

Public Private Partnership Legislation: Ohio

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A Q&A guide to Ohio public private partnership (P3 or PPP) legislation. 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 are governed in Ohio by statute, which was enacted in June 2011 and codified in Chapter 5501 of Title LV of the Ohio Revised Code (*Ohio Rev. Code Ann.* §§ 5501.70 to 5501.83). To explain how it would implement the provisions of this statute, the Ohio Department of Transportation (ODOT) adopted in November 2012 the Public-private Initiatives Policy.

In addition to the Public-private Initiatives Policy, the ODOT has adopted standard operating procedures specific to its actions under the Ohio public private partnership statute, including:

- *ODOT Standard Procedure No. 430-002*, approved in January 2013, relating to availability payment transactions.
- *ODOT Standard Procedure No. 430-003*, approved in February 2013, governing any protests related to the bid or proposal selection process for PPPs.

The ODOT is authorized to issue rules to implement the public private partnership statute (*Ohio Rev. Code Ann.* §§ 5501.77 and 5501.83 and see *Question 21: Rulemaking*). However, the Public-private Initiatives Policy and these Standard Procedures were not adopted under this authority and as a result may be changed by the ODOT at any time.

2. Are there any limitations on the types of projects that can be developed or monetized under the legislation?

The Ohio public private partnership statute gives broad authority to the Ohio Department of Transportation (ODOT) to undertake a public private initiative with a private entity to develop, finance, maintain or operate transportation facilities (*Ohio Rev. Code Ann.* §§ 5501.71(A) and 5501.72(A)).

Under the statute, the public private initiative is defined as any arrangement between the ODOT and one or more private entities that is reduced to a public private agreement and provides for all of the following:

- Acceptance of a private contribution, including a money payment, for a project or service for a transportation facility.
- The sharing of resources and the means of providing a project or service for a transportation facility.
- Cooperation in researching, developing and implementing projects or services for a transportation facility.

(*Ohio Rev. Code Ann.* §§ 5501.70(l).)

A transportation facility is defined in the Ohio Revised Code generally to include all publicly owned modes or means of transportation, such as:

- Highways.
- Rights-of-way.
- Roads and bridges.
- Parking facilities.
- Aviation, port and rail facilities.
- Public transportation facilities.



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- Rest areas.
- Roadside parks.

The Ohio public private partnership statute also defines transportation facility to include:

- Tunnels.
- Ferries.
- Port facilities on navigable waters that are used for commerce.
- Intermodal facilities.
- Other similar facilities open to the public and used for the transportation of persons or goods.
- Any building, structure, parking area or other appurtenances or property needed to operate a transportation facility that is subject to a public private agreement.

(Ohio Rev. Code Ann. § 5501.70(J) and Ohio Rev. Code Ann. § 5501.01.)

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 Ohio Department of Transportation (ODOT) may issue a Request for Qualifications (RFQs) or similar solicitation to qualify bidders (see *ODOT: Public-private Initiatives Policy, at 4*). The ODOT will review the RFQs and each respondent's qualifications taking into account the respondent's:

- General reputation.
- Qualifications.
- Industry experience.
- Financial capacity.

(Ohio Rev. Code Ann. § 5501.71(C)(4).)

BIDDING PROCEDURES

Once the ODOT has identified a transportation facility that may be developed under a public private initiative, it may solicit either:

- Sealed bids.

- Proposals, with or without negotiations, based on:
 - the best value;
 - the qualifications of the proposers; or
 - a combination of the best value, qualifications and other factors.

(Ohio Rev. Code Ann. § 5501.71(B) and ODOT: Public-private Initiatives Policy, at 4.)

The bidding procedures vary depending on which of the following two processes the ODOT uses:

- In a sealed bidding process, the ODOT may issue an Invitation to Bids (ITBs).
- In a proposal process, the ODOT may prepare a Request for Proposals (RFPs).

In either case, the solicitation documents must describe in sufficient detail the proposed public private initiative and the procedures for receiving, reviewing and evaluating responses (see *ODOT: Public-private Initiatives Policy, at 4*).

COMPETING GOVERNMENT BIDS

The Ohio public private partnership (PPP or P3) statute excludes governmental entities from submitting bids for PPP projects. The statute does not, however, prohibit other governmental entities from working with private entities in preparing bids or proposals and anticipates that an "affected jurisdiction" may be a party to a PPP agreement (Ohio Rev. Code Ann. §§ 5501.70(A) and 5501.73(A)). Affected jurisdiction is defined in the statute as any unit of government within Ohio in which all or part of a transportation facility is located or any other public entity directly affected by the transportation facility (Ohio Rev. Code Ann. § 5501.70(A)).

