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Public-Private Partnership (P3) Model State Legislation

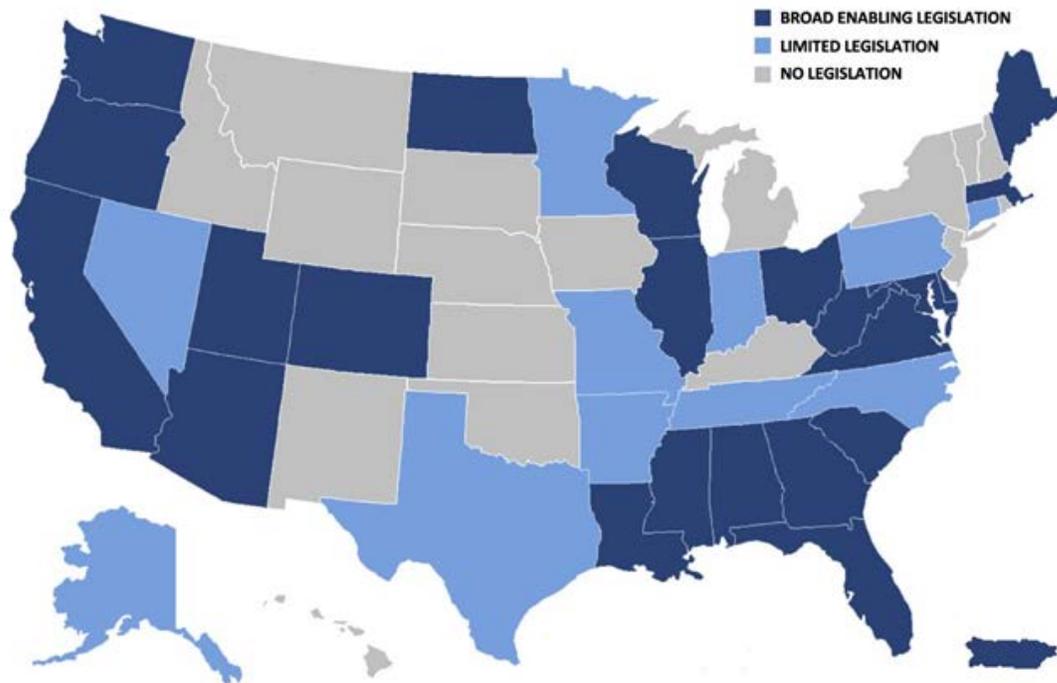


BIPARTISAN POLICY CENTER

Summary

The U.S. faces a growing need to build and maintain critical infrastructure—everything from airports to wastewater treatment plants—but with limited government funding to do the job. Encouraging private sector investment in infrastructure is part of the solution. But one promising tool—public-private partnerships or “P3s”—is currently limited or unavailable in most states due to lack of enabling legislation.

FIGURE 1. States with P3-Enabling Legislation



Source: National Conference of State Legislatures

As shown above, 33 states (along with the District of Columbia and Puerto Rico) have enacted by statute some sort of P3-enabling legislation—a patchwork of laws met with varying degrees of success and public support. The following model legislation is the product of review of best practices nationwide. While drafted with the intention of having each state tailor the legislation according to its needs and circumstances, states considering adopting P3-enabling legislation for the first time or updating their existing laws may want to use this model as a tool.

Key Components of the Model Law

- ***Enables P3s for a wide range of projects.***

While many states have passed P3-enabling legislation, only a handful support P3s for all types of infrastructure and at all levels of government. This model legislation allows for all government entities within a state that are authorized to develop and operate infrastructure projects to contract with private partners for a wide range of projects including roads, bridges, ports, stormwater management, broadband infrastructure, and courthouses, for example.

- ***Creates a state office dedicated to providing P3 expertise and assistance.***

The United States has a deep and successful municipal bond market, long responsible for the financing of local infrastructure projects around the country. While public-private partnerships have a great deal to offer, they are not suitable in every circumstance and can require considerable technical expertise and evaluation. The Office of Infrastructure Investment created by the model legislation would be a resource in this regard not only for state-level agencies and transportation departments, but for localities and counties that may be unfamiliar with alternative methods of procurement but interested in the benefits they could bring. The legislation leaves it to each state to decide how best to fund the Office's operations.

