposals in the
8 request for proposals; (ii) to unsuccessful proposer(s) that
9 submit a proposal provided that the public sponsor determines
10 that the proposal is responsive to the public sponsor's request
11 for proposals and meets all requirements established by the
12 public sponsor for the project; or (iii) to the selected
13 proposer if the public sponsor cancels the project after
14 selection of the proposer.

15 (d) In exchange for such stipend or payment for work
16 product, the public sponsor may require the proposer to grant to
17 the public sponsor the right to use any work product contained
18 in the proposer's proposal. For this purpose, "work product"
19 means any technical or financial concepts (i) included in a
20 proposer's proposal or any portion thereof, (ii) submitted by
21 the proposer for review by the public sponsor in accordance with
22 the public sponsor's request for proposals, or (iii) raised by
23 the proposer at one-on-one meetings or alternative technical or
24 financial concepts meetings with the public sponsor prior to the

1 due date for proposals, and in each case includes any
2 alternative technical or financial concepts, ideas, innovation,
3 technology, techniques, methods, processes, unique uses of
4 commercial items, design concepts, solutions, construction means
5 and methods, project execution approach, drawings, reports,
6 plans and specifications, information and submittals that
7 constitute intellectual property of the proposer.

8 (e) The public sponsor may identify in a request for
9 qualifications, request for proposals or similar solicitation
10 document a process whereby proposers may request and receive
11 authorization to deviate from technical specifications on making
12 a showing satisfactory to the public sponsor.

13 (f) Notwithstanding any other provision of law, in order
14 to properly balance the need to maximize competition under this
15 chapter and create a transparent procurement process, proposals
16 shall not be subject to release or disclosure by the public
17 sponsor until the award of the public-private agreement and the
18 conclusion of any protest or other challenge to such award or
19 the lapse of the protest period without challenge, absent an
20 administrative or judicial order requiring such release or
21 disclosure. A proposer may identify those portions of a
22 proposal or other submission that the proposer considers to be
23 trade secrets or confidential commercial, financial, or
24 proprietary information. In order for confidential and

1 proprietary information and trade secrets to be exempt from
2 disclosure, the proposer shall do all of the following: (i)
3 invoke such exclusion upon submission of the information or
4 other materials for which protection is sought; (ii) identify
5 the data or other materials for which protection is sought with
6 conspicuous labeling; (iii) state the reasons why protection is
7 necessary; and (iv) fully comply with any applicable provisions
8 of law with respect to information the proposer contends should
9 be exempt from disclosure. Notwithstanding the foregoing, the
10 characterization by the private party of documents as being
11 confidential and proprietary information and trade secrets
12 exempt from disclosure is not binding upon the public sponsor if
13 the documents are not afforded such protection under existing
14 law.

15 (g) Notwithstanding any other provision of law, the public
16 sponsor may: (i) provide exclusive protest remedies in its
17 requests for qualifications, requests for proposals or similar
18 solicitation documents; (ii) limit the rights of private parties
19 responding to such solicitation documents to protest matters
20 arising in connection with the procurement; and (iii) require
21 that private parties responding to such solicitation documents
22 expressly waive all other rights and remedies that may be
23 available under applicable law.

1 **§ -F Public-Private Agreement.** (a) Notwithstanding any
2 other provision of law, the public sponsor is authorized to
3 include in a public-private agreement any provision that the
4 public sponsor determines is necessary or appropriate. Examples
5 of such provisions include, but are not limited to, the
6 following:

7 (1) Allocation of Risks. Provisions addressing the
8 allocation and management of project risks including
9 without limitation design, construction, geotechnical,
10 delay, permitting, governmental approvals, change of
11 law, change in utility costs, operations and
12 maintenance, force majeure, inflation and financing
13 risks.

14 (2) Payments and Adjustments. Provisions providing that:
15 (i) the public sponsor may pay the private party for
16 the development services provided by the private party
17 by making periodic payments to the private party
18 through the term of the public-private agreement or
19 any portion thereof; (ii) the public sponsor's
20 payments to the private party may include milestone,
21 progress, substantial completion or final acceptance
22 payments; (iii) the payments described in
23 subparagraphs (i) and (ii) may include compensation to
24 the private party for design costs, construction

1 costs, financing costs, operating costs, maintenance
2 costs, the cost of utilities, land acquisition costs,
3 and any other project development costs, and may
4 include a rate of return on the private party's
5 investment determined to be appropriate by the public
6 sponsor, in its discretion; and (iv) the payments
7 described in subparagraphs (i) and (ii) may be subject
8 to adjustments where the private party fails to
9 achieve performance specifications or standards or
10 otherwise fails to comply with its obligations under
11 the public-private agreement.

