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May 2, 2007

The Honorable Mary E. Peters, U.S. Secretary of Transportation
The Honorable Richard Capka, Federal Highways Administrator
Mr. Tyler Duvall, Assistant Secretary for Transportation Policy,
Office of the Secretary
Mr. Michael Saunders, Program Manager For Public-Private Partnerships, FHWA

Re: Model PPP Legislation Posted on Federal Highway Administration (FHWA) Web Site for Review and Comment

Dear Secretary Peters, Administrator Capka, Mr. Duvall, and Mr. Saunders:

On behalf of the American Bar Association, I am transmitting comments on the model Public Private Partnership legislation posted on the Federal Highway Administration web site at http://www.fhwa.dot.gov/ppp/legislation.htm. These comments, drafted by leaders of two ABA entities -- the Section of Public Contract Law and the Section of State and Local Government Law -- with especial expertise in this area of law, comport with association policy.

Sincerely,

Denise A Cardman

Denise A. Cardman
Acting Director

cc: National Association of State Procurement Officials
National Institute of Governmental Purchasing
Section of Public Contract Law Officers and Council
Section of State and Local Government Law Officers and Council

2006-2007

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The Honorable Mary E. Peters, U.S. Secretary of Transportation
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Re: Model PPP Legislation Posted on Federal Highway Administration (FHWA) Web Site for Review and Comment

Dear Secretary Peters, Administrator Capka, Mr. Duvall, and Mr. Saunders:

On behalf of the American Bar Association (ABA), we are writing as representatives of the Section of Public Contract Law (PCL) and the Section of State and Local Government Law (SLG) of the ABA. The ABA, with its 410,000 members, is the national representative of the legal profession, serving the public and professionals by promoting justice, professional excellence and respect for the law.

The views expressed herein are based on the proposed state and local government procurement policies and practices contained in the ABA 2000 Model Procurement Code for State and Local Governments (Model Procurement Code) and implementing regulations.

The PCL is comprised of attorneys and associated professionals in private practice, industry, and in Government service, at both the federal, state, and local levels. The PCL's governing Council and substantive committees contain members representing these three segments to ensure that all points of view are considered. The mission of the PCL is to improve the process of public contracting for the full range of supplies, services, and construction. The Section's members include public and private sector attorneys with long-time experience in the procurement of supplies, services, design, construction, design-build, and operations services at all levels of government.

The SLG is comprised of attorneys and associated professionals involved in all aspects of state and local government law. Members represent states and local governments as well as those who interact with states and local governments and those in academic settings. As with the PCL, the SLG's governing council and substantive committees consider the perspectives of government, industry, and private practice in its work to improve the practice of state and local government law.

Background on the ABA 2000 Model Procurement Code

The ABA Model Procurement Code project began in the mid-1970s and focused on bringing transparency, common practices and procedures, and competitiveness to state and local procurement transactions. The original project was the recipient of major grant funding from the Law Enforcement Assistance Administration (LEAA), which provided the sponsoring ABA Sections with a multi-year project office in Washington, DC. After years of extensive work by the PCL, SLG, and nineteen other national organizations interested in state and local procurement, the 1979 edition of the Model Procurement Code was adopted by the House of Delegates of the ABA. Since 1979, the Model Procurement Code has been adopted in full by sixteen states; in part, by several more; and by hundreds of local jurisdictions. The 1979 edition of the Model Procurement Code helped hundreds of state and local jurisdictions create transparent, competitive, and reliable processes by which they have expended billions of dollars through contracts with private sector businesses.

The Model Procurement Code has had a profound and favorable impact on the conduct of public procurement throughout the United States. For example, in implementing the provisions of the Clean Water Act, which included $70 billion in federal grants for wastewater treatment plants across the United States, the Environmental Protection Agency (EPA) regulations provided that grantees who could demonstrate that they had adopted fair procurement processes and procedures (a grant requirement) would receive different, less intrusive, and more expeditious review of their grant applications. LEAA and EPA jointly funded the adaptation of the 1979 Model Procurement Code into a Model Procurement Ordinance. EPA regulations provided that grantees could put their applications into the streamlined review track by adopting the ABA Model Procurement Ordinance, and hundreds of local jurisdictions did so.

The 1979 Model Procurement Code offered states and local jurisdictions, for the first time and in one place, a basic formulation of the fundamental principles upon which durable procurement systems rest.

1. Competition
2. Ethics
3. Predictability (stability, advanced publication, accountability)
4. Clear Statements of Procurement Needs
5. Equal Treatment of Bidders/Offerors
6. Methods of Source Selection
7. Clear Statement of Bid/Proposal Evaluation Factors
8. Reduction in Transaction Costs for Public and Private Sector Entities
9. Procurement of Construction Related Services
10. Remedies

11. Facilitation of Intergovernmental Transactions (Cooperative Procurements)

Between 1997 and 2000, the Sections conducted a revision project to improve and update the 1979 Model Procurement Code. A key purpose of the revision project was to encourage the appropriate use of the emerging project delivery methods that comprise Public Private Partnerships (PPPs).[1] Since 1997, the ABA has been focused upon adapting the bedrock principles embedded in the Model Procurement Code to incorporate PPPs into the procurement law of the United States. The revision project did not make major changes to these principles, which have become bedrock notions in the American law of public procurement.

