

Approved:

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Responsible Division: Innovative Delivery


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PUBLIC-PRIVATE INITIATIVES POLICY

BACKGROUND:

In 2011, the General Assembly authorized the Ohio Department of Transportation (“ODOT”) to develop, operate, and maintain transportation facilities through public-private initiatives.

AUTHORIZATION:

ODOT is authorized by Sections 5501.70 through 5501.83 of the Ohio Revised Code (“ORC”) (the “Statute”) to solicit, receive, consider, evaluate, and accept bids and proposals for public-private initiatives.

PURPOSE:

The purpose of this policy is to provide further explanation of the manner in which ODOT will implement the Statute through the solicitation, review, and acceptance of bids and proposals for public-private initiatives and to provide a consistent, transparent, and efficient framework for the procurement of public-private initiatives. Additional guidance will be provided to potential bidders or proposers and other interested parties on a project-by-project basis in the procurement solicitation documents for each public-private initiative.

RESPONSIBLE ODOT OFFICE:

The Division of Innovative Delivery (the “Division”) will have primary responsibility for the implementation of this policy. The mission of the Division is to develop new and innovative approaches to managing, maintaining, operating, and building the State’s infrastructure assets to reduce costs, enhance efficiency, and generate revenue. The Division will identify and evaluate potential public-private initiatives in accordance with this policy. The Division will assist in the evaluation and development of procurement options for projects undertaken by ODOT as public-private initiatives.

RELATIONSHIP BETWEEN PUBLIC-PRIVATE INITIATIVES AND GENERAL PLANNING AND FINANCE PROCESSES:

Public-private initiatives will be identified and implemented in a manner consistent with the State’s strategic plans for the development of transportation infrastructure. As such, a project undertaken as a public-private initiative must comply with State Transportation Improvement Program requirements, either by current or future inclusion in the State Transportation Improvement Program. The project will also be included in the Transportation Improvement

Program developed by the applicable Metropolitan Planning Organization in whose jurisdiction the project is located. The project must be consistent with and satisfy all requirements of applicable improvement programs, including the long-range statewide transportation plan and any long-range metropolitan transportation plan applicable to the project.

In certain public-private initiatives, ODOT may commit to make payments in lump sum(s) and/or periodic amounts to a private party in return for the private party successfully undertaking the design, construction, financing and long-term maintenance and/or operation of a project (“PPP Payments”). PPP Payments are contractual commitments which may include availability payments, up-front grants, milestone payments, final acceptance payments and/ or operating period subsidy payments.

If project-specific dedicated revenue(s) fund some or all of a project’s PPP Payments, then sufficient amounts of those revenue(s) will be reserved in a dedicated account before being applied to any other ODOT obligations. To the extent project-specific dedicated revenues do not fund some or all of a project’s PPP Payments:

1. ODOT will fund such PPP Payments in each year after funding all current debt obligations.
2. The following priority of payments will apply:
 - a. ODOT will pay all current debt obligations prior to funding PPP Payments in each year.
 - b. ODOT will pay the portion of the PPP Payments that can be reasonably imputed to arise from upfront capital costs of the project and financing thereof (the “Capital Portion”) in advance of all other ODOT capital costs.¹
 - c. ODOT will pay the portion of PPP Payments that can be reasonably imputed to arise from the ongoing maintenance, renewal and operations related to the project in advance of all other ODOT maintenance, renewal and operation costs.
3. The Capital Portion does not constitute debt service. However, for financial management purposes, ODOT will ensure that in each year in which PPP Payments are due, the respective sums of (x) the Capital Portion for such year; and (y) ODOT’s debt service requirements in such year, which will be satisfied from state and federal funds, as applicable, do not exceed:
 - i. for those amounts to be satisfied from state funds: 20% of ODOT’s share of annual state revenue dedicated to highways, and
 - ii. for those amounts to be satisfied from federal funds: 20% of ODOT’s share of annual federal revenue dedicated to highways.²

¹ If ODOT undertakes more than one PPP project, all PPP payment obligations will be ranked equally with each other within (i.e. there shall be no order of precedence of one PPP project above another).