- ***Standardizes and promotes best practices.***

The model legislation is a template that should be customized to suit each state's particular circumstances and needs. Yet providing some degree of standardization and promotion of best practices may encourage greater private infrastructure investment and establish clear rules of the road. To do this, the legislation creates a Guidelines Task Force with members representing all tiers of government within a state as well as public and private stakeholders. It is tasked with recommending the governing guidelines for solicitation, evaluation, award, and delivery of P3 projects. The success of such a task force can be seen in states like Florida, whose task force held public meetings recorded and available online and made recommendations following significant input from the public and interested stakeholders. The task force will also identify the types of projects for which a P3 approach must be considered. The Office of Infrastructure Investment is charged with reviewing and updating the task force's guidelines as well as supplying template contracts and promoting best practices.

- ***Protects the public interest.***

For a P3 project to be a success, the public must support its goals and understand the benefits it will bring. The model legislation provides a process for public education and input in the development of P3 projects. The legislation requires an evaluation of the life-cycle costs and benefits of a potential P3 project, and before a contract can be signed, there must be a finding of public interest and compatibility with regional plans to ensure that the public agency has fully assessed the costs and benefits of the P3 and disclosed that information to the public. Further, the Guidelines Task Force would bring various stakeholders together to make a recommendation on a uniform process to receive solicited and unsolicited proposals. The Office of Infrastructure Investment is directed to conduct on-going public and stakeholder engagement and outreach and work to promote transparency and information-sharing.

P3 Enabling Model Legislation

Legislative Findings & Purpose

It is the intent of this act by encouraging public-private partnerships to:

- Promote the development and operation of quality infrastructure projects that provide economic and social value;
- Provide a well-defined mechanism to facilitate collaboration between public and private entities in infrastructure development and operation and enable increased investment of private capital;
- Bring innovative thinking to public projects;
- Provide flexibility in contracting and delivering infrastructure projects;
- Reduce total life-cycle costs of public infrastructure; and
- Allow for cost and risk sharing between public and private partners.

Section 1. Definitions

“Affected Jurisdiction” means any county, municipality, city, town, or special district in which all or a portion of a qualifying project is located.

“Develop” means to plan, design, develop, finance, lease, acquire, install, construct, or expand a qualifying project.

“Comprehensive Agreement” means an agreement between one or more private partners and one or more responsible public entities contractually providing for the responsibilities of all parties in developing or operating a qualifying project in a public-private partnership.

“Concession” means any lease, license, franchise, easement, or other binding agreement transferring rights for the use or control, in whole or in part, of a qualifying project by a responsible public entity for a definite term during which the private partner will provide services in return for the right to receive all or a portion of the revenues of the qualifying project.

“Fees” means rates, tolls, fees, or other charges imposed by the private partner or responsible public entity for use of all or a portion of a qualifying project pursuant to a comprehensive agreement.

“Material Default” means any default by private partners in the performance of its duties as outlined in a comprehensive agreement that jeopardizes adequate service to the public from a qualifying project and is not remedied following notice and a reasonable cure period.

“Operate” means to finance, maintain, improve, equip, modify, repair, or operate a qualifying project.

“Private Partner” means any natural person, corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public benefit corporation, nonprofit entity, other private business entity or combination thereof.

“Proposal” means a plan for a qualifying project submitted by a private partner with detail beyond a conceptual level for which all terms determined to be necessary by the responsible public entity, including costs, payment schedules, financing, deliverables, and project schedule, are defined.

“Qualifying Project” means any public facility or infrastructure or improvement to any public facility or infrastructure that is used or will be used by the public at large or in support of a public purpose or activity including, but not limited to: civic or education facilities; surface transportation facilities such as roads, bridges, public transit systems, ferry and port facilities, airports and intermodal systems; cultural or recreational facilities; medical facilities; utility facilities; and telecommunications facilities.

“Responsible Public Entity” means the state or any agency or authority thereof; a county, municipality, school board, or any other political subdivision of the state or combination of entities; a public body corporate and politic; or a regional entity that serves a public purpose and is authorized to develop or operate a qualifying project.

“Revenues” means all revenues including income; earnings; dedicated tax revenues; fees; lease payments; federal, state, and local appropriations or the appropriations of other funds available to any political subdivision, authority, or instrumentality thereof; bond proceeds; equity investments, service payments, or any combinations thereof arising out of or in connection with supporting the development or operation of a qualifying project, including money received as grants or otherwise from the United States of America, from any public entity, or from any agency or instrumentality of the foregoing in aid of such a qualifying project.