The revision project was housed in the Civil and Environmental Engineering Department at the Massachusetts Institute of Technology (MIT), and conducted as a widely publicized, *web-based*, collaboration. The product of this research led to the adoption of the 2000 Model Procurement Code by the ABA's House of Delegates in July 2000. The project was launched with seed funding provided by the PCL and the SLG. Major grant funding for the project was provided by Lockheed Martin; MIT's Civil and Environmental Engineering Department; Public Technology, Inc., and the National Institute of Governmental Purchasing, with financial support from the American Consulting Engineers Council, the Engineers Joint Contract Documents Committee, and the Council On Federal Procurement of Architectural & Engineering Services. The 2000 revision to the Model Procurement Code was accomplished in cooperation with the National Association of State Procurement Officials, comprising the heads of state procurement in each of the fifty states. In addition to participation via the Internet, extensive comments and suggestions were received by leading procurement organizations, including the National Institute of Governmental Purchasing, the National Association of State Procurement Officials, the Design Build Institute of America, the Construction Industry Roundtable (CIRT), the American Consulting Engineers Council, the Engineers Joint Contract Documents Committee, and the Council On Federal Procurement of Architectural & Engineering Services.

The revisions update procurement models to allow processes to adapt to the electronic age in full support of electronic commerce. The revisions modify definitions and language in Article 10 to extend cooperative purchasing among state and local governments. Article 3 has been revised to provide badly needed flexibility to senior procurement officials to adapt procurement procedures to unusual circumstances, with appropriate safeguards and reporting responsibilities.

In the realm of infrastructure facilities and services, Article 5 of the revisions provides explicit guidance on the use of a full range of design, construction, operation, and maintenance methods that are now included within the rubric of PPPs. The 2000 Model Procurement Code supports best practice recommendations in the use of all alternative delivery methods in the effective management of entire networks of state and local infrastructure facilities.

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[1] Other purposes of the revision project were to (1) Reduce transaction costs for all governmental entities at the state and local levels; (2) Reduce transaction costs to private sector suppliers of goods and services; (3) Substantially increase available levels and ranges of competition through modern methods of electronic communications; and (4) Encourage the competitive use of new technologies, new methods of performing, and new forms of project delivery in public procurement, particularly in the construction area.

We suggest that FHWA and U.S. Department of Transportation (DOT) review the content of the 2000 Model Procurement Code for posting on the FHWA website. There is a substantial body of knowledge, law, regulations, and court decisions that form the basis for the principles in the Code. These principles provide a sound, stable base for procurement of PPPs. Our Sections would be happy to assist DOT, FHWA, and state and local governments apply the procurement models already embedded in the Model Procurement Code to PPPs.

Model PPP Legislation Posted on the FHWA Web Site

The FHWA has recently posted "model PPP legislation" on the FHWA web site, and has requested review and comment. We understand that the model PPP legislation does not, at the present time, represent the policy of either FHWA or of the DOT. We also understand that the model has been prepared solely for informational purposes and was prepared based on a survey of existing state statutes that authorize so called "public-private initiatives."

The introductory language, however, also states that the purpose of the model PPP legislation is:

> to provide States with an example of what basic elements to consider and address in PPP authorizing legislation. It is meant to serve as a representation of the core provisions dealing with issues that a State should consider when pursuing greater private sector involvement in the delivery of transportation services. Users are advised that the model legislation cannot anticipate the relationship of State laws with the model provisions contained herein.

The model posted on the FHWA web site is materially different from the policies and processes set forth in the 2000 Model Procurement Code. While the model PPP legislation includes some useful ideas, many provisions in the draft do not constitute basic elements of a statutory procurement policy for state and local procurement of public private partnerships. For example, the model legislation purports to exempt PPP projects from state procurement laws, which would have the effect of stripping away requirements for transparency; advance notice of government requirements; fair treatment of competitors; ethics on the part of government officials; ethics on the part of individuals and entities in the private sector (for example, prohibitions on gratuities, kickbacks, and bribery); and proper enforcement of labor and civil rights laws. The draft appears to put state and local governments in the position of assuming the financial obligations of private sector PPP providers as a condition to termination, even for default, which is not consistent with best procurement practices. The draft should contain significantly more detailed language creating and protecting the competition environment for establishing PPPs, and evaluation and award processes for PPPs should be significantly more transparent prior to the competition. These are core principles of the Model Procurement Code, and should be included in recommendations FHWA makes to state and local governments. The absence of appropriate statutory and regulatory safeguards can produce substantial confusion in both the public and private sector, none of which is in the interest of federal, state, or local government, any of the proposers, or the public.

In addition to these general comments, more specific comments are in the following form:

(1) A table (Attachment 1) showing how the various project delivery alternatives in the 2000 Model Procurement Code may be used in the provision of PPPs;

(2) Specific comments (Attachment 2) on the "model PPP legislation" now posted on the FHWA website at http://www.fhwa.dot.gov/PPP/legis_model.htm.

(3) In addition to these general comments, we have attached a copy of the ABA 2000 Model Procurement Code for your consideration.

Recommendations:

1. We believe that FHWA should reconsider whether the model PPP legislation should continue to be displayed on the FHWA website;

2. We request that these comments be posted on the FWHA site so that state and local officials navigating to the site will have an opportunity to review and consider these comments.

3. We recommend that FHWA and DOT adapt the 2000 Model Procurement Code for particular use in transportation, with policy incentives to encourage flexible, but uniform, processes. FHWA can substantially lower transaction costs for all participants, while providing transparency and predictability to PPP procurements at the federal, state and local government levels.

As PPP awards grow, such transparency and predictability will increase competition, encourage better value, technology, and systems for government, encourage participation by U.S. firms, and lower prices for the nation's highway users. As FHWA's and DOT's review and approval role is exercised more frequently with respect to PPPs, we believe that the best practices as reflected in the 2000 Model Procurement Code can be extremely helpful to FHWA in streamlining this review process. EPA very successfully used the 1980 Model Procurement Ordinance to substantially streamline its administration and oversight of more than 3000 wastewater treatment plants. We believe that FHWA and DOT can achieve similar benefits here, in the realm of PPPs.