With respect to the preceding calculations, the following amounts shall not be included in the Capital Portion:

- a. Amounts funded through project-specific dedicated revenues;
- b. Amounts already appropriated; or
- c. Amounts for which ODOT could issue debt at the time such amount is due. In these instances, the preceding calculations will include the expected repayment profile of such debt rather than the proceeds of such debt.

TYPES OF DELIVERY MECHANISMS:

Under the Statute, ODOT may consider a variety of delivery mechanisms for public-private initiatives. A public-private agreement may provide for any combination of planning, acquisition, financing, development, design, construction, reconstruction, replacement, improvement, maintenance, management, repair, leasing, or operation of a transportation facility.

Possible types of agreements for public-private initiatives include:

- Design-Build-Maintain Agreements;
- Design-Build-Operate-Maintain Agreements;
- Design-Build-Finance Agreements
- Design-Build-Finance-Operate Agreements;
- Design-Build-Finance-Operate-Maintain Agreements;
- Operation and Maintenance Agreements;
- Concession Agreements; and
- Other agreements that best serve the public interest in context of the particular project.

ODOT will consider the appropriate delivery mechanism for each public-private initiative on a case-by-case basis, considering the nature and status of the project, risk factors applicable to the project, the project schedule, available funding, project goals, and other project-specific factors. The type of contract will be specified in the procurement solicitation documents for the public-private initiative.

Following a successful procurement, ODOT may also enter into a pre-development agreement with a private entity before entering into the definitive agreement for the development, financing, operation, maintenance, lease, or otherwise of the transportation facility. Successful completion of certain objectives of the pre-development agreement may be a condition to executing or effectuating the definitive agreement for the transportation facility. The pre-development agreement may also provide different pricing or other terms as appropriate for the specific public-private initiative.

SOLICITED PROPOSAL PROCESS:

² As described in ODOT’s State Highway Capital Improvement Bond and Grant Anticipation Revenue Vehicles (GARVEE) Bond policy.

After a possible public-private initiative has been identified, ODOT will solicit proposals and select a private operator with which to enter into a public-private agreement for the initiative consistent with the following:

1. **Delivery Mechanism.** ODOT will determine the appropriate project delivery mechanism, whether an agreement for the design, build, finance, operation, and/or maintenance of the transportation facility, a concession and lease agreement, or some other appropriate delivery mechanism.
2. **Procurement Solicitation Mechanism (Bids or Proposals).** ODOT will determine whether to solicit sealed bids or proposals. In the case of proposals, ODOT will also determine whether to include negotiations between ODOT and proposers as part of the procurement process and whether the proposals will be based on best value, qualifications of the proposers, or some combination of those and other factors.
3. **Phases to Procurement.** ODOT will determine whether to use one or multiple phases in connection with the procurement.
 - a. **Non-Binding Requests for Information.** ODOT may issue a Request for Information (RFI), Request for Expressions of Interest (RFEI), or similar solicitation for information from the bidder or proposer community and other interested persons. Responses to an RFI or RFEI will not be binding upon the respondents or preclude or limit future bids or proposals, although ODOT may consider the information included in any response to an RFI or RFEI in later reviewing a Statement of Qualifications, proposal, or bid.
 - b. **Qualification of Bidders.** Consistent with the requirements of ORC § 5501.71(C)(4), which requires ODOT to consider the general reputation, qualifications, industry experience, and financial capacity of the private entity, ODOT may also issue a Request for Qualifications (RFQ) or similar solicitation for the purpose of qualifying bidders or proposers. ODOT will review respondents' Statements of Qualifications and determine based on those Statements of Qualifications whether each such respondent is qualified to be a private operator of the transportation facility. ODOT may limit the issuance of a Request for Proposals or Invitation to Bid for the public-private initiative to only those respondents found to be the most qualified as set forth in the RFQ.
4. **Procurement Solicitation Documents.** ODOT will prepare appropriate procurement solicitation documents, which may include an Invitation to Bids ("ITB") in the case of a solicitation for sealed bids, a Request for Proposals ("RFP") in the case of a solicitation for proposals, and any RFI, RFEI, or RFQ, as appropriate. The procurement solicitation documents will describe in sufficient detail the proposed public-private initiative and the procedures for receiving, reviewing, and evaluating responses.
5. **Issuance and Advertisement of Procurement Solicitation Documents.** ODOT will issue the procurement solicitation documents consistent with other procurement methods, including by providing sufficient notice to the public. ODOT will also advertise the

opportunity through appropriate channels to maximize interest among potential bidders or proposers.

