

Public Private Partnership Legislation: Washington

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A Q&A guide to Washington public private partnership legislation (PPPs or P3). This Q&A discusses key provisions of P3 legislation, including bid submission, review and approval procedures and the project delivery structures that may be used. This Q&A also discusses the rights and obligations of the government party and the private sector party, including financing and compensation structures.

BID SUBMISSION AND REVIEW

1. What legislation governs public private partnerships (PPPs or P3s) in your state?

Public private partnerships (PPPs) for state transportation projects in Washington are governed by the Transportation Innovative Partnerships Act of 2005 (the PPP Act) (*Wash. Rev. Code §§ 47.29.010 to 47.29.900*). This law replaces the Public-Private Transportation Initiatives Act (*Wash. Rev. Code §§ 47.46.010 to 47.46.900*). The PPP Act generally allows transportation-related projects and programs of all modes to be eligible for development as a PPP under the Transportation Innovative Partnership Program (TIPP).

In 2006, the Washington Transportation Commission (WATC) adopted administrative rules to implement the TIPP, which can be found in Sections 468-600-010 to 468-600-810 of the Washington Administrative Code.

2. Are there any limitations on the types of projects that can be developed or monetized under the public private partnership (PPP or P3) legislation?

The PPP Act applies to:

- All transportation projects where the "state's primary purpose for

- the project is to preserve or facilitate the safe transport of people or goods via any mode of travel" (*Wash. Rev. Code § 47.29.050(1)*).
- Facilities, structures, operations, properties, vehicles, vessels, or the like that are developed concurrently with an eligible transportation project and either:
 - capable of providing revenues to support financing of an eligible transportation project; or
 - are public projects advancing non-transportation related public purposes.

(*Wash. Rev. Code § 47.29.050(2)*.)

The PPP Act also provides that the state may enter into agreements with other states or Canadian provinces for trans-border PPP projects (*Wash. Rev. Code § 47.29.210*).

However, the PPP Act excludes projects that are primarily for recreational purposes, including:

- Parks.
- Hiking trails.
- Off-road vehicle trails.

(*Wash. Rev. Code § 47.29.050(1)*.)

3. Please give a brief overview of the bidding process. In particular:

- Must the bidder be pre-qualified or meet any other submission requirements?
- What are the permitted bidding procedures, including does the legislation provide for a negotiated or fixed bidding process?
- Is a government entity permitted or required to submit a competing bid? If so, how is this bid treated and what is the standard of review?
- Are unsolicited bids permitted? If so, are there any restrictions on these bids?
- Are there any other or unique bidding procedures?



QUALIFICATION OF BIDDERS

The Transportation Innovative Partnerships Act (PPP Act) does not require bidder pre-qualification.

BIDDING PROCEDURES

The Washington State Department of Transportation (WSDOT) has broad discretion as to the nature and structure of the proposals that it solicits. The WSDOT may:

- Solicit proposals for eligible projects (*Wash. Admin. Code § 468-600-100*).
- Allow unsolicited proposals if the project meets the following criteria:
 - meets the definition of an eligible project (see *Question 2*);
 - is not listed in the registry of projects intended for a competitive solicitation; and
 - is included in the Washington state transportation plan or otherwise identified by the WSDOT as being a priority need of the State of Washington.

(*Wash. Admin. Code § 468-600-210*.)

The PPP Act provides for a detailed and lengthy process for creating and submitting of both solicited and unsolicited proposals (see *Wash. Admin. Code §§ 468-600-100 to 468-600-605*).

For solicited proposals, the WSDOT must issue a request for proposal (RFP). The WSDOT must specify requirements for proposal content and may identify criteria and procedures under which proposals will be evaluated and selected. These criteria include:

- A description of the eligible project.
- A description of the process by which proposals will be evaluated.
- An outline of the contract terms, including terms and conditions, representations and warranties.

(*Wash. Admin. Code § 468-600-105*.)