Our Sections are very supportive of both FHWA's and DOT's efforts to bring alternative infrastructure delivery methods to the nation's transport sector. We strongly support the initiative and foresight shown by both FHWA and DOT in supporting the expanded use of PPPs. We have been aware of FHWA's long-time support for the extension of life cycle costing and asset management concepts into the transportation sector, and we applaud FHWA's and DOT's long-time leadership in these arenas. We join with FHWA and DOT in the belief that state and local governments will need to adapt and improve procurement mechanisms, statutes, and regulations in order to appropriately bring private sector services, goods, materials, and (in appropriate cases) financing to meet and serve the nation's transportation needs in the coming decades.

We appreciate the opportunity to comment on the model PPP legislation, and we stand ready to assist you in any way that you would find useful.

Very truly yours,

Michael A. Hordell
Chair, Section of Public Contract Law

Edward J. Sullivan
Chair, Section of State and Local Government Law

cc: National Association of State Procurement Officials
National Institute of Governmental Purchasing
Section of Public Contract Law Officers and Council
Section of State and Local Government Law Officers and Council

Attachment 1 – Applicability of the ABA 2000 Model Procurement Code to Infrastructure Projects

Finance Type	Method Described in the ABA 2000 Model Procurement Code (MPC)	General Applicability	Specific Applications
PUBLICLY FINANCED	Design Bid Build *See* MPC §5-101(2); §5-202(2) Design Build *See* MPC §5-101(3); §5-202(4), and §§5-204(2 and 3) Design Build Operate Maintain *See* below for MPC references. Operate and Maintain *See* below for MPC references.	Suitable where state does not establish a dedicated revenue stream collectible from the project. Financing is PUBLIC, typically from a general revenue source, often raised through municipal bond market	**Building Projects of All Kinds**: Schools; public buildings; roads; bridges; terminals; water treatment supply, treatment, distribution; wastewater treatment and discharge. **Operations and Maintenance Contracts Paid Out of General Funds**.
MIXED -- SOME PUBLIC FINANCING WITH PRIVATE FINANCING	Design Build Operate Maintain *See* MPC §5-101(5); §5-202(5), and §§5-204(2 and 3) Operate and Maintain *See* MPC §5-101(9); §5-202(3)	Suitable where the state establishes a "fence" around the revenue stream generated by a particular project or collection of projects and dedicates that stream to support long term contract – typically user fees, or tolls. If revenues are sufficient to cover ongoing maintenance, repair, and operations work (and required expansion), <u>no additional public financing is needed</u>. If not, Public Financing commitment is made, e.g. through shadow toll or shadow user fee payment. Contract may include capital additions, technology enhancements, capital replacements.	**Long Term Concessions and Leases** Water supply, distribution, and treatment (supported by rates) Wastewater collection, treatment, and discharge (supported by rates) Port, airport, terminal, intermodal transportation projects (supported by charges on goods or people moved, e.g. TEUs) Roads (supported by tolls) Bridges (supported by tolls) Tunnels (supported by tolls) Schools (supported by shadow payments per pupil) Prison s (supported by shadow payment per inmate)
PRIVATELY FINANCED (ONLY)	Design Build Finance	Suitable where the state establishes a "fence" around the revenue stream from a project or collection of	**Long Term Concessions and Leases** Water supply, distribution, and treatment (supported

	Operate and Maintain *See* MPC §5-101(4); §5-202(6), and §§5-204(2 and 3)	projects and dedicates that stream to support long term contract, as in DBOM. <u>But, different from DBOM</u>. Contractor takes the risk that customers will come, will pay prescribed tolls, and that revenue will be sufficient to fully operate and maintain facility and cover all costs and profit. Contract may include requirements for capital additions, replacements, and enhancements.	by rates) Wastewater collection, treatment, and discharge (supported by rates) Port, airport, terminal, intermodal transportation projects (supported by charges on goods or people moved, e.g. TEUs, PFCs) Road projects (supported by tolls) Bridge projects (supported by tolls) Tunnel projects (supported by tolls)

Model PPP Legislation

Located on FHWA Website at: http://www.fhwa.dot.gov/PPP/legis_model.htm

WORKING DRAFT

This model legislation has been prepared solely for informational purposes and should be not construed as a statement of United States Department of Transportation or Federal Highway Administration policy.

This model legislation is based on a survey of existing State statutes that authorize public-private initiatives. The purpose of this model PPP legislation is to provide States with an example of what basic elements to consider and address in PPP authorizing legislation. It is meant to serve as a representation of the core provisions dealing with issues that a State should consider when pursuing greater private sector involvement in the delivery of transportation services. Users are advised that the model legislation cannot anticipate the relationship of State laws with the model provisions contained herein. This model legislation has been prepared solely for informational purposes and should be not construed as a statement of United States Department of Transportation or Federal Highway Administration policy.

ABA Comment 1: Many of the core principles embodied in the 2000 Model Procurement Code are not included in the model legislation. Rather than comment on a point-by-point basis to the numerous specific concerns we have with the model legislation, these comments attempt to address only high level issues presented by the current draft.

Because the draft does not address or attempt to reconcile existing state and local purchasing laws and practices, it risks leaving the impression that many public contracting issues, such as remedies and dispute resolution, are not needed in PPP transactions. We believe FHWA advocacy of an integrated model, including both PPP and traditional purchasing provisions, would be more useful to all parties because it would enable them easily to analyze what additional code provisions they might need. Alternatively, they might choose to accept an entire FHWA model code, particularly if there were audit and compliance advantages associated with use of the recommended best practices.

AN ACT

concerning Public-Private Transportation Initiatives

Be it enacted by the [State Legislature] that:

SECTION 1. [State Code Citation] is amended to read:

§1-101. Definitions.