6. **Meetings with Bidders or Proposers.** ODOT may hold meetings with the public, interested persons, and potential and actual bidders or proposers, both before and after the receipt of proposals, bids, or other responses, to receive input on the public-private initiative and the procurement process.
7. **Receipt, Review, and Evaluation of Bids and Proposals.** ODOT will receive, review, and evaluate bids or proposals in accordance with ORC § 5501.71 and the procurement solicitation documents. ODOT will consider the following factors in determining with which, if any, private entity to enter into a public-private agreement for the public-private initiative:
 - a. The extent to which the bidder's or proposer's plan for the transportation facility, as described in its bid or proposal, will improve safety, reduce congestion, increase capacity, and promote economic growth;
 - b. The extent that the bid or proposal addresses the needs identified in the appropriate State, regional, or local transportation plan by improving safety, reducing congestion, increasing capacity, or enhancing economic efficiency; and whether the bid or proposal is on the transportation improvement program for the affected metropolitan planning organization or the State transportation improvement program;
 - c. The proposed cost of and financial plan for the transportation facility if the proposal or bid is accepted;
 - d. The general reputation, qualifications, industry experience, and financial capacity of the bidder or proposer (which may be determined through an RFQ prior to the solicitation of bids or proposals);
 - e. The proposed design, operation, and feasibility of the transportation facility;
 - f. Comments from local citizens and affected jurisdictions;
 - g. Benefits to the public and the affected transportation facility;
 - h. The bidder's or proposer's safety record; and
 - i. Any other criteria that ODOT considers appropriate.
8. **Negotiations.** ODOT may enter into negotiations with one or more proposers concerning their proposals. As part of the negotiations, ODOT may also request and receive revised proposals from those proposers.

UNSOLICITED PROPOSAL PROCESS:

The Statute permits ODOT to receive, consider, evaluate, and accept unsolicited proposals for a public-private initiative. The following process related to unsolicited proposals is adopted pursuant to and consistent with the Statute.

1. **Informational Pre-Meetings.** Interested persons are strongly encouraged to meet with ODOT prior to submitting an unsolicited proposal for a public-private initiative. ODOT welcomes the opportunity to receive conceptual proposals, which need not conform with the requirements outlined below, for ODOT to consider in its strategic planning or which might serve as the basis for a solicitation of proposals or bids by ODOT.
2. **Submission and Receipt of Unsolicited Proposals.**
 - a. **Form and Method of Submission.** A person desiring to submit an unsolicited proposal should submit five complete printed copies and one complete electronic copy (contained on a compact disc) of the proposal to the Office of Innovative Delivery. ODOT encourages that any unsolicited proposal be conceptual in nature, brief and to the point. ODOT will not undertake any obligation to ensure the confidentiality of any information submitted in an unsolicited proposal. As a result, any person intending to submit an unsolicited proposal to ODOT should not include any information that such person believes to be confidential.
 - b. **Receipt by ODOT.** Consistent with ORC § 5501.72(A) and (E), ODOT may receive, but is not obligated to accept for further evaluation, unsolicited proposals. As indicated above, ODOT strongly encourages interested persons to meet with ODOT prior to submitting an unsolicited proposal. ODOT may decline to accept for further evaluation an unsolicited proposal for various reasons, including, without limitation, because the project is already under consideration or has been considered by ODOT, because ODOT believes the project is better developed through another form of solicitation or procurement, or because ODOT has determined that it is not in the public interest to proceed further with review of the project.
 - c. **Preliminary Evaluation.** After receipt of an unsolicited proposal, ODOT will undertake a preliminary evaluation within 90 days after notice of such determination is provided to the proposer to determine whether to proceed with further evaluation and possible procurement of the proposed public-private initiative. As part of the preliminary evaluation, ODOT will consider whether the unsolicited proposal:
 - i. Addresses the needs identified in the appropriate State, regional, or local transportation plan by improving safety, reducing congestion, increasing capacity, or enhancing economic efficiency; and is on the transportation improvement program for the affected metropolitan planning organization or State transportation improvement program;
 - ii. Is independently originated and developed by the proposer;
 - iii. Benefits the public;