UNSOLICITED BIDS

The Ohio PPP statute allows the ODOT to receive, consider, evaluate and accept unsolicited proposals for public private initiatives if these unsolicited proposals satisfy certain statutory requirements (Ohio Rev. Code Ann. § 5501.72(A)). However, the bidders are encouraged to meet with the ODOT before submitting an unsolicited proposal and to make this proposal brief and conceptual in nature (see *ODOT: Public-private Initiatives Policy, at 6*).

To be considered, an unsolicited proposal must:

- Address the needs identified in the appropriate state, regional or local transportation plan by improving safety, reducing congestion, increasing capacity or enhancing economic efficiency.
- Be on the transportation improvement program for the affected metropolitan planning organization or state transportation improvement program.
- Be independently originated and developed by the proposer.
- Benefit the public.
- Be prepared without supervision of the ODOT.
- Include sufficient detail and information for the ODOT to evaluate

the proposal in an objective and timely manner.

- Be made by a private entity that is not otherwise prohibited from making an unsolicited proposal under applicable provisions of the Ohio Revised Code.

Once this preliminary review is complete, the ODOT may evaluate the bid further (see *Question 4: Evaluation of Unsolicited Proposals*).

OTHER PROCEDURES

Under the Public-private Initiatives Policy, the ODOT may:

- Before issuing any solicitation documents, issue a Request for Information (RFI), a Request for Expressions of Interest (RFEI) or other similar solicitation for information. Responses to an RFI or RFEI are not binding on the respondent and do not preclude the respondent from responding to an RFQ, RFP or ITB.
- Hold meetings with the public, interested persons and potential or actual bidders before or after receipt of bids and proposals to receive input on the public private initiative and the procurement process.

(See *ODOT: Public-private Initiatives Policy*, at 4-5.)

4. Please give a brief overview of the bid review process. 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

The Ohio Department of Transportation (ODOT) must select a solicited bidder or proposal on a competitive basis (*Ohio Rev. Code Ann. § 5501.71(E)*). When evaluating and selecting a solicited bid or proposal, the ODOT must consider:

- The ability of the transportation facility to improve safety, reduce congestion, increase capacity and promote economic growth.
- The extent to which the 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.

- The extent to which the proposal is consistent with state and regional (metropolitan planning organization) transportation improvement programs.
- The proposed cost of, and financial plan for, the transportation facility.
- The general reputation, qualifications, industry experience and financial capacity of the bidder.
- The proposed design, operation and feasibility of the transportation facility.
- Comments from local citizens and affected jurisdictions.
- The benefits to the public and the affected transportation facility.
- The safety record of the bidder or proposer.
- Any other criteria the ODOT considers appropriate.

(*Ohio Rev. Code Ann. § 5501.71(C)*.)

Evaluating Unsolicited Proposals

The evaluation of unsolicited proposals is a twofold process:

- The ODOT must first determine within 90 days of receipt of the unsolicited proposal whether the unsolicited proposal satisfies the threshold requirements set out in the public private partnership statute (see *Question 3: Unsolicited Bids*). If the ODOT determines that the unsolicited proposal does not satisfy the statutory requirements, it must return the proposal without further action.
- If the ODOT determines that the unsolicited proposal satisfies the threshold statutory requirements and it wants to proceed with a public private initiative, the ODOT then determines whether to:
 - advertise the proposal to solicit competing proposals;
 - request or require modifications and advertise the modified proposal to solicit competing proposals; or
 - terminate the unsolicited proposal process and initiate a solicited proposals process.

(See *ODOT: Public-private Initiatives Policy*, at 7-8 and *Question 3: Bidding Procedures*.)

If the ODOT elects to solicit competing proposals, on receipt of these competing proposals, the ODOT must:

- Determine whether any of the competing proposals are comparable to the unsolicited proposal.
- Evaluate the unsolicited proposal and any comparable proposal.
- Conduct good faith discussions and, if necessary, negotiations with the bidders of the qualified proposals.

In evaluating the unsolicited proposal and any comparable competing proposal, the ODOT must consider:

- Novel methods, approaches or concepts demonstrated in the proposals.