(a) "Affected jurisdiction" means any county [, city, or town / or municipal corporation], or other unit of government within the State in which all or part of a transportation facility is located or any other public entity directly affected by the transportation facility.

(b) "Department" means the State Department of Transportation.

ABA Comment 2: Using best practices as reflected in the 2000 Model Procurement Code, the model legislation could be broadened to include multiple jurisdictions, acting either as a single entity, or through one entity, or acting on behalf of multiple entities through an appropriate cooperative purchasing agreement. See Article 10 of the 2000 Model Procurement Code, which provides for such flexibility. As the country moves increasingly toward regionalized transportation planning and operation, cooperative purchasing among governments – a concept pioneered in the 1979 Model Procurement Code and continued with improvements in the 2000 Model Procurement Code - would be highly valuable.

(c) "Force majeure" means an uncontrollable force or natural disaster not within the power of the operator or the State.

(d) "Maintenance" includes ordinary maintenance, repair, rehabilitation, capital maintenance, maintenance replacement, and any other categories of maintenance that may be designated by the Department.

(e) "Material default" means any failure of an operator to perform any duties under a public-private agreement, which jeopardizes delivery of adequate service to the public and remains unsatisfied after a reasonable period of time and after the operator has received written notice from the Department of the failure.

(f) "Operate" means any action to maintain, rehabilitate, improve, equip, or modify a transportation facility.

ABA Comment 3: The definition of "operate" is significantly broader than that in the 2000 Model Procurement Code. As written, it could include the work of every private entity that enters into any design, construction, or operations contract with a public entity. This definition creates the situation where it will be difficult to distinguish among contracts awarded pursuant to local procurement laws and those awarded through processes described in the model legislation. Moreover, the definition is likely to create substantial confusion among both bidders and proposers, which will tend to increase the cost of preparing and submitting proposals and quotations ("transaction costs"), raise prices, decrease the level of competition by discouraging participation, and increase the likelihood of litigation over the law, regulations, and processes applicable to PPP transactions.

(g) "Operator" means a private entity that has entered into a public-private agreement under this [title/chapter/article].

ABA Comment 4: The definition of "operator" is also very broad. See ABA Comment 3, with respect to the definition of the word "operate." above.

(h) "Private entity" means any natural person, corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public benefit corporation, non-profit entity, or other business entity.

(i) "Public-private agreement" means the agreement between a private entity and the Department that relates to the development, financing, maintenance, or operation of a transportation facility subject to this [title/chapter/article].

ABA Comment 5: The definition of a "public private agreement" is similarly broad. As written, the definition could include every contract between any government and any private entity, including an agreement for only design; for only planning; for construction; for supply of equipment, goods, technology; and for maintenance and operations services. The model legislation will promote duplicate, and sometimes, inconsistent coverage with the procurement laws of state and local governments.

(j) "Public-private initiative" means an arrangement between the Department and one or more private entities, the terms of which are stated in a public-private agreement, that provides for:

(1) acceptance of a private contribution, including a money payment, for a project or service for a transportation facility;

(2) sharing of resources and the means of providing a project or service for a transportation facility;

(3) cooperation in researching, developing, and implementing projects or services for a transportation facility.

ABA Comment 6: The definition of "public private initiative" is similarly over-broad. The term "arrangement" is not defined and will generate confusion and misunderstanding as to how an "arrangement" is different from a "contract" awarded under the applicable procurement laws of a state or local government. The definition is also vague, in that the activities described in this definition might not involve a mutual exchange of consideration.

(k) "Transportation facility" means any, including new and existing, highway, road, bridge, tunnel, overpass, ferry, airport, public transportation facility, vehicle parking facility, seaport facility, rail facility, intermodal facility, or similar facility open to the public and used for the transportation of persons or goods, and any building, structure, parking area, appurtenances, or other property needed to operate such facility that is subject to a public-private agreement.

(l) "User fees" means the rate, toll, fee, or other charges imposed by an operator for use of all or part of a transportation facility.

(m) "Utility" means a privately, publicly, or cooperatively owned line, facility, or system for producing, transmitting, or distributing communications, cable television, power, electricity, light, heat, gas, oil, crude products, water, steam, waste, storm water not connected with highway drainage, or any other similar commodity, including fire or police signal system or street lighting system, which directly or indirectly serves the public.

§1-102. Solicited Proposals.

(a) The [INSERT STATE'S PROCUREMENT ACT] shall not apply to solicited proposals under this [title/chapter/article].

ABA Comment 7: Section 1-102 (a) is in fundamental conflict with the basic principles underlying the 2000 Model Procurement Code. States have acquired substantial education, training, and experience in the procurement arena to address persistent difficulties that have been experienced in the announcement, competition, award, contracting, and performance of contracts for goods, services, supplies, and construction between government and the private sector. The PPP arena includes all the same issues and requirements that procurement transactions have generated across the United States. These issues include transparency; advance notice of government requirements; fair treatment of competitors; ethics on the part of government officials; ethics on the part of individuals and entities in the private sector (for example, prohibitions on gratuities, kickbacks, and bribery); proper enforcement of labor and civil rights laws; full disclosure regarding the creation of government obligations along with corresponding appropriations of government funds, appropriate contract risk allocation provisions; protection against funding deficiencies (lack of appropriations) and government indemnifications. Moreover, numerous decisions by courts throughout the various states, the Comptroller General of the United States, and the boards of contract appeals (and grant appeals with respect to grants made by the federal government) should not be discarded in the PPP arena without careful deliberation and review. The 2000 Model Procurement Code includes consensus best practices from leading organizations of procurement professionals for dealing wisely and fairly with these issues.

(b) The Department may solicit, receive, consider, evaluate, and accept a proposal for a public-private initiative.