- iv. Is prepared without ODOT supervision;
- v. Includes sufficient detail and information for ODOT to evaluate the proposal in an objective and timely manner; and
- vi. Is made by a private entity that is not prohibited from making an unsolicited proposal under ORC § 3517.13(AA)(1).

ODOT may also consider whether the unsolicited proposal is consistent with other applicable law and policies, including without limitation those funding policies and priorities established by the Transportation Review Advisory Council to the extent that the unsolicited proposal requests the use of ODOT funding sources or a financial commitment by the State.

If the unsolicited proposal does not satisfy all of the criteria set forth above, ODOT will return the unsolicited proposal to the proposer without further action. If the unsolicited proposal satisfies all of the criteria set forth above, ODOT will determine whether to proceed with possible procurement of the proposed public-private initiative. Consistent with ORC § 5501.72(E), ODOT may, but is not obligated to, continue with the evaluation and possible procurement. ODOT may also request or require modifications to the unsolicited proposal before determining whether to proceed.

- d. **Determination to Proceed.** If ODOT determines to proceed with possible procurement of the proposed public-private initiative, ODOT may either (i) solicit competing proposals in accordance with the remainder of this Section 2 or (ii) terminate the unsolicited proposal process and procure the proposed public-private initiative through the solicited proposals process in accordance with Section 4 below and the solicited proposals process above.
- e. **Solicitation of Competing Proposals.** If ODOT determines to solicit competing proposals, ODOT will advertise the unsolicited proposal for the purpose of receiving competing proposals for the proposed transportation facility. The advertisement will outline the general nature and scope of the unsolicited proposal, including the location of the transportation facility and the work to be performed on or in connection with the transportation facility, and any other information that ODOT determines to be appropriate or beneficial to the possible procurement. The advertisement will specify an ODOT address to which a competing proposal may be submitted and a reasonable time period by which competitors must submit a competing proposal to ODOT. The advertisement may also be accompanied by appropriate procurement solicitation documents, such as an RFP. ODOT may also request or require that the unsolicited proposer supplement its unsolicited proposal with additional information, such as demonstrating its qualifications or evidencing a financing commitment, consistent with information that has been requested or required from competing proposers.

- f. **Review of Competing Proposals.** Upon receipt of competing proposals, ODOT will determine whether any competing proposal is comparable in nature and scope to the unsolicited proposal. ODOT will then evaluate the unsolicited proposal and any comparable competing proposal based upon the following factors:
 - i. Novel methods, approaches, or concepts demonstrated by the proposal;
 - ii. Scientific, technical, or socioeconomic merits of the proposal;
 - iii. Potential contribution of the proposal to ODOT’s mission;
 - iv. Capabilities, related experience, facilities, or techniques of the private entity or unique combinations of these qualities that are integral factors for achieving the proposal objectives;
 - v. Qualifications, capabilities, and experience of the proposed principal investigator, team leader, or key personnel, who are critical to achieving the proposal objectives;
 - vi. How the proposal benefits the public; and
 - vii. Any other factors appropriate to a particular proposal.
 - g. **Negotiations.** ODOT may conduct good faith discussions and enter into negotiations with one or more proposers concerning their proposals. As part of the negotiations, ODOT may also request and receive from bidders revised proposals.
 - h. **Actions by ODOT.** After evaluating the unsolicited proposal and any comparable competing proposals, ODOT may do any of the following:
 - i. Accept the unsolicited proposal and reject any competing proposals;
 - ii. Reject the unsolicited proposal and accept a comparable competing proposal if ODOT determines that the comparable competing proposal is the most advantageous to the State;
 - iii. Accept both an unsolicited proposal and a competing proposal if accepting both proposals is advantageous to the State;
 - iv. Reject the unsolicited proposal and any competing proposals.
3. **Fee for Review of Proposals.** ODOT may charge a reasonable fee to any person who submits an unsolicited proposal or a competing proposal sufficient to reimburse ODOT for the time and expenses incurred by ODOT in reviewing such proposal.
4. **Use of Unsolicited Proposal for Solicitation of Proposals.** At any time, ODOT may determine that it is in the best interests of the State to procure the proposed public-private