12 (3) Performance and Payment Security. Provisions

13 requiring that the private party or one or more of its
14 prime contractors provides performance and payment
15 security. Notwithstanding any other provision of
16 state law, the penal sum or amount of such security
17 may be less than the contract price involved, based
18 upon the public sponsor's determination, made in its
19 discretion on a project-by-project basis, of what is
20 required or desirable to adequately protect the public
21 interest and adequately assure payment of persons and
22 amounts provided for in **[add statutory reference, if**
23 **appropriate]**. Performance and payment security if
24 required may be in the form of bonds, guarantees,

1 letters of credit or any other type of financial
2 instrument, or any combination of the foregoing.

3 (4) Lands. Provisions requiring that either the public
4 sponsor or the private party acquire the lands and
5 other property interests required for the development
6 of the eligible facility, and either the public
7 sponsor and/or the private party hold title to, or
8 lease or lease back, the lands and the eligible
9 facility through the term of the public-private
10 agreement.

11 (5) Utilities. Provisions requiring that either the
12 public sponsor or the private party provide the
13 utilities required during construction and operation
14 of the eligible facility.

15 (6) Dispute Resolution. Provisions requiring the use of
16 arbitration or other alternative dispute resolution
17 procedures to resolve disputes between the public
18 sponsor and the private party. Such alternative
19 dispute resolution procedures may include, but are not
20 limited to, binding or nonbinding process, arbitration
21 or mediation, the establishment of a board to hear
22 disputes and/or resort to the courts.

- 1 (7) Occupancy Readiness. Provisions establishing criteria
2 for commissioning the eligible facility and
3 determining occupancy readiness.
- 4 (8) Use of Eligible Facility. Provisions addressing the
5 public sponsor's requirements for programming,
6 operations, use and change in use of the eligible
7 facility and flexibility to expand the eligible
8 facility.
- 9 (9) Facilities Management Services. Provisions addressing
10 the facilities management services, including
11 maintenance and renewal, to be provided by the private
12 party, the public sponsor or third parties.
- 13 (10) Handback. Provisions addressing responsibility for
14 maintenance and rehabilitation in order for an
15 eligible facility to meet the standards determined by
16 the public sponsor, in its discretion, at the end of
17 the term of the public-private agreement.
- 18 (11) Termination Payments. Provisions providing for
19 compensation of the private party upon early
20 termination of the public-private agreement,
21 including, but not limited to, termination by the
22 public sponsor for its convenience, or termination by
23 default of either the public sponsor or the private
24 party. Compensation on termination amounts and

1 formulas shall be as determined by the public sponsor
2 in its discretion.

3 (12) Defaults and Remedies. Provisions specifying events
4 of default and remedies available to the private party
5 and the public sponsor.

6 (13) Technical Standards and Specifications. Provisions
7 setting forth the technical standards and
8 specifications with which the private party must
9 comply, including, but not limited to, performance
10 standards and output specifications, together with
11 provisions allowing the public sponsor to enforce,
12 amend or waive such technical standards and
13 specifications.

14 (14) Insurance. Provisions requiring that the private
15 party obtain and maintain insurance with such
16 coverages and deductibles as determined by the public
17 sponsor to be appropriate in its discretion.

18 (15) Books and Records. Provisions regarding the
19 maintenance and auditing of the private party's books
20 and records.

21 **§ -G Other Laws.** (a) The authority granted under this
22 chapter supplements and is independent of any existing
23 authority, and does not limit, replace, or detract from existing
24 authority.

1 (b) This chapter supersedes all conflicting laws.

2 (c) Public contracting and procurement laws that restrict
3 or limit, or prescribe terms for, procurement or contracting
4 under this chapter shall not apply, provided that the foregoing
5 does not affect application of environmental, health, safety,
6 labor and land use laws.

7 SECTION 3. If any provision of this chapter, or the
8 application thereof to any person or circumstance is held
9 invalid, the invalidity does not affect other provisions or
10 applications of the chapter which can be given effect without
11 the invalid provision or application, and to this end the
12 provisions of this chapter are severable.

13 SECTION 4. In codifying the new sections added by Section
14 2 of this Act, the revisor of statutes shall substitute
15 appropriate section numbers for the letters used in designating
16 the new sections in this chapter.

17 SECTION 5. This chapter shall take effect upon its
18 approval.

INTRODUCED BY: _____
BY REQUEST

19