



# Background Information: Meeting 2

JTC Public-Private Partnership (P3) Work Group

October 20, 2023

**CDM**  
**Smith**

# Meeting roadmap reminder

The meeting information provided below is a roadmap of what is planned for coverage. Detailed agendas, presenters, activities, action items, and expected outcomes are developed approximately three weeks in advance of the scheduled meeting.

## MEETING 1

September 21, 2023  
1 – 3 pm, Virtual



### Establish common understanding

- Introductions by Work Group members, overview of the P3 study directive, Work Group meeting schedule, deliberation process, and ground rules.
- Overview of the fundamentals of P3s and key issues for Work Group consideration.
- *Washington's experience with P3s, including a higher-level overview of RCW 47.29, Washington's current P3 law (moved to Meeting 2).*

## MEETING 2

October 20, 2023  
9 am – Noon, In-Person



### Review of P3 challenges and opportunities

- Washington's experience with P3s
- Washington's ability to deliver large, complicated or innovative transportation projects under current laws and processes.
- Essential elements of a successful P3 enabling statute.
- Challenges and barriers to broader uses of P3s in Washington.

## MEETING 3

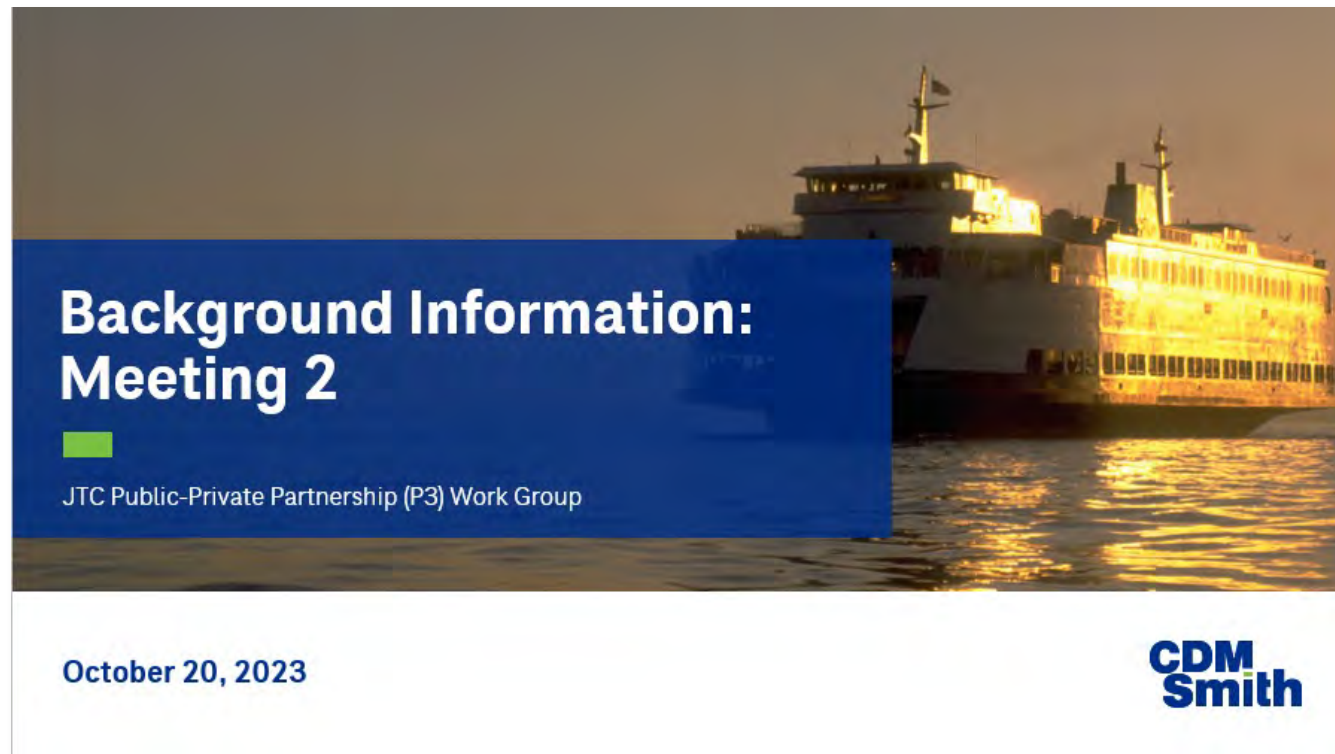
December 8, 2023  
9 am - Noon, In-Person