COMPETING GOVERNMENT BIDS

The PPP Act does not provide for competing government proposals. However, before soliciting proposals or accepting unsolicited proposals, the WSDOT must compare its internal ability to complete the project as a public venture versus completing the project as a PPP and specify the advantages and disadvantages of each approach (*Wash. Rev. Code § 47.29.090*).

UNSOLICITED BIDS

The PPP Act permits unsolicited proposals if the proposal:

- Meets the definition of an eligible project (see *Question 2*).
- Is not listed in the registry of projects intended for a competitive solicitation.
- Is included in the Washington state transportation plan or otherwise identified by the WSDOT as being a priority need of the State of Washington.

However, the Washington State Transportation Commission (WATC) cannot accept or consider any unsolicited proposals before July 1, 2015. (*Wash. Rev. Code § 47.29-170*; *Wash. Admin. Code § 468-600-210*.)

OTHER PROCEDURES

Before undertaking a PPP project, the WATC must:

- Complete a tolling feasibility study.
- Adopt rules specifying the procedures for the proper solicitation, review and evaluation of projects. Procedures must include factors such as priority, costs, risk sharing, scheduling and management conditions.

(*Wash. Rev. Code § 47.29-090*).

In addition, for projects that costs at least \$300 million, an advisory committee must be established to review the proposals for eligible projects (*Wash. Rev. Code § 47.29-180*).

4. Please give a brief overview of the bid review process for a public private partnership (PPP or P3). In particular:

- Does the legislation set out criteria for evaluating a successful bid?
- Must the bidder post a deposit or security, or pay an application fee?
- Is there a dedicated office or PPP unit that must review the bids? If so, what is the scope of its authority?
- Does the legislation provide a schedule for reviewing bids?
- Is any government entity required or permitted to reimburse unsuccessful bidders for costs they incur in preparing and submitting the bid?

CRITERIA FOR EVALUATING BIDS

Evaluating Solicited Bids or Proposals

For solicited proposals, the Washington State Department of Transportation (WSDOT) first conducts a preliminary review of the proposal to ensure that it:

- Is complete.
- Is responsive.
- Meets any additional request for proposal (RFP) requirements.

(*Wash. Admin. Code § 468-600-310*.)

The proposals are then assessed by an evaluation panel established by the Washington Transportation Commission (WATC) (*Wash. Admin. Code § 468-600-330*). For solicited proposals, the WATC considers the "unique project-specific evaluation criteria identified in the solicitation documents," including:

- Written amendments or clarifications.
- Any other factors the panel believes is necessary.

(*Wash. Admin. Code § 468-600-330*.)

Evaluating Unsolicited Proposals

For unsolicited and competing proposals, the evaluation panel must consider several factors, including:

- The bidder's qualifications and experience with similar infrastructure projects and demonstrated ability to perform the work required.
- The project characteristics, particularly whether it is feasible.
- The bidder's plan and demonstrated ability to finance the project.

- Public support for the project.
- The project's compatibility with existing transportation plans.

(*Wash. Admin. Code § 468-600-330.*)

If the proposal includes a plan to impose tolls, the WATC must also consider:

- The interests of governments that encompass or are adjacent to the path of the proposed tollway project in having the tollway installed.
- The potential impact of the proposed tollway project on local environmental, aesthetic and economic conditions and on the state's economy.
- The extent to which funding other than state funding is available for the proposed tollway project and the extent to which resources other than tolls would be required to be established and/or maintained as necessary security to support the financing.
- The likelihood that the estimated use of the tollway project will provide sufficient revenue to independently finance the costs related to the construction and future maintenance, repair and reconstruction of the tollway project, including paying back loans.
- If there is any part of the tollway project which will be financed with state funds:
 - the relative importance of the proposed tollway project compared to other proposed tollways; and
 - traffic congestion and economic conditions in the communities that will be affected by competing tollway projects.
- The effect of the proposed tolls other major highways in the state system and on local street traffic.