ABA Comment 8: As Subsection (b) is currently written, a government could accept a solicited proposal for a "public private initiative" without announcing the evaluation factors in advance and without negotiations with any offerors. This is inconsistent with the Model Procurement Code's best practices.

(c) In soliciting and selecting a private entity with which to enter into a public-private initiative, the Department may utilize one or more of the following procurement approaches:

(1) sealed bidding;

(2) selection of proposals, with or without negotiations, based on qualifications, best value, or both; or

(3) any competitive selection process that the Department determines to be appropriate or reasonable.

(d) The Department may consider the following factors in evaluating and selecting a bid or proposal to enter into a public-private initiative:

(1) the ability of the transportation facility to improve safety, reduce congestion, increase capacity, and promote economic growth;

(2) the proposed cost of and financial plan for the transportation facility;

(3) the general reputation, qualifications, industry experience, and financial capacity of the private entity;

(4) the proposed design, operation, and feasibility of the transportation facility;

(5) comments from local citizens and affected jurisdictions;

(6) benefits to the public;

(7) the safety record of the private entity; and

(8) other criteria that the Department deems appropriate.

(e) The Department may select multiple private entities with which to enter a public-private agreement for a transportation facility if it is in the public interest to do so.

(f) The Department shall select a private entity or entities for a public-private initiative on a competitive basis to the maximum extent practicable.

ABA Comment 9: Subsections (c), (d), and (e) are confusing. The model legislation does not define terms used, and its terms do not appear to coincide with established meanings in the Model Procurement Code or the hundreds of procurement-related judicial and administrative decisions at the federal, state, and local level. "Sealed bidding," for example, typically means award on the basis of price alone. The reference in subsection (d) to "bids" is confusing. The evaluation factors listed in Subsection (d) are also confusing and may be internally inconsistent. The four elements of the factor listed in (d)(1) may be internally inconsistent in a particular procurement. For example, a project that dramatically improves safety might include a reduction in speed, or a reduction in capacity. Yet, these very characteristics are likely to increase congestion. Economic growth might be achieved irrespective of an increase in capacity. The model legislation, as written, is likely to create confusion among proposers, discourage participation, increase transaction costs, and increase prices to transportation users. The factors listed in (d)(3) and (4) also appear to represent different concepts, not a single factor. Yet, these components are not weighted. Proposers are likely to be confused how to structure their proposals in response to such factors.

The model legislation also does not require that evaluation factors be set forth in full in the request for proposals (RFP), before the competition and before proposals are submitted. If evaluation factors are not included before submittal in the RFP, the competition is not based on the evaluation factors and is not "head–to-head." Subsection (d)(8) reserves to the government the right to add any factor it chooses during the evaluation process. The likely effect is to discourage participation and to diffuse competition because participants do not know how they will be evaluated, and cannot shape their proposal to focus on the features of their proposals that are most valued by the government.

The best practices reflected in the 2000 Model Procurement Code are designed to protect competitiveness and transparency, to encourage participation, and to minimize transaction costs for proposers. Best practices with respect to evaluation factors, transparency, and competitiveness have been carefully considered, discussed, and resolved in the 2000 Model Procurement Code.

Version #1

(g) (1) A private entity may request a review, prior to submission of a solicited proposal, by the Department of information that the private entity has identified as confidential or proprietary to determine whether such information would be subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(2) A private entity may identify confidential or proprietary information submitted as part of a solicited proposal. A private entity shall have an opportunity to object to the release of any information it identifies as confidential or proprietary.

(3) The Department shall review any information identified as confidential or proprietary by a private entity as part of a solicited proposal and shall determine if such information is exempt from disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(4) The Department shall inform the private entity that submitted the information of its determination of whether information identified by the private entity as confidential or proprietary is subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(5) The private entity shall have the opportunity to object to the determination that the information is subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT] or to withdraw its proposal.

(6) Any information determined by the State to be confidential or proprietary shall be exempt from disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(7) Any information not determined to be confidential or proprietary may be subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

Version #2

(g) (1) A private entity may request a review, prior to submission of a solicited proposal, by the Department of information that the private entity has identified a confidential or proprietary to determine whether such information will be subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(2) The Department shall take appropriate action to protect confidential or proprietary information that a private entity provides as part of a solicited proposal and that is exempt from

disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

ABA Comment 10: The provisions regarding confidentiality of information submitted by proposers are inconsistent with best practices as reflected in the 2000 Model Procurement Code. Pre-award, information should be confidential within the evaluating agencies, to prevent what is called "technical leveling" across proposals. While all proposals are being evaluated, many agencies allow submitters to designate as confidential certain portions of such submittals. After award, in the event of a controversy involving the evaluation process, the need to protect the integrity of the state's procurement process must be weighed against the need of proposers to keep confidential information that was previously designated "confidential." Typically, this is handled by well-developed court processes that strike this balance on a case-by-case basis. Courts are well equipped to deal with assertions of confidentiality and corresponding assertions that information is either not confidential or needs to be disclosed to preserve the integrity of the procurement process.

§1-103. Unsolicited Proposals.

(a) The [INSERT STATE'S PROCUREMENT ACT] shall not apply to this section.

ABA Comment 11: Section 1-103 (a), like Section 1-102, is inconsistent with best practices as reflected in the2000 Model Procurement Code. See ABA Comment 7 to Section 1-102(a), above.

(b) (1) The Department may receive, consider, evaluate, and accept an unsolicited proposal for a public-private initiative if the proposal:

(A) is independently originated and developed by the proposer;

(B) benefits the public;

(C) is prepared without Department supervision; and

(D) includes sufficient detail and information for the Department to evaluate the proposal in an objective and timely manner.