### P3 statutory provisions and deliberation

- Review of P3 statutory framework and draft legislative language.
- Discussion of key issues to be resolved.
- Viability of select transportation projects under draft P3 enabling statute.
- Process and schedule for implementation plan development (2024) final report.

# How to use this Briefing Book



- This briefing book is provided to Work Group members as read-ahead background information for the **October 20, 2023**, meeting. These materials are aligned with the agenda for the meeting and provide background information on several of the topics to be reviewed and discussed.
- During the meeting, slide presentations may summarize some of these topics (but will not repeat everything), so it will be helpful to read the content of this briefing book prior to the meeting.
- The project team is happy to answer any questions that arise prior to the meeting.



# Contents

1

**Washington's Existing Project Delivery Authority and Procedures** (p. 5-12). A scan of Washington laws authorizing alternative project delivery methods, including design-build and RCW 47.29, public-private partnerships for transportation.

2

**Other States' P3 Enabling Legislation** (p 13-23). How other states have addressed P3s in law, with a spotlight on a few of the top P3 states' enabling statutes.

3

**Gaps Between Best Practices for P3 Enabling Statutes and Current Washington Law** (p. 24-30). Comparing the best practices from enabling statutes in the leading P3 states against Washington's current law and identifying gaps.

A

**Appendix A.** Full text of Washington's P3 law, RCW 47.29

B

**Appendix B.** key elements of Virginia's P3 legislation.

Section 1



# Washington's Existing Project Delivery Authority and Procedures

# Legal authority: alternative delivery (DB and GCCM)

Exclusive of the P3 statute, Washington has other legal authority for design/build and progressive design/build contracting. However, because this legal authority is spread among various chapters of RCW, different review and approval processes apply, depending on the exact type of alternative contract desired.

## ■ **Primary source for transportation design build authority:**

- RCW [47.20.780](#) and [.785](#).
- This is WSDOT's primary authority to utilize design/build contracting. However, the statute says that projects must be *competitively bid*— meaning, lowest price must be a determining factor. This effectively precludes use of best overall value procurements.

## ■ **Progressive design build and GCCM alternative delivery fall under RCW 39.10**

- [RCW 39.10](#) is for all public agencies. It adds an additional approval process in order to use alternative contracting methods.
- RCW 39.10 grants public agencies the ability to use alternative contracting methods, including best overall value selections on design/build projects.
- Projects developed under RCW 39.10 must be reviewed and approved by the Capital Projects Advisory Review Board (CPARB) prior to procurement
- WSDOT has relied upon RCW 39.10 for a few projects (including fish passage barriers) and GCCM to construct the new Colman Dock and by the City of Seattle for the Elliott Bay Seawall Replacement.

# Legal authority: Washington's P3 law, RCW 47.29

Washington's current authority for P3 projects is contained in [RCW 47.29](#) (see Appendix A for full text). Key provisions of Washington's P3 statute are summarized as follows:

- **47.29.20:** Defines “public funds” to include “all moneys derived from taxes, fees, charges, tolls, etc.”
- **47.29.030:** Delegates to the Washington State Transportation Commission (WSTC): (1) reviewing and approving proposed contracts with P3 developers; (2) promulgating rules to govern WSDOT's P3 program, including provisions that allow a broad range of contract types, confidentiality of proposals, and several other contract-related items.
- **47.29.040:** Legislative intent that design, build, finance, operations, and maintenance P3s are allowable.
- **47.29.050:** All transportation projects (capital or operating) are eligible, except recreational facilities. Also allowed: projects that are developed in conjunction with a transportation project, and that “advance public purposes”
- **47.29.060:** Allows “any lawful source of funds” to be used in a P3 project. *Limitations:*