(*Wash. Admin. Code § 468-600-331.*)

DEPOSITS AND OTHER FEES

Washington law does not require bidders to post a deposit or to pay a fee, but authorizes the WATC to impose these fees (see *Wash. Admin. Code § 468-600-110(1)*).

DEDICATED PPP UNIT

The PPP Act established the state Transportation Improvement Program (TIP) to review PPP bids. The TIP is overseen by the WATC and is administered by the WSDOT through the Transportation Partnerships Office.

BID REVIEW SCHEDULE

No specific schedule is provided.

REIMBURSEMENT OF LOSING BIDDERS' COSTS

Losing bidders are not reimbursed for any costs they incur in preparing or submitting their bids.

5. Is executive or legislative authorization or approval required before either:

- A request for proposals may be issued or the bidding process may be initiated?
- A bid can be approved?

PROJECT AUTHORIZATION

There is no general executive or legislative authorization required before initiating the proposal process. However, legislative authorization is required for projects that are to be funded by tolls before the Washington State Department of Transportation (WSDOT) may issue a request for proposal (RFP).

BID APPROVAL

The Washington Attorney General (WAAG) reviews any tentative PPP agreement for legal sufficiency.

After approval by the WAAG, the Washington Transportation Commission (WATC), in consultation with the governor, then votes to approve, reject or order further negotiations on the agreement (*Wash. Rev. Code. § 47.29-280*).

6. Are public hearings required during the bidding and review process?

No public hearings are required to approve a bidder or a proposal. However, before approving a PPP agreement, the Washington Transportation Commission (WATC) must hold an informational session and public hearing with at least 20 calendar days' notice (*Wash. Rev. Code § 47.29.160*).

7. Can an approved bidder perform preliminary work before the public private partnership (PPP or P3) agreement is executed? If so:

- What type of preliminary work can be performed?
- Will the bidder be compensated for this work if the parties cannot agree on a PPP agreement?
- Who has title to any work produced during this period?

PERMITTED PRELIMINARY WORK

The PPP Act does not expressly address the status of preliminary work.

COMPENSATION

The PPP Act does not expressly address the status of preliminary work.

TITLE TO WORK

The PPP Act does not expressly address the status of preliminary work.

PROJECT DELIVERY STRUCTURES

8. What project delivery structures can be used to implement a public private partnership (PPP or P3)?

The PPP Act provides the Washington Transportation Commission (WATC) and the Washington State Department of Transportation (WSDOT) wide flexibility in entering into PPP agreements. Theoretically, there is no restriction on the form of project delivery structure. Structures may include:

- Design-bid-build.
- Design-build.
- Design-build-finance-operate.

- Build-own-operate.
- Build-operate-transfer.
- General contractor or construction manager.

For more information on these delivery systems, see *Practice Note, Public Private Partnerships: Issues and Considerations* (www.practical-law.com/3-504-9995).

RIGHTS AND OBLIGATIONS OF THE GOVERNMENT ENTITY

9. What rights, if any, does the government entity have to ensure proper management and maintenance of the public private partnership (PPP or P3) project? In particular:

- Are there any repairs, maintenance or other operational issues that require the approval of a government entity?
- What inspection or auditing rights does the government entity have?
- Under what circumstances can the government take over the project?

REQUIRED MAINTENANCE AND REPAIR

The PPP Act does not provide for maintenance requirements. However, any maintenance on a public facility must be provided in manner "consistent with collective bargaining agreements, the Personnel Reform Act and civil service laws in effect on any portion of the project that constitutes a public facility" (*Wash. Rev. Code § 47.29.140(1)*).

For projects that revert to the government entity at the end of the project term, the PPP agreement must allocate responsibility for reconstruction and renovations that are required for the project to meet all applicable government standards (*Wash. Rev. Code § 47.29.140(2)*).

AUDITING AND INSPECTION RIGHTS

The PPP agreement must include provisions addressing the following issues:

- The allocation of financial responsibility.
- The project's development costs.
- The accounting and auditing standards to be used to evaluate the work on the project.

(*Wash. Rev. Code § 47.29.140(2)*.)