Section 2. Office of Infrastructure Investment

- A. There shall be established an Office of Infrastructure Investment reporting to the Governor and independent of other agencies and departments of the state. The Office shall be headed by an Executive Director, appointed by the Governor for a fixed term of five years, who shall have demonstrated knowledge, training, or experience in one or more of the following areas:
1. Infrastructure development or operation;
 2. Capital markets and finance, including municipal finance;
 3. Public-sector planning; or
 4. Procurement.
- B. The Office shall:
1. Assist responsible public entities with identifying projects, including opportunities for project aggregation, for which a public-private partnership may be appropriate;
 2. Provide technical assistance and expertise to responsible public entities on using public-private partnerships to develop or operate infrastructure projects, including analyzing their benefits and costs and the innovative financing options available to support them;
 3. Supply template contracts;
 4. Track proposed, ongoing, and completed private-public partnerships;
 5. Identify methods of encouraging competition for the development or operation of infrastructure projects;
 6. Serve as a liaison to federal government officials charged with promoting public-private infrastructure partnerships, other state Executive Directors of Infrastructure Investment and regional or metropolitan public-private partnership offices;
 7. Conduct public and stakeholder engagement and outreach, including efforts to encourage transparency and information-sharing regarding public-private partnerships;

8. Create a process for updating, as necessary, the recommendations made by the task force pursuant to Subsection (D), including a public comment period;
 9. Promote best practices, including standardized methodologies and processes; and
 10. Attract private investment in infrastructure to the state.
- C. The Executive Director shall provide to the standing committees of the Legislature having jurisdiction over transportation or infrastructure and post online a report annually within six weeks of the end of each fiscal year that:
1. Lists those public-private partnerships that—
 - a. are expected to be soliciting bids within the next fiscal year
 - b. are in progress,
 - c. were completed during the prior fiscal year, or
 - d. were removed from consideration during the prior fiscal year; and
 2. Summarizes actions taken by the Office to fulfill its duties pursuant to Subsection (B) of this section.
- D. The Executive Director, within three months of appointment by the Governor, shall convene a task force, which is directed to:
1. Make recommendations within one year of the task force convening, and following a period of public review, to responsible public entities on a uniform process for the review, solicitation, evaluation, award, and delivery of public-private partnerships, including:
 - a. A process for acceptance of unsolicited proposals by a responsible public entity;
 - b. A specific schedule for review of unsolicited proposals by the responsible public entity that shall include public solicitation of additional proposals prior to entering a comprehensive agreement; and
 - c. Timeframes and requirements for public outreach prior to entering into a comprehensive agreement on a selected proposal, whether solicited or unsolicited. Such timeframes and requirements shall provide for a reasonable period of public review and comment;
 2. Determine a cost threshold for qualifying projects, depending on type of project and type of responsible public entity, to merit standardized screening pursuant to Subsection (H) of this section and independent audit pursuant to Subsection (D) of Section 4;
 3. Make any recommendations to the Legislature and Governor on any changes to this act deemed necessary to carry out the purposes of this act; and
 4. Terminate following public release of final recommendations required under this subsection.
- E. The task force convened pursuant to Subsection (D) shall be composed of nine members, as follows:
1. The head of the department of the state with primary jurisdiction over economic development, who shall serve with the Executive Director as co-chairs of the task force; and
 2. Seven members appointed by the Governor having expertise, knowledge, or experience in infrastructure development or operation, capital markets and finance, public-sector planning, or procurement, including:
 - a. One county government official,
 - b. One municipal government official,
 - c. One regional or district official,
 - d. Two representatives of the public interest, and
 - e. Two representatives of the business community.

3. Not more than five members of the task force shall be members of the same political party. Members of the task force shall represent geographically diverse regions of the state.
- F. A responsible public entity shall follow the final recommendations of the task force with regard to any public-private partnership subject to this act, except that a responsible public entity may adopt guidelines for public-private partnerships other than those pursuant to Subsection (D)(1) of this section so long as such guidelines are not inconsistent with this act.
- G. The Office shall coordinate with responsible public entities on state environmental reviews and permitting for all qualifying projects subject to this act. As soon as practicable, and not later than the commencement of a comprehensive agreement, the responsible public entity shall identify all necessary state permits, and in consultation with the Office and relevant state offices and departments, shall create a timeline for review and issuance of such permits. The Office shall maintain on its website a listing of projects under this section for which state permits are delayed more than 90 days past the deadline specified in the timeline and post an official explanation for the delay which shall come from the office in charge of approving the permit, or link to public websites containing such information.
- H. For qualifying projects with an estimated cost meeting the threshold determined by the task force pursuant to Subsection (D)(2) of this section, the Office, in coordination with the responsible public entity, must assess through a standardized screening process whether a public-private partnership may provide a greater value added than traditional procurement.