Subsection 1(e) requires any tolls proposed under the P3 project first be approved by the legislature;

Subsection (2) prohibits the P3 project from issuing general obligation (GO) debt;

Subsection (3) requires that any transportation project-related debt that is used to develop the project must be issued by the Washington State Treasurer

Subsection (4) requires any other debt used to develop an ancillary public facility (e.g., a state office building) must be reviewed and approved by the State Finance Committee, or by the Board of an entity overseeing use public benefit corporation bonds.

# Legal authority: Washington's P3 law, RCW 47.29 (cont'd)

Washington's current authority for P3 projects is contained in [RCW 47.29](#) (see Appendix A for full text). Key provisions of Washington's P3 statute are summarized as follows:

- **47.29.70 and .80:** Allows Washington State Department of Transportation (WSDOT) to use federal funds, any source of funds outside the public treasury, and any property donated as a contribution to the project.
- **47.29.090** authorizes WSTC to solicit proposals for P3 projects and accept unsolicited proposals from outside entities. Allows WSTC to direct WSDOT to scan its current project inventory and identify potential P3 candidate projects.
- **47.29.100** allows WSDOT to charge private entities an application fee for unsolicited proposal review.
- **47.29.110 -.130:** if funds are available in its agency budget, WSDOT may engage specialized assistance from consultants, law firms, financial firms, etc. to support their evaluation, negotiation, and development of P3 projects. WSDOT may contract back with a private partner for certain services related to environmental and engineering.
- **47.29.140:** requires WSDOT to include (or at least consider) contract provisions covering a range of topics:
  - Subsection 1(a) requires contracts to include provisions that are consistent with collective bargaining agreements;
  - Subsection 1(b) requires proposed projects to be included in the State Transportation Improvement Plan;
  - Subsection 1(c) requires any tolling technology to be compatible with WSDOT's existing toll systems;
  - Subsection 1(d) requires the contract to include security to pay labors, contractors, and suppliers
  - Subsection 2 generally outlines several topics (without mandatory provisions) that must be negotiated and agreed in a contract



# Legal authority: Washington's P3 law, RCW 47.29, (cont'd)

Washington's current authority for P3 projects is contained in [RCW 47.29](#) (see Appendix A for full text). Key provisions of Washington's P3 statute are summarized as follows:

- **47.29.150:** Requires that any P3 proposal also include a process for incorporating public involvement in the development of the project. Requires WSDOT to participate in public involvement processes, including being physically present at public meetings.
- **47.29.160:** Prior to P3 contract approval, requires WSDOT to prepare a financial disclosure, publish the information (including the proposed contract) for at least 20 days, and hold a public hearing on the proposed agreement. After an additional 20-day post-hearing period, WSTC may execute the contract.
- **47.29.170:** Directs WSTC to adopt rules governing the acceptance, review, and approval of any unsolicited proposals. Contains a provision requiring the publication of an unsolicited proposal so that competing proposals might be submitted in response.
- **47.29.180:** Requires advisory committees to be appointed by WSTC for any P3 project valued at \$300 million or more.
- **47.29.190:** Allows P3 partners to mark certain sections of their proposal as confidential, proprietary information, or trade secrets if they provide a justification as to why these provisions should not be disclosed. Once an agreement has been negotiated but prior to final execution, all provisions of the agreement must be disclosed.
- **47.29.200:** If public funds are used, Washington's prevailing wage law applies to the entire project (not just the portion funded with public funds).
- **47.29.210:** authorizes the state to enter into agreements with other jurisdictions for transborder transportation projects.