- The scientific, technical or socioeconomic merits of the proposals.
- The potential contribution of the proposals to the ODOT's mission.
- The capabilities, related experience, facilities or techniques of the private entities or unique combination of these qualities.
- The qualifications, capabilities and experience of the proposed principal investigator, team leader or key personnel critical to achieving the proposal's objectives.
- The benefit to the public of each proposal.
- Any other factors it deems appropriate.

After evaluating the proposals, the ODOT may:

- Accept the unsolicited proposal and reject any competing proposals.
- Reject the unsolicited proposal and accept a comparable competing proposal if the department determines that the comparable competing proposal is the most advantageous to the state.
- Accept both an unsolicited proposal and a competing proposal if accepting both proposals is advantageous to the state.
- Reject the unsolicited proposal and any competing proposals.

(Ohio Rev. Code Ann. § 5501.72.)

DEPOSITS AND OTHER FEES

Ohio's PPP statute does not require bidders or proposers to post a deposit or pay an application fee for solicited bids or proposals. However, the ODOT must charge a reasonable fee to cover its costs to process, review and evaluate any unsolicited or competing proposal (Ohio Rev. Code Ann. § 5501.72(G)).

DEDICATED PPP UNIT

The ODOT's Division of Innovative Delivery has the primary responsibility to implement the Public-private Initiatives Policy, including to:

- Develop new and innovative approaches to managing, maintaining, operating and building the state's infrastructure assets.
- Identify and evaluate potential public private initiatives.
- Assist in evaluating and developing procurement options for projects undertaken as public private initiatives.

(See ODOT: Public-private Initiatives Policy, at 1.)

BID REVIEW SCHEDULE

While Ohio's PPP statute does not establish a review schedule for solicited bids or proposals, it does provide for a 90-day period for initial reviews of unsolicited proposals (see *Evaluation of Unsolicited Proposals*).

REIMBURSEMENT OF LOSING BIDDERS' COSTS

The ODOT is not required to reimburse unsuccessful proposers or bidders for any portion of the costs they incur in preparing and submitting bids or proposals. However, the ODOT may make a fee or stipend available to:

- Encourage development of high-quality submissions.
- Acquire the rights to use the intellectual property developed.

The terms and amount of this fee or stipend is specified in the procurement solicitation documents (see ODOT: Public-private Initiatives Policy, at 9.)

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

Ohio's public private partnership (P3 or PPP) statute does not require any executive or legislative approval for the Ohio Department of Transportation (ODOT) to initiate a project.

BID APPROVAL

There is no additional executive or legislative action necessary for the ODOT to approve a public private initiative and enter into a PPP agreement for a transportation facility. However, necessary appropriations must be made available and the transportation facilities must be consistent with applicable transportation plans and improvement programs (see *Question 4: Evaluation of Solicited Bids or Proposals* and *Question 10*).

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

Ohio's public private partnership statute does not require that public hearings be held during the proposal, bidding, review, evaluation or award process. However, the Public-private Initiatives Policy provides that the Ohio Department of Transportation (ODOT) may hold meetings with the public and interested persons before and after receipt of proposals, bids or responses (see *Public-private Initiatives Policy*, at 5 and *Question 3: Other Procedures*). In any solicited bid or proposal process, the ODOT must also consider any comments received from local citizens and may hold hearings to solicit comments in its evaluation of process (Ohio Rev. Code Ann. § 5501.71(C)(6) and *Question 4: Evaluation of Solicited Bids or Proposals*).

7. Can an approved bidder perform preliminary work before the public private partnership (P3 or PPP) 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

Ohio's PPP statute does not expressly address the status of preliminary work. However, the Public-private Initiatives Policy provides that the Ohio Department of Transportation (ODOT) may enter into a pre-development agreement before and with performance conditional to a definitive public private agreement (see *ODOT: Public-private Initiatives Policy*, at 3).

COMPENSATION

If the ODOT enters into a pre-development agreement, the agreement may provide for separate pricing or other terms appropriate for the specific public private initiative. This compensation would be in addition to any cost reimbursement provided to the unsuccessful participants to cover costs of preparing a responsive bid or proposal (see *ODOT: Public-private Initiatives Policy*, at 3 and *Question 4: Deposits and Other Fees*).

TITLE TO WORK

Ohio's PPP statute and the Public-private Initiatives Policy are silent on title to preliminary or pre-development work submitted by bidders or proposers to the ODOT. The determination of who owns title to the preliminary or pre-development work is effectively left to the procurement process and any pre-development agreements.