initiative through the solicited proposals process, including without limitation to ensure that all proposals are responsive to the needs of the State or conform to a common solicitation or proposed project agreement. ODOT may use components of or information contained in the unsolicited proposal as the basis for forming a solicitation for proposals, including any, RFI, RFQ, RFP, or ITB. In such case, ODOT may require the unsolicited proposer to revise and re-submit its proposal in accordance with the solicitation documents.

CONFIDENTIALITY:

Information submitted to ODOT may be subject to public inspection in accordance with the Ohio Open Records Law, ORC § 149.43, or other applicable law. ODOT cannot guarantee that information submitted to it, including information identified as being exempt from public inspection, will be kept confidential. ODOT will not be liable for the disclosure of any material submitted to it.

Any person who submits information to ODOT should clearly identify portions of the information that the submitter believes are exempt from inspection in accordance with the Ohio Open Records Law, the Statute, or another applicable law. The submitter's identification of certain information as being exempt is not controlling on, and is subject to further review by, ODOT. A submitter may, however, prior to submitting the information, request a review by ODOT of the information to be submitted to determine whether such information would be subject to or exempt from public inspection.

PROPOSAL DEVELOPMENT FEE OR STIPEND:

To encourage the development of high-quality proposals or bids and to acquire the rights to use the intellectual property therein, ODOT may, in its discretion, make available a fee or stipend for the development and submission of bids or proposals to ODOT for potential public-private initiatives. The terms and amount of such fee or stipend will be specified in the procurement solicitation documents. If the procurement solicitation documents are silent, no such fee or stipend shall be made available unless otherwise explicitly agreed in writing by ODOT.

RESERVATION OF RIGHTS:

ODOT may waive or deviate from some or all the provisions of this policy where ODOT has determined that such waiver or deviation would be in the best interest of the State and would not be inconsistent with the Statute. No such waiver or deviation will result in any liability for the State, ODOT, or any other party.

ODOT reserves all rights available by law and in equity in its procurement process, including without limitation the right to:

1. Modify the procurement process or solicitation documents, including deadlines;
2. Modify the scope of the public-private initiative or the responsibilities of the parties under the proposed agreement;

3. Solicit bids or proposals for a public-private initiative after previously terminating the evaluation of or rejecting proposals for the same or a similar initiative;
4. Reject or terminate the evaluation of submittals, responses, Statements of Qualifications, bids, and proposals at any time;
5. Suspend or terminate negotiations, negotiate with a proposer without being bound by the proposer's proposal, and elect not to negotiate with a proposer;
6. Require additional information from any bidder, proposer, or other respondent;
7. Revise the evaluation factors or methodology prior to the date on which proposals or bids are due;
8. Cancel an RFI, REFI, RFQ, RFP, or ITB, in whole or in part, at any time prior to the execution of an agreement pertaining to such public-private initiative without incurring any obligation or liability;
9. Issue addenda, supplements, and modifications to a procurement solicitation document;
10. Waive immaterial deficiencies in a Statement of Qualifications, bid, or proposal or permit clarifications or corrections thereto;
11. Disqualify any bidder, proposers, or other respondent;
12. Develop some or all of a project itself; and
13. Disclose information submitted to ODOT as permitted by the law and the procurement solicitation documents.

REFERENCES:

ORC § 5501.70 through 5501.83

ORC § 149.43

TRAINING:

There is no training mandated for the implementation of this policy or the statutes identified as the authority for this function. Questions concerning this process may be referred to the Division of Innovative Delivery.