Section 3. Government Agreements

- A. The responsible public entity may, either separately or in combination with any other public entities, enter into working agreements, coordination agreements, or similar implementation agreements, including the formation of bi-state or multistate organizations, to develop or operate a qualifying project subject to the requirements of this act. These agreements must conform to any relevant state laws.

Section 4. Procurement

- A. The responsible public entity may request proposals from private partners for the development or operation of a qualifying project under one or more of the project delivery methods described in Section 8. The responsible public entity shall not charge a fee to cover the costs of processing, reviewing, and evaluating proposals received in response to such a request.
- B. A private partner may request approval by a responsible public entity of an unsolicited proposal using one or more of the project delivery methods described in Section 8 and in conformance with all recommendations made by the task force under Subsection (D)(1) of Section 2 or any alternative guidelines adopted by a responsible public entity pursuant to Subsection (F) of Section 2. A responsible public entity may charge a reasonable fee to cover its costs to process and review unsolicited proposals.
- C. Upon submitting a proposal, a private partner shall identify those portions of a proposal that the partner considers to be a trade secret or confidential commercial, financial, or proprietary information and provide any justification as to why these materials, upon request, should not be disclosed by the responsible public entity. A private partner shall fully comply with any applicable state laws for such materials to be exempt from disclosure. Patent information will be covered until the patent expires. Other information such as originality of design or records of negotiation may only be protected under this section until a comprehensive agreement is reached. Projects under federal jurisdiction or using federal funds must conform to federal regulations under the Freedom of Information Act.

- D. For any selected proposal for a qualifying project with an estimated cost meeting the threshold determined by the task force pursuant to Subsection (D)(2) of Section 2, the responsible public entity shall obtain an independent audit of the proposed private-public partnership, including an assessment of projected usage and public costs, before the comprehensive agreement is executed. The analysis shall be disclosed to the public prior to execution of a comprehensive agreement, subject to the limitations described in Subsection (C).
- E. The responsible public entity may apply for local, state, or federal credit assistance, or endorse such applications submitted by private partners, for qualifying projects to be developed or operated pursuant to a comprehensive agreement.
- F. Consultants and experts may be engaged at any point to assist in the evaluation, negotiation, development or operation of qualifying projects.

Section 5. Finding of Public Interest

- A. The responsible public entity may enter into a comprehensive agreement for the development or operation of a qualifying project only after the chief executive officer of the responsible public entity makes a finding of public interest and regional plan compatibility. Such a finding shall, at a minimum, consider the following:
 - 1. Benefits to the public;
 - 2. Advantages or disadvantages of developing or operating the qualifying project as a public-private partnership versus a traditional procurement, including the anticipated cost over the project life-cycle, adjusted for risk and risk transfers;
 - 3. Sources of funding and financing for the qualifying project;
 - 4. General reputation, qualifications, industry experience and financial capacity of the private partners;
 - 5. Proposal's compatibility with regional infrastructure plans; and
 - 6. Other criteria that the responsible public entity deems appropriate.
- B. The responsible public entity shall publicly disclose all findings of public interest and regional compatibility made pursuant to the requirements of Subsection (A) in a public report, which shall include a detailed discussion of all considerations on which the findings are based subject to the limitations outlined in Subsection (C) of Section 4 and be followed by a reasonable period of public comment before execution of a comprehensive agreement.

Section 6. Notice to Affected Jurisdictions Regarding Unsolicited Proposals

- A. Prior to entering into a comprehensive agreement resulting from an unsolicited proposal, the responsible public entity shall notify affected jurisdictions by furnishing a copy of the proposal to each affected jurisdiction.
- B. Each affected jurisdiction that is not the responsible public entity may, within 60 days after receiving the notice, submit in writing any comments on the project's potential impact or compatibility with local and regional budgets and infrastructure plans to the responsible public entity.
- C. The responsible public entity shall consider the comments of the affected jurisdictions before entering into a comprehensive agreement with a private partner.