PROJECT DELIVERY STRUCTURES

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

Ohio's PPP statute does not mandate particular project delivery mechanisms and allows the Ohio Department of Transportation (ODOT) to enter into a public private partnership agreement with a private entity to plan, design, acquire, develop, finance, construct, replace, improve, maintain, manage, repair, lease or operate a transportation facility (*Ohio Rev. Code Ann. § 5501.73(B)*).

To provide various combinations of the above services, under the Public-private Initiatives Policy, the public private initiative may be structured in a variety of ways, including as:

- Design-build-maintain.
- Design-build-operate-maintain.

- Design-build-finance.
- Design-build-finance-operate.
- Design-build-finance-operate-maintain.
- Operation and maintenance.
- Concessions.
- Any other arrangement that the ODOT determines best serves the public interest.

The 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.
- The applicable risk factors.
- The project's scheduling and available funding.
- The project's goals.
- Any other project-specific factors.

(See *ODOT: Public-private Initiatives Policy*, at 3.)

For more information on these structures, see *Practice Note, Public Private Partnerships: Issues and Considerations*.

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 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

Under Ohio's public private partnership (P3 or PPP) statute, all PPP agreements must include a specific plan to ensure proper maintenance of the transportation facility throughout the term of the agreement. If applicable, the plan must also ensure the return of the facility to the Ohio Department of Transportation (ODOT) in good condition and repair (*Ohio Rev. Code Ann. § 5501.73(B)(4)*).

The PPP agreement may also include terms granting the ODOT:

- The right to review and approve the private entity's plans for developing and operating the transportation facility.
- The right to inspect construction or improvements to the transportation facility.

(*Ohio Rev. Code Ann. § 5501.73(C)*.)

AUDITING AND INSPECTION RIGHTS

Ohio's PPP statute does not mandate particular oversight rights for transportation facilities procured under the statute. It effectively leaves oversight rights for the transportation facilities to the procurement process and the applicable PPP agreement. However, it does provide that a PPP agreement may include terms related to the ODOT's right to inspect improvements and periodically receive appropriate financial statements and traffic reports (*Ohio Rev. Code Ann. § 5501.73(C)*).

STEP-IN RIGHTS

If the private entity materially defaults in its obligations under the PPP agreement, the ODOT has the statutory right to elect to take over the transportation facility (including the succession of all right, title and interest in the transportation facility) (*Ohio Rev. Code Ann. § 5501.75(A)*).

If the ODOT takes over the transportation facility, it may either develop and operate the transportation facility or solicit proposals for the maintenance and operation of the transportation facility (*Ohio Rev. Code Ann. § 5501.75(B)*).

This is in addition to any termination rights the ODOT may have under the statute or PPP agreement (see *Question 15: Early Termination*).

PRIVATE SECTOR PARTY COMPENSATION

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

Ohio's PPP statute does not mandate any specific compensation structure. The compensation structure is determined in the procurement process and the applicable public private partnership agreement. However, the Public-private Initiatives Policy provides the ODOT may make payments to the private entity either in lump sum or periodic amounts. The payments may include:

- Availability payments.
- Up-front grants.
- Milestone payments.
- Final acceptance payments.
- Operating period subsidy payments.

(See *ODOT: Public-private Initiatives Policy, at 2*.)

If the private entity will be compensated from user fees, the PPP agreement must also indicate how these fees will be determined and modified (*Ohio Rev. Code Ann. § 5501.73(B)* and *Question 12: User Fee Increases*).

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

The Ohio Department of Transportation (ODOT) may agree to compensate the private entity in the form of availability payments (see *Question 10*).

The ODOT can use project-specific dedicated revenues to make these payments. The ODOT has indicated that it will reserve a sufficient amount of this revenue in a dedicated account before applying these revenues to any other ODOT obligations (*Ohio Rev. Code Ann. § 5501.76*).

If the project-specific dedicated revenues are insufficient to make these payments, the ODOT has indicated that it will make these payments from other sources subject to biennial appropriations and according to a payment priority waterfall.

In each year these amounts are due, the ODOT will pay these amounts on a *pro rata* basis with all other PPP projects as follows:

- All then-current debt obligations before funding any of these payments.
- That portion of these amounts that is reasonably attributable to up-front capital costs (capital payments) are to be paid before the other similar ODOT costs.
- That portion of these payments that is reasonably attributable to ongoing maintenance, renewal and operations are to be paid before the other similar ODOT costs.