ABA Comment 12: Section 1-103(b) is inconsistent with best practices as reflected in the 2000 Model Procurement Code. Under this provision, a Department could "accept" an unsolicited proposal after applying undefined evaluation factors. A variety of issues are likely to arise. In addition, the terms "independently originated and developed" and "without Department supervision" are not defined. The language in Subsection (b)(1) (D) further appears to authorize the Department to evaluate such proposals on whatever objective basis it may decide to apply after receipt of the unsolicited proposal. The 2000 Model Procurement Code deals with these and related issues by establishing a level playing field among competitors before the competition is conducted. Under the proposed model legislation, information obtained by one competitor from prior engagements with the "Department" might never be disclosed, and any kind of participation by the "Department" in such engagement appears to be permitted as long as it is not characterized as "supervision."

(2) Within [INSERT NUMBER] days after receiving an unsolicited proposal, the Department shall undertake a preliminary evaluation of the unsolicited proposal to determine if the proposal complies with the requirements under paragraph (1) of this subsection.

Version #1

(c) (1) A private entity may request a review, prior to submission of an unsolicited proposal, by the Department of information that the private entity has identified as confidential or proprietary to determine whether such information would be subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(2) A private entity may identify confidential or proprietary information submitted as part of an unsolicited proposal. A private entity shall have an opportunity to object to the release of any information it identifies as confidential or proprietary.

(3) The Department shall review any information identified as confidential or proprietary by a private entity as part of an unsolicited proposal and shall determine if such information is exempt from disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(4) The Department shall inform the private entity that submitted the information of its determination of whether information identified by the private entity as confidential or proprietary is subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(5) The private entity shall have the opportunity to object to the determination that the information is subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT] or to withdraw its proposal.

(6) Any information determined by the State to be confidential or proprietary shall be exempt from disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(7) Any information not determined to be confidential or proprietary may be subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

Version #2

(c) (1) A private entity may request a review, prior to submission of an unsolicited proposal, by the Department of information that the private entity has identified a confidential or proprietary to determine whether such information will be subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(2) The Department shall take appropriate action to protect confidential or proprietary information that a private entity provides as part of an unsolicited proposal and that is exempt

from disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(d) (1) If the unsolicited proposal does not comply with the subsection (b)(1) of this section, the Department shall return the proposal without further action.

(2) If the unsolicited proposal complies with the subsection (b)(1) of this section, the Department may continue to evaluate the proposal in accordance with this section.

(e) (1) If the unsolicited proposal complies with the subsection (b)(1) of this section, the Department shall advertise the unsolicited proposal for the purpose of receiving competitive proposals for the same proposed transportation facility.

ABA Comment 13: With respect to Section 1-103, Version 2 (c)(2), see ABA Comment 10, above. We respectfully contend the FHWA should carefully re-consider this provision. For example, the "same facility" requirement is not consistent with best practices as reflected in the 2000 Model Procurement Code. The model legislation creates an unusual situation. It would require the Department to spend resources conducting a competition for the same facility as that proposed in the unsolicited proposal. The Department would be placed in the position of forcing other potential competitors to compete on terms established by an unsolicited proposer, or to decline to compete. This provision also may encourage conduct that is not healthy to the Department in its overall mission, and arguably, is not fair to competitors. It has the potential to discourage head-to-head competition, while requiring the diversion of precious Department resources away from procurements in which the Department's needs and requirements are solicited on a competitive, transparent basis.

(2) The advertisement shall 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 shall specify an address to which a competing proposal may be submitted.

(3) The advertisement shall specify a reasonable time period by which competitors must submit a competing proposal to the Department.

ABA Comment 14: This provision may not be consistent with best practices as reflected in the 2000 Model Procurement Code. Language should be included to remove any competitive advantage to the initial submitter of an unsolicited proposal simply because the time to acquire corresponding information and data about the proposed project is insufficient to create a level playing field among competitors.

(f) The Department may charge a reasonable fee to cover its costs to process, review, and evaluate an unsolicited proposal and any competing proposals.

ABA Comment 15: This provision is inconsistent with best practices as reflected in the 2000 Model Procurement Code. Competitors following the initial unsolicited proposal would be faced with an additional disincentive to compete, paying for the Department's cost to review. See also ABA Comment 13, above, relating to Section 1-103(e).

(g) The Department shall:

(1) determine if any competing proposal is comparable in nature and scope to the original unsolicited proposal;

(2) evaluate the original unsolicited proposal and any comparable competing proposal; and

(3) conduct any good faith discussions and, if necessary, any negotiations concerning each qualified proposal.

(h) The Department shall evaluate an unsolicited proposal and any comparable competing proposal using the following factors:

(1) novel methods, approaches, or concepts demonstrated by the proposal;

(2) scientific, technical, or socioeconomic merits of the proposal;

(3) potential contribution of the proposal to the Department's mission;

(4) 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;

(5) qualifications, capabilities, and experience of the proposed principal investigator, team leader, or key personnel, who are critical to achieving the proposal objectives;

(6) how the proposal benefits the public; and

(7) any other factors appropriate to a particular proposal.

ABA Comment 16: This provision is inconsistent with best practices as reflected in the 2000 Model Procurement Code. For example, evaluation factors for unsolicited proposals are not the same as for solicited proposals, which is unusual and likely to cause confusion. Standard evaluation factors, such as those listed in the 2000 Model Procurement Code relating to price, quality, level of service, and life cycle costs, also are missing in this section.