# Legal authority: Washington's P3 law, RCW 47.29, (cont'd)

Washington's current authority for P3 projects is contained in [RCW 47.29](#) (see Appendix A for full text). Key provisions of Washington's P3 statute are summarized as follows:

- **47.29.220:** Authorizes the use of the state's eminent domain powers, even if the acquired property will not be owned in fee simple by the state.
- **47.29.230:** Creates the Transportation Innovative Partnerships Account as the repository of all public funds intended for use on a P3 project. All funds in the account are subject to legislative appropriation.
- **47.29.240:** Describes allowable uses of funds in the Transportation Innovative Partnerships Account.
- **47.29.250:** Authorizes WSTC to request that revenue bonds be issued by the State Treasurer for a P3 project.
- **47.29.260:** Required WSDOT to conduct a study and make recommendations for legislative changes related to its alternative contracting powers. The study [was] due to the legislature prior to the 2006 legislative session.
- **47.29.270:** Acknowledges that if federal funds are used on a P3 project, any federal laws and regulations pertaining to those funds shall prevail over any apparent or actual conflict with state laws.
- **47.29.280:** Requires the Governor to appoint an Expert Review Panel to review, analyze, and make recommendations to the Governor and WSTC on whether to approve the negotiated P3 agreement.
- **47.29.290:** After receiving the recommendations of the Expert Review Panel, and after conferring with the Governor, WSTC may either approve, reject, or direct WSDOT to continue negotiations on the proposed P3 agreement.