The capital payments do not include debt service amounts. For financial management purposes, the ODOT will generally limit the aggregate amount of debt service and capital payments based on anticipated and dedicated federal and state sources available to the ODOT (see *ODOT: Public-private Initiatives Policy, at 2-3*).

Availability payments beyond any fiscal biennium will be subject to appropriation by the Ohio General Assembly. If the Ohio General Assembly fails to appropriate the funds necessary to pay these future availability payments, the ODOT will have no obligation for these availability payments (see *ODOT: Standard Procedure No. 430-002, at 2* and *Question 16: Private Entity*).

The ODOT has indicated that it will limit PPP agreements funded from availability payments subject to biennial appropriations to a term of two years subject to a series of options to renew conditioned only on the appropriation of the necessary funds (see *ODOT: Standard Procedure No. 430-002, at 2* and *Question 15: Limit on Maximum Term*).

For more information, see the *Public-private Initiatives Policy* and *ODOT: Standard Procedure No. 430-002*.

If otherwise authorized under Ohio law, the ODOT may seek to issue bonds to meet certain of its obligations under a PPP agreement (*Ohio Rev. Code Ann. § 5501.76*).

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

The Ohio public private partnership (P3 or PPP) statute permits the imposition of user fees (for example, tolls, rates and any other charges imposed for the use of all or a portion of a transportation facility) (*Ohio Rev. Code Ann. § 5501.75(B)(1)* and *Ohio Rev. Code Ann. § 5501.70(K)*).

If user fees are to be used for a project, the PPP agreement must make that clear. The agreement must also set out the basis for determining and modifying these fees (*Ohio Rev. Code Ann. § 5501.73(B)(5)*).

EXECUTIVE OR LEGISLATIVE APPROVAL

The Ohio PPP statute does not require any executive or legislative approval to establish or modify user fees.

PUBLIC HEARINGS REQUIREMENT

The Ohio PPP statute does not require any public hearings to establish or modify user fees.

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 Ohio public private partnership (P3 or PPP) statute authorizes acceptance of private contributions, including money payments, for projects or services for transportation facilities (*Ohio Rev. Code Ann. § 5501.70(I)(1)*). However, it does not mandate any specific compensation structure for payments to the Ohio Department of Transportation (ODOT) and effectively leaves that determination for the procurement process and the PPP agreement.

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

All moneys received by the Ohio Department of Transportation (ODOT) under a PPP agreement must be deposited in Ohio's state treasury and credited to the highway operating fund (*Ohio Rev. Code Ann. § 5501.73(F)*).

To the extent the ODOT makes payments to the private entity from dedicated project-specific revenues, the ODOT's Public-private Initiatives Policy requires that a sufficient amount of these revenues be reserved in a dedicated account before being applied to any other ODOT obligations (see *Question 11*).

TERM, RENEWAL AND EARLY TERMINATION**15. Does the legislation:**

- Include a maximum term for any public private partnership (P3 or PPP) 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 Ohio PPP statute does not impose any limitation on the term of a PPP agreement and effectively leaves that determination for the procurement process and the PPP agreement, where the term must be set out.

However, any PPP agreement is subject to general limitations applicable to all contracts entered into by Ohio, including limitations relating to debt, taxes and the biennial appropriation of funds (see *Ohio Const. Arts. II, § 22, VIII and XII*).

To address those limitations, the Ohio Department of Transportation (ODOT) expects to limit PPP agreements to a maximum term of two years with renewal or a series of renewals conditioned only on legislative appropriation of the necessary funds (see *ODOT: Standard Procedure No. 430-002, at 2 and Question 11*).

RENEWAL PROVISIONS

The Ohio PPP statute does not establish any specific conditions for renewal of the term of a PPP agreement. However, ODOT Standard Procedure No. 430-002 anticipates that PPP agreements using requiring payments beyond the end of any fiscal biennium may be automatically renewable on a biennial basis, subject only to the legislative appropriation of the necessary funds.

EARLY TERMINATION

The PPP agreement must specify any grounds for termination by the ODOT or the operator of a transportation facility (*Ohio Rev. Code Ann. § 5501.73(B)(7)*). If there is a material default by a private entity operator, the ODOT may:

- Terminate the PPP agreement.
- Exercise any other rights it has under the agreement or applicable law.
- Take over the transportation facility, subject to any liens on revenues previously granted by the private entity (see *Question 9: Step-in Rights*).