The PPP Act does not otherwise mandate any specific auditing and inspection rights.

STEP-IN RIGHTS

The PPP Act does not mandate any step-in rights. However, the PPP agreement must include provisions addressing both:

- The consequences for non-performance.
- The posting of security to address any default or non-performance by the private sector partner or the Washington Transportation Commission (WATC)'s other contractual claims.

(*Wash. Rev. Code § 47.29.140.*)

PRIVATE SECTOR PARTY COMPENSATION

10. How is the private sector party compensated for performing its obligations under the public private partnership (PPP or P3) agreement?

The PPP agreement must include provisions addressing allocation of costs and incentives (*Wash. Rev. Code § 47.29.140*). However, the PPP Act does not mandate any particular compensation scheme.

11. If availability payments or shadow tolls are permitted, how will the government entity's obligations be met?

The PPP Act does not prohibit availability payments or shadow tolls. However, the PPP Act does not specify how the provisions would be implemented.

12. If user fees are permitted:

- Can the private sector party increase the fees?
- Must the executive or legislative branch approve the fees?
- Are price increases subject to public hearings?

USER FEE INCREASES

Under the PPP Act, any project financed by tolls or an equivalent funding source must first be authorized by the state legislature (*Wash. Rev. Code § 47.56.820*).

Although Section 47.56.820 of the Washington Revised Code specifies the requirements and restrictions for tolled facilities, the PPP Act does not expressly address private party regulation of user fees after initial legislative approval. It is unclear whether the further requirements specified in Section 47.56.820 apply to PPP projects beyond the initial authorization of tolling.

EXECUTIVE OR LEGISLATIVE APPROVAL

See *User Fee Increases*.

PUBLIC HEARINGS REQUIREMENT

The PPP Act does not expressly require public hearings on fee increases, but there is a public hearing requirement in Section 47.56.820 of the Washington Revised Code.

GOVERNMENT ENTITY COMPENSATION AND USE OF FUNDS

13. Please describe the government entity's compensation structure including any lump sum and profit sharing agreements.

The PPP Act does not provide for a pre-determined compensation structure.

14. Are there any limitations or restrictions on the government entity's use of any funds it receives under the public private partnership (PPP or P3) agreement?

The PPP Act requires the establishment of a Transportation Innovative Partnership Account, which is a separate and distinct account from the state general fund (*Wash. Rev. Code § 47.29.230*). All proceeds from bonds or other financing instruments and revenues from

any PPP project must be:

- Deposited into the state Transportation Innovative Partnership Account.
- Used exclusively for highway purposes as specified under the Washington State Constitution.
- May be expended only on evidence of approval by the Washington state legislature.

(*Wash. Rev. Code § 47.29.230; Wash. Const. art. II, § 40.*)

TERM, RENEWAL AND EARLY TERMINATION

15. Does the legislation:

- Include a maximum term for any public private partnership (PPP or P3) agreement (including any renewals)?
- Allow the PPP agreement to be renewed? If so, what are the conditions under which this renewal can occur?
- Allow the private sector party or the government entity to terminate the PPP agreement before the expiration date?

LIMIT ON MAXIMUM TERM

The PPP Act does not specify a maximum term for a PPP agreement.

RENEWAL PROVISIONS

The PPP Act does not specify any restrictions on renewing a PPP agreement.

EARLY TERMINATION

The PPP Act requires all PPP agreements to include provisions requiring the allocation of project risk and penalties for non-performance, but does not specifically address early termination (*Wash. Code Rev. § 47.29.140*).

16. What are the parties' rights on termination of the public private partnership (PPP or P3) agreement?

GOVERNMENTAL ENTITY

The PPP Act does not mandate any specific termination rights.

PRIVATE SECTOR PARTY

The PPP Act does not mandate any specific termination rights.