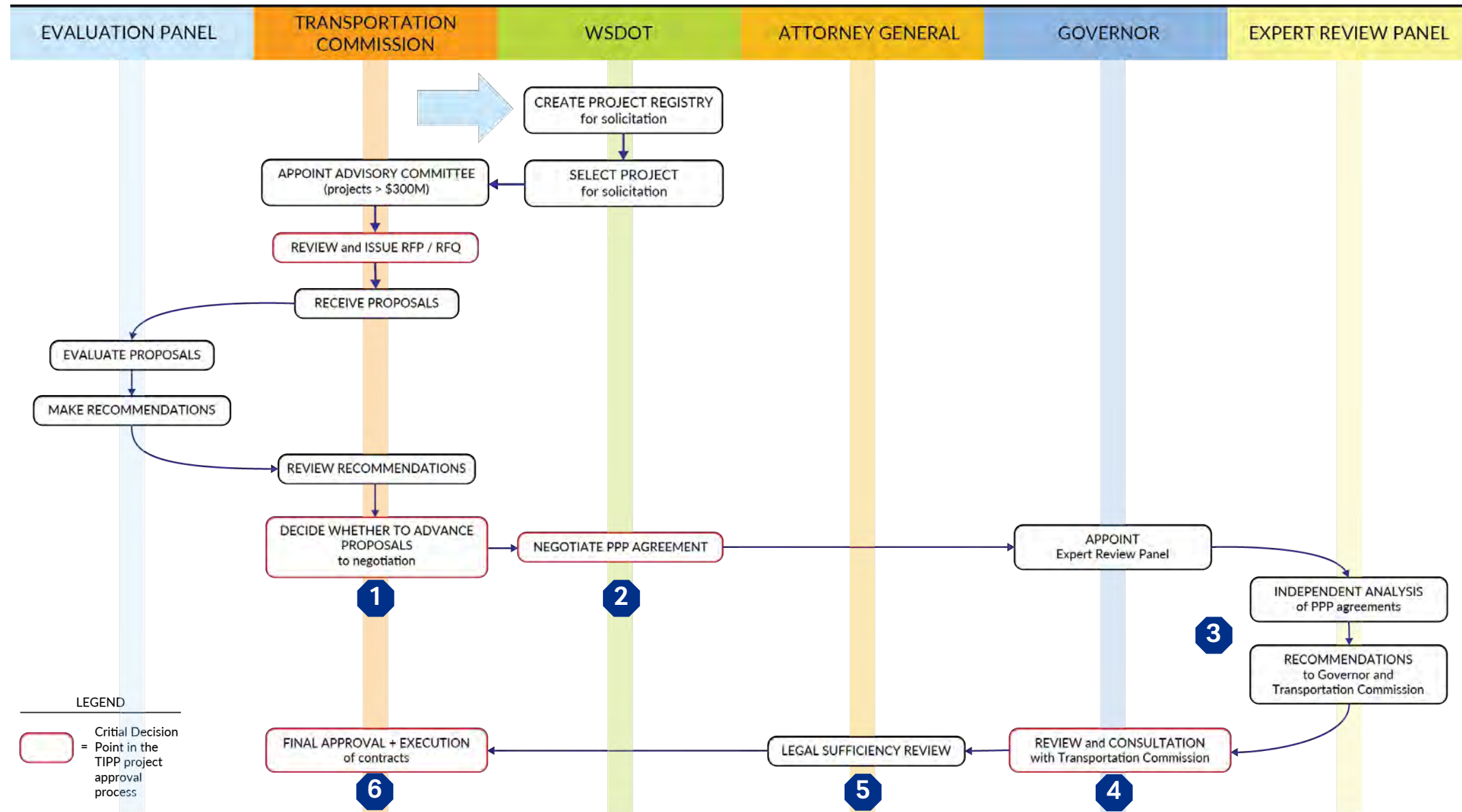
# Administrative rules and process

As directed in [RCW 47.29.170](#), the Washington State Transportation Commission is responsible for developing administrative rules to provide more detail around how the P3 program will operate, how P3 proposals will be reviewed, and more. The full text of these rules can be found at [WAC 468-600](#). A short summary of select key provisions is provided below. *Note:* these administrative rules can be modified and updated however WSTC sees fit, so long as they do not exceed the statutory parameters of [RCW 47.29](#).

- [WAC 468-600-100](#) establishes process for soliciting proposals
- [WAC 468-600-102](#) establishes process for Department to select projects it believes would benefit from development of a P3.
- [WAC 468-600-103](#) provides authority to Department to establish alternative process for solicitation under limited circumstances
- [WAC 468-600-110](#) requires public notice of solicitation
- [WAC 468-600-210](#) provides authority to accept unsolicited proposals and establishes guidelines for eligibility of unsolicited proposals.
- [WAC 468-600-232](#) provides authority to establish alternative process for unsolicited proposals under limited circumstances.
- [WAC 468-600-305](#) requires establishing an evaluation panel to review submissions.
- [WAC 468-600-330](#) establishes proposal evaluation factors and criteria.
- [WAC 468-600-600](#) provides rules for determining what, if any part, of a proposal is subject to public records and disclosure laws.
- [WAC 468-600-700](#) et al establishes conditions for entering into agreements; mandatory and negotiable terms of an agreement; requirement for public hearings and final Commission approval.

# Understanding Washington's P3 project approval process

## TIPP Project Agreements: Approval Process



- Touch-points after evaluation of proposals in response to WSDOT RFP, there are six distinct review and approval steps:
  - 1 Commission decides whether to advance proposals to negotiation
  - 2 WSDOT negotiates agreement
  - 3 Expert panel reviews agreement and makes recommendation
  - 4 Governor and Commission each reviews agreement
  - 5 AG reviews agreement
  - 6 Commission provides final approval

Section 2



# Other States' P3 Enabling Legislation

# Model and key comparative states

## Model State: Virginia

- Chosen as a benchmark because VA is regarded as the most successful P3 program in the U.S., and the longest tenured
- P3s have added billions of dollars to Virginia's economy and supported tens of thousands of jobs

### Major Projects:

- I-495 Express Lanes
- I-95 Express Lanes
- Elizabeth River Tunnels

## Key State: Colorado

- New P3 Office as of 2022
- Wide variety