(*Ohio Rev. Code Ann. § 5501.75(A)*.)

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

GOVERNMENTAL ENTITY

The Ohio PPP statute provides that on termination of the agreement the transportation facility reverts to the Ohio Department of Transportation (ODOT) and will be dedicated to the ODOT for public use (*Ohio Rev. Code Ann. § 5501.74*). For additional rights of the ODOT on early termination, see *Section 5501.75 of the Ohio Revised Code* and *Question 15: Early Termination*.

PRIVATE SECTOR PARTY

If the PPP agreement terminates, the authority and duties of the private entity cease, except for any duties and obligations that extend beyond the termination as provided in the agreement (*Ohio Rev. Code Ann. § 5501.74*).

A PPP agreement may include provisions for a termination payment to be made by the ODOT to the private entity if the agreement is terminated by the ODOT because the Ohio General Assembly did not appropriate the required funds. Any termination payment is also subject to appropriation but the ODOT anticipates that these payments may be funded by either:

- The issuance of debt obligations under agreement with other state agencies.
- Application of appropriated capital funds available for the purpose.

(See *ODOT: Standard Procedure No. 430-002, at 2* and *Question 15: Limit on Maximum Term*.)

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

Under the Ohio public private partnership statute, the Ohio Department of Transportation (ODOT) may but is not required to arrange and participate in providing financing for any Public Private Partnership (P3 or PPP) project. A transportation facility may be financed in whole or in part by contributions of funds or property by either any:

- Private entity.

- Affected governmental entity that is a party to the applicable PPP agreement (including funds derived from obligations issued by the governmental entity if permitted under the law applicable to that entity).

(*Ohio Rev. Code Ann. § 5501.77(B)*.)

The ODOT does not have direct authority to issue bonds or notes to finance its obligations. However, under the Ohio PPP statute, the issuing authority for the state infrastructure bank may issue obligations permitted under the laws applicable to the state infrastructure bank to provide funds to the ODOT to develop or finance a transportation facility (*Ohio Rev. Code Ann. §§ 5501.76, 5531.09 and 5531.10*).

Under the Ohio PPP statute, the ODOT is specifically authorized to accept and use any or all of the following to finance a transportation facility and must comply with any requirements or restrictions governing the use of the funds:

- Federal, state, local and private funds.
- Funds or property from the private entity or from a jurisdiction or governmental entity that is affected by the transportation facility.
- Grants, donations, gifts or other conveyances of land, money, real and personal property or any other item of value from any other source.

(*Ohio Rev. Code Ann. § 5501.77(A)(3)*.)

The ODOT must comply with any requirements or restrictions governing the use of these funds.

FINANCING CAP

The Ohio PPP statute does not impose any caps on the amount of financing that can be provided in support of public private initiatives.

TIFIA AND OTHER FEDERAL FINANCING

The Ohio PPP statute permits the ODOT to accept funds from the federal government or any of its agencies, whether the funds are made available by grant, loan or other financial assistance (*Ohio Rev. Code Ann. § 5501.77(A)(1)*). The ODOT may apply or support an application for a TIFIA loan.

FULL FAITH AND CREDIT OF THE STATE

The financing authorized by the Ohio PPP statute in support of a public private initiative does not carry or constitute a debt or pledge of the full faith and credit of Ohio. Similarly, any payments required under a PPP agreement do not constitute a debt or pledge of the full faith and credit of Ohio. There is no right to have taxes or excises levied by the Ohio General Assembly for any financing authorized under the Ohio PPP statute or, except under a valid appropriation within the applicable fiscal biennium, any payments required to be made under a PPP agreement.

NON-COMPETE

18. Does the PPP 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 Ohio public private partnership statute does not address whether the Ohio Department of Transportation or another governmental entity may develop a competing facility.

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

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

TAX BREAKS

The Ohio PPP statute exempts transportation facilities and all tangible personal property used exclusively in connection with transportation facilities from all *ad valorem* property taxes and special assessments levied against property in Ohio (*Ohio Rev. Code Ann. § 5501.78*).