The nature of the evaluation factors set forth in this section of the model legislation may not be appropriate in legislation since they do not provide a clearly discernable objective basis for proposers (on the private side) and evaluators (on the public side) to distinguish between and consistently evaluate proposals. The factors in this section appear to favor the first unsolicited proposal which, while encouraging unsolicited proposals, makes it more likely that unsolicited proposals will be accepted without head-to-head competition. For example, "novelty" is not inherently valuable to an infrastructure network. Scientific merit appears to be different from technical merit, which would also be different from the socioeconomic merit of a proposal. Combining these three different concepts into a single evaluation factor does not inform proposers or evaluators how evaluation factors will be applied in a fair way across all proposals. The "potential" contribution of the proposal, the "capabilities" of the private entity, and the "qualifications" of key personnel are important, but they are typically applied as part of a pre-qualification process – rather than as stand-alone award criteria.

(i) After evaluating the unsolicited proposal and any competing proposals, the Department may:

(1) accept the unsolicited proposal and reject any competing proposals;

(2) 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;

(3) accept both an unsolicited proposal and a competing proposal if accepting both proposals is advantageous to the State; or

(4) reject the unsolicited proposal and any competing proposals.

(j) Subsection (c) of this section shall apply to any unsolicited proposal or competing proposal that is rejected.

§1-104. Public-Private Agreement.

Version #1

(a) (1) After selecting a solicited or unsolicited proposal for a public-private initiative, the Department shall enter into a public-private agreement for a transportation facility with the selected private entity or any configuration of private entities.

(2) An affected jurisdiction may be a party to a public-private agreement entered into by the Department and a selected private entity or combination of private entities.

(b) The public-private agreement shall provide for the planning, acquisition, financing, development, design, construction, reconstruction, replacement, improvement, maintenance, management, repair, leasing, or operation of a transportation facility.

(c) The financing mechanism included in a public-private agreement may include the imposition and collection of user fees and the development or use of other revenue sources.

(d) A public-private agreement between the Department and a private entity shall specify at least the following:

(1) which party will assume responsibility for which specific project elements and the timing of the assumption of responsibility;

(2) the type of property interest, if any, the private entity will have in the transportation facility;

(3) if and how the parties will share costs of development of the project;

(4) if and how the parties will allocate financial responsibility for cost overruns;

(5) liability for nonperformance;

(6) any incentives for performance;

(7) any accounting and auditing standards to be used to evaluate progress on the project; and

(8) other terms and conditions.

ABA Comment 17: Both versions of Section 1-104 are inconsistent with best practices as reflected in the 2000 Model Procurement Code, principally because the basis for the competition (either solicited or in response to an unsolicited proposal) is not clearly established prior to submittal of proposals. The terms of any resulting public private partnership are not delineated until after a particular proposal is selected, preventing a price comparison among competitors based on common contractual terms. These types of processes typically create high transaction costs for potential proposers while they explore the opportunity as well as for actual proposers. They are also problematic for government evaluators, who must try to measure the value of disparate proposals against an unknown standard. Such processes discourage participation, are less likely to produce head-to-head competition, are more likely to result in higher prices to transportation users, and are more likely to result in less advantageous contract terms to governments.

§1-104. Public-Private Agreement.

Version #2

(a) (1) After selecting a solicited or unsolicited proposal for a public-private initiative, the Department shall enter into a public-private agreement for a transportation facility with the selected private entity or any configuration of private entities.

(2) An affected jurisdiction may be a party to a public-private agreement entered into by the Department and a selected private entity or combination of private entities.

(b) A public-private agreement under this [title/chapter/article] shall provide for the following:

(1) the planning, acquisition, financing, development, design, construction, reconstruction, replacement, improvement, maintenance, management, repair, leasing, or operation of a transportation facility;

(2) the term of the public-private agreement;

(3) the type of property interest, if any, the private entity will have in the transportation facility;

(4) a description of the actions the Department may take to ensure proper maintenance of the transportation facility;

(5) whether user fees will be collected on the transportation facility and the basis by which such user fees shall be determined and modified;

(6) compliance with applicable Federal, State, and local laws;

(7) grounds for termination of the public-private agreement by the Department or operator; and

(8) procedures for amendment of the agreement.

(c) A public-private agreement under this [title/chapter/article] may provide for the following:

(1) review and approval by the Department of the operator's plans for the development and operation of the transportation facility;

(2) inspection by the Department of construction of or improvements to the transportation facility;

(3) maintenance by the operator of a policy of liability insurance or self-insurance;

(4) filing by the operator, on a periodic basis, of appropriate financial statements in a form acceptable to the Department;

(5) filing by the operator, on a periodic basis, of traffic reports in a form acceptable to the Department;

(6) financing obligations of the operator and the Department;

(7) apportionment of expenses between the operator and the Department;

(8) the rights and duties of the operator, the Department, and other State and local governmental entities with respect to use of the transportation facility;

(9) the rights and remedies available in the event of default or delay;

(10) the terms and conditions of indemnification of the operator by the Department;

(11) assignment, subcontracting, or other delegation of responsibilities of the operator or the Department under the agreement to third parties, including other private entities and other State agencies;

(12) sale or lease to the operator of private property related to the transportation facility;

(13) traffic enforcement and other policing issues, subject to section 1-111, including any reimbursement by the private entity for such services; or

(14) other terms and conditions.

§1-105. Reversion of Transportation Facility to the Department.

In the event of termination of the public-private agreement, the authority and duties of the operator cease, except for any duties and obligations that extend beyond the termination as provided in the public-private agreement, and the transportation facility reverts to the Department and shall be dedicated to the Department for public use.