Section 7. Public-Private Partnership Agreements

- A. Interim Agreements. Before or in connection with the negotiation of a comprehensive agreement, the responsible public entity may enter into an interim agreement with the private partner that submitted the selected proposal. An interim agreement shall not obligate the responsible public entity to enter into a comprehensive agreement. The interim agreement is discretionary with the parties and is not required on a qualifying project for which the parties may proceed directly to a comprehensive agreement without the need for an interim agreement. An interim agreement shall only:
1. Authorize the private partner to commence activities for which it may be compensated related to the proposed qualifying project, including, but not limited to, project planning, advance right-of-way acquisition, design and engineering, environmental analysis and mitigation and ascertaining the availability of financing for the proposed facility; and
 2. Establish the process and timing of the negotiation of the comprehensive agreement.
- B. A responsible public entity may enter into an interim agreement with multiple private partners if the responsible public entity determines in writing that it is in the public interest to do so.
- C. Comprehensive Agreements. Prior to developing or operating a qualifying project, the private partner that submitted the selected proposal shall enter into a comprehensive agreement with the responsible public entity. Comprehensive agreements, in addition to other contract terms stipulating the obligations of the parties, must include:
1. Descriptions of which party will assume responsibility for specific project elements and when;
 2. How the parties will share management of the risks of the project;
 3. How the parties will share costs of development or operation of the project;
 4. How the parties will allocate financial responsibility for cost overruns;
 5. Any safeguards to mitigate additional costs or service disruptions to the public in the event of material default or cancellation of the agreement;
 6. Performance standards and any damages for nonperformance;
 7. Any performance incentives;
 8. Accounting and auditing standards to be used to evaluate work on the project;
 9. For a project that reverts to public ownership, the responsibility for reconstruction or renovations required for a qualifying project to meet all applicable government standards upon reversion to the state; and
 10. Such other terms and conditions agreed to mutually by the responsible public entity and private partner.
- D. The comprehensive agreement shall provide for such fees as may be established by agreement of the parties.
- E. The comprehensive agreement shall contain a provision by which a private partner expressly agrees that it is prohibited from seeking injunctive or other equitable relief to delay, prevent or otherwise hinder the responsible public entity or any jurisdiction from developing or operating any project that was planned and that may impact the revenue that the private partner may derive from the qualifying project under a public-private partnership, except that the comprehensive agreement may provide for reasonable compensation to the private partner for the adverse effect on revenues resulting from an unplanned revenue impacting project.

Section 8. Project Delivery Methods

- A. Subject to the requirements of this act, the responsible public entity may utilize any project delivery method or agreement or combination of methods or agreements to develop or operate a qualifying project including but not limited to: a design-build agreement; a design-build-maintain agreement; a design-build-finance-operate agreement; a design-build-operate-maintain agreement; a design-build-finance-operate-maintain agreement; and a concession providing for the private partner to design, build, operate, maintain, manage, or lease a qualifying project.

Section 9. Eligible Funding and Financing

- A. Any financing of a qualifying project may be in such amounts and upon such terms and conditions as may be determined by the parties to the interim or comprehensive agreement. The private partner and responsible public entity may utilize any and all revenues that may be available to them for the purposes of this act and may, to the fullest extent permitted by applicable law:
1. Issue debt, equity, or other securities or obligations;
 2. Enter into leases, concessions, and grant and loan agreements;
 3. Access any designated state funds;
 4. Borrow or accept grants from any state infrastructure bank; and
 5. Secure any other financing with a pledge of, security interest in, or lien on any or all of its property, including all of its property interests in the qualifying project.
- B. The responsible public entity may take any action to obtain federal, state, and/or local assistance for a qualifying project that serves the purpose of this act and may enter into contracts required to receive such federal assistance. To the fullest extent allowed by law, federal, state, and local monies may be combined with any private sector monies for any project purposes.
- C. The private partner and responsible public entity are authorized to acquire right-of-way by any means allowable under applicable federal and state constitutional, legal and regulatory requirements.

About the Executive Council on Infrastructure

The Executive Council on Infrastructure is a working group of corporate CEOs and executives drawn from the financial, industrial, logistics, and services industries. The council is developing recommendations to help facilitate increased private sector investment in U.S. infrastructure.

The goal of the council is to connect private capital to American infrastructure—tapping billions of dollars that could be available for this purpose but is currently targeted elsewhere. The council will explore measures to overcome information gaps that preclude private investment, including identifying legislative and regulatory barriers, as well as consider the creation of financial vehicles to aid in expanding the universe of private investors.

Informed by research, outreach to stakeholders and experts, and internal deliberations, the council will develop and endorse a set of specific recommendations aimed at achieving this goal. This work will culminate with the release of a final report in 2016.

Disclaimer

The findings and recommendations expressed herein do not necessarily represent the views or opinions of the Bipartisan Policy Center's founders or its board of directors, or the Executive Council on Infrastructure.

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Founded in 2007 by former Senate Majority Leaders Howard Baker, Tom Daschle, Bob Dole and George Mitchell, the Bipartisan Policy Center (BPC) is a non-profit organization that drives principled solutions through rigorous analysis, reasoned negotiation and respectful dialogue. With projects in multiple issue areas, BPC combines politically balanced policymaking with strong, proactive advocacy and outreach.

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