CONTRIBUTIONS IN KIND

The Ohio PPP statute does not provide for in-kind benefits to a private entity. If the Ohio Department of Transportation (ODOT) determines that an acquisition of property is for public transportation use and serves the public transportation purposes of the Ohio PPP statute, the ODOT may exercise the power of eminent domain to acquire lands necessary for a transportation facility (*Ohio Rev. Code Ann. § 5501.79*). The ODOT may not transfer this power to a private entity under a PPP agreement. The private entity must compensate the ODOT for the costs of acquiring the property (*Ohio Rev. Code Ann. §§ 5501.73(E) and 5501.79*).

LABOR INCENTIVES

The Ohio PPP statute does not provide labor incentives.

OTHER INCENTIVES

The Ohio PPP statute does not provide other incentives.

COMPLETED OR PENDING PPP PROJECTS

20. Please describe any completed or pending projects.

No projects have been completed under the Ohio public private partnership (P3 or PPP) statute. However, several projects are in development, including:

- **The Cleveland Innerbelt project.** On September 13, 2013, the Ohio Department of Transportation (ODOT) announced that it had identified a winning team for the second phase of the Cleveland Innerbelt project. This project involves the demolition of an existing bridge carrying Interstate 90 through downtown Cleveland and the design and construction of a new bridge, related roadways and improvements to carry eastbound traffic.
- **The Ohio Route 823 Portsmouth Bypass project.** The ODOT has invited a short list of three teams to submit technical and financial proposals.
- **The Brent Spence Bridge Improvement project.** This project will span Interstate routes 71 and 75 across the Ohio River into Kentucky. It remains pending as an intended PPP project. Delivery structures are under discussion between Ohio and Kentucky based on a value-for-money study. For more information on value-for-money analyses, see *Practice Note, Public Private Partnerships: Issues and Considerations*.

Other studies and Requests for Information have been periodically released by the ODOT but no other projects are currently pending under the Ohio PPP statute.

OTHER ISSUES

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

Other material provisions applicable to PPP projects in Ohio under the Ohio PPP statute include sections regarding rulemaking, confidentiality and binding dispute resolution.

RULEMAKING

The Ohio Department of Transportation (ODOT) may issue rules to carry out the Ohio PPP statute, but has not yet done so (*Ohio Rev. Code Ann. §§ 5501.77(D) and 5501.83*).

Ohio's PPP statute expressly authorizes the ODOT to adopt rules to control or regulate traffic on any transportation facility subject to a PPP agreement for:

- The protection and preservation of the transportation facility.
- The maintenance and preservation of good order within the transportation facility.

- The purpose of establishing vehicle owner or operator liability for avoiding user fees, including tolls and other user charges.

(*Ohio Rev. Code Ann. § 5501.77(D).*)

Violation of any rules adopted by the ODOT may result in a criminal charge or a civil violation, with fees and charges that may be disposed of under the PPP agreement (*Ohio Rev. Code Ann. § 5501.77(E) (2)*).

CONFIDENTIALITY

Trade secrets submitted to the ODOT as part of a bid or a proposal are confidential and not subject to Ohio's public records laws (*Ohio Rev. Code Ann. §§ 5501.71(F) and 5501.72(C)*).

Financial information submitted to the ODOT as part of a bid or proposal is confidential and not subject to Ohio's public records laws until a proposal is acted on by the ODOT (*Ohio Rev. Code Ann. §§ 5501.71(F) and 5501.72(C)*).

Before submitting a proposal, a private entity may request a review by the ODOT of information it has identified as confidential to determine if it would be subject to disclosure under Ohio's public records laws (*Ohio Rev. Code Ann. §§ 5501.71(F) and 5501.72(C)*).

The ODOT's Public-private Initiatives Policy states that the ODOT will not undertake any obligation to ensure the confidentiality of any information submitted in an unsolicited proposal and that unsolicited proposals should not include any information that the submitter believes to be confidential.

BINDING DISPUTE RESOLUTION

Under the Ohio PPP statute, a PPP agreement may include a provision authorizing a binding dispute resolution method for any controversy arising under the agreement (*Ohio Rev. Code Ann. § 5501.73(D) (1)*). The binding dispute resolution method may proceed only on agreement of all parties to the controversy (*Ohio Rev. Code Ann. § 5501.73(D)(1)*). The Ohio PPP statute defines binding dispute resolution as a review of all relevant items by a technical expert (*Ohio Rev. Code Ann. § 5501.73(D)(1)(c)(2)*). The binding dispute resolution does not involve any representation by legal counsel or any other advocacy (*Ohio Rev. Code Ann. § 5501.73(D)(1)(c)(2)*).

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

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

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