<u>ABA Comment 18</u>: Section 1-105 is inconsistent with best practices as reflected in the 2000 Model Procurement Code. This provision should be carefully reviewed so that it is clear, in all circumstances, that in the event of a default by the operator, the arrangements made by the operator for both equity and debt financing remain the risk of the operator, and need not be assumed by the Department. A principal advantage of public contracts for privately-financed infrastructure is the discipline brought to PPP deals by financial institutions, who provide additional, independent verification of both cost and revenue projections associated with the proposed PPP. The amount of equity and debt and the detailed contractual relationships among members of consortia that make PPP proposals is independently analyzed and confirmed by financing entities. This section alludes to "duties and obligations that extend beyond the termination." Care should be taken to assure that in the event of a default by the contractor, financing institutions will have the choice of protecting their investment in the PPP through a refinancing to ensure ongoing operations or to allowing the government to proceed with a substitute procurement for a new operator by the Department.

§1-106. Material Default; Remedies.

(a) Upon the occurrence and during the continuation of material default by an operator, not related to an event of force majeure, the Department may:

(1) elect to take over the transportation facility, including the succession of all right, title, and interest in the transportation facility, subject to any liens on revenues previously granted by the private entity; and

<u>ABA Comment 19</u>: See ABA Comment 18, above, relating to Section 1-105.

(2) terminate the public-private agreement and exercise any other rights and remedies that may be available.

(b) In the event that the Department elects to take over a transportation facility under subsection (a), the Department:

(1) shall collect and pay any revenues that are subject to lien to satisfy any obligation;

<u>ABA Comment 20</u>: See ABA Comment 18 above regarding the risk retained by an operator with respect to outstanding debt and other obligations under the PPP agreement.

(2) may develop and operate the transportation facility, impose user fees for the use of the transportation facility, and comply with any service contracts; and

(3) may solicit proposals for the maintenance and operation of the transportation facility under section 1-102 of this [title/chapter/article].

§1-107. Bonds.

(a) (1) The Department may issue and sell bonds or notes of the Department for the purpose of providing funds to carry out the provisions of this [title/chapter/article] with respect to the

development, financing, or operation of a transportation facility or the refunding of any bonds or notes, together with any costs associated with the transaction.

(2) Any bond or note issued under this section:

(A) constitutes the corporate obligation of the Department;

(B) does not constitute the indebtedness of the State within the meaning or application of any constitutional provision or limitation; and

(C) is payable solely as to both principal and interest from:

(i) the revenues from a lease to the Department, if any;

(ii) proceeds of bonds or notes, if any;

(iii) investment earnings on proceeds of bonds or notes; or

(iv) other funds available to the Department for such purpose.

(b) (1) For the purpose of financing a transportation facility, the Department and operator may apply for, obtain, issue, and use private activity bonds available under any Federal law or program.

(2) Any bonds debt, other securities, or other financing issued for the purpose of this [title/chapter/article] shall not be considered to be a debt of the State or any political subdivision of the State or a pledge of the faith and credit of the State or any political subdivision of the State.

(c) Nothing in this section shall limit a local government or any authority of the State to issue bonds for transportation projects.

ABA Comment 21: The model legislation should be revised to include appropriate requirements for surety bonds (payment and performance), operations bonds, and errors and omissions insurance.

§1-108. Funding from Federal Government or Other Sources.

(a) (1) The Department may accept from the United States or any of its agencies funds that are available to the State for carrying out this [title/chapter/article], whether the funds are made available by grant, loan, or other financial assistance.

(2) The State assents to any Federal requirements, conditions, or terms of any Federal funding accepted by the Department under this section.

(3) The Department may enter into agreements or other arrangements with the United States or any of its agencies as may be necessary for carrying out the purposes of this [title/chapter/article].

(b) The Department may accept from any source any grant, donation, gift, or other form of conveyance of land, money, other real or personal property, or other item of value made to the State or the Department for carrying out the purpose of this [title/chapter/article].

(c) Any transportation facility may be financed in whole or in part by contribution of any funds or property made by any private entity or affected jurisdiction that is party to a public-private agreement under this [title/chapter/article].

(d) The Department may combine Federal, State, local, and private funds to finance a transportation facility under this [title/chapter/article].

§1-109. Property Tax Exemption.

(a) This section applies to:

(1) a transportation facility; and

(2) tangible personal property used exclusively with a transportation facility that are:

(A) owned by the Department and leased, licensed, financed, or otherwise conveyed to an operator; or

(B) acquired, constructed, or otherwise provided by an operator on behalf of the Department.

(b) Property listed under subsection (a) of this section are exempt from all ad valorem property taxes and special assessments levied against property by the State or any political subdivision of the State.

§1-110. Eminent Domain.

The Department may exercise the power of eminent domain to acquire property, rights of way or other rights in property for transportation projects that are part of a public-private initiative.

§1-111. Police Powers; Violations of Law.

(a) All law enforcement officers of the State and of an affected local jurisdiction shall have the same powers and jurisdiction within the limits of the transportation facility as they have in their respective areas of jurisdiction and access to the transportation facility at any time for the purpose of exercising such powers and jurisdiction.

(b) The traffic and motor vehicle laws of the State or, if applicable, any affected local jurisdiction shall be the same on the transportation facility as those laws applied to conduct on similar transportation facilities in the State or local jurisdiction.

(c) Punishment for violations of traffic and motor vehicle laws of the State or, if applicable, any affected local jurisdiction on the transportation facility shall be as prescribed by law for conduct occurring on similar transportation facilities in the State or local jurisdiction.

§1-112. Utility Crossings.

An operator under this [title/chapter/article] and any utility whose facility is to be crossed or relocated shall cooperate fully in planning and arranging the manner of the crossing or relocation of the utility facility.

§1-113. Sovereign Immunity.

Nothing in this [title/chapter/article] shall be construed or deemed to limit any waiver of the sovereign immunity of the State or any officer or employee of the State with respect to the participation in or approval of all or any part of the transportation facility or its operation.

§1-114. Regulations.

The Department may adopt rules and regulations to carry out the provisions of this [title/chapter/article].

SECTION 2. This Act shall take effect on [DATE].