FINANCING THE PROJECT

17. Is the government entity permitted or required to provide any portion of the financing? If so:

- Can it issue bonds or notes to meet its financing obligations?
- Is there a cap on the amount of financing it can provide or the amount of debt it can incur?
- Can Transportation Infrastructure Finance and Innovation Act (TIFIA) loans or other federal funding be used?
- Is the debt backed by the full faith and credit of the state?

GOVERNMENT ENTITY FINANCING

The Washington Transportation Commission (WATC) may finance a project in whole or in part with various funding sources, including:

- Bond proceeds.
- Grants.
- Loans.
- Loan guarantees.
- Lines of credit.
- Revolving lines of credit.
- Infrastructure loans.
- Federal, state and local tax revenues.
- User fees, tolls and fares.

(*Wash. Rev. Code § 47.29.060.*)

The state transportation commission may request that the state treasurer issue revenue bonds on behalf of the government entity (*Wash. Rev. Code § 47.29.250*).

Debt issued to pay for a PPP project that is owned, leased, used or operated by the state of Washington as a public facility must be issued by the state treasurer (*Wash. Rev. Code § 47.29.060(3)*). As the default financing mechanism is state-issued debt, this effectively requires legislative approval for private financing.

FINANCING CAP

There is no cap on the amount of financing a government entity can provide for a PPP project.

TIFIA AND OTHER FEDERAL FINANCING

The PPP Act expressly provides authorization for federal funding (*Wash. Rev. Code §§ 47.29.060(1)(d) 47.29.070*).

FULL FAITH AND CREDIT OF THE STATE

Any revenue bonds issued by the Washington State Treasurer on a government entity's behalf is not the general obligation of the state.

NON-COMPETE

18. Does the public private partnership (PPP or P3) legislation allow the government entity to build or develop a competing project? If so:

- What constitutes a competing project?
- What is the term of the non-compete provision?
- What rights and remedies does the private sector party have if the government breaches the non-compete?
- Which government entities are bound by the non-compete?
- Are there any other material terms?

The PPP Act does not address whether a Washington government entity may develop a competing project.

19. What incentives, if any, does the public private partnership (PPP or P3) legislation authorize to attract bids including:

- Tax breaks?
- Contributions in kind, including assets, property or services?
- Labor incentives?
- Any other incentives?

The PPP Act does not address whether a Washington government entity may provide incentives to attract PPP proposals.

COMPLETED OR PENDING PPP PROJECTS

20. Please describe any completed or pending public private partnership (PPP or P3) projects.

Project development has been limited under the PPP Act and has largely consisted of the Washington State Department of Transportation (WSDOT)-Commerce Electric Highway (a network of electric vehicle (EV) DC fast charging stations located every 25 to 50 miles along Interstate 5 and other major roadways in the Pacific Northwest) and a pilot project for development of website advertising for the WSDOT. A full description of contemplated projects can be found at the WSDOT website.

OTHER ISSUES

21. Please identify any other material provisions of the public private partnership (PPP or P3) legislation.

PREVAILING WAGE: WASH. REV. CODE §§ 39.12.010 TO 39.12.900

Under the PPP Act, at minimum Washington state prevailing wages must be paid for PPP projects where public funds are used to pay the costs of construction of a public facility (*Wash. Rev. Code §§ 39.12.010 to 39.12.900*). A PPP agreement must specify the prevailing wages paid to the workers and all the prevailing wages that apply to the project (*Wash. Rev. Code § 39.12.030*). For a PPP project that is greater than \$10,000, a contractor must post, in a location readily visible to the workers, a sign that includes both:

- A copy of a statement of intent to pay prevailing wages.
- The address and telephone number of the industrial statistician of the Washington Department of Labor and Industries to file a complaint or inquiry concerning prevailing wages.

(*Wash. Rev. Code § 39.12.020*.)

22. If your jurisdiction does not have public private partnership (PPP or P3) enacting legislation but still engages in PPP activity, please describe the authority, basis and process for doing so.

Washington has PPP enacting legislation (see *Question 1*).

For the links to the documents referenced in this note, please visit our online version at <http://us.practicallaw.com/8-562-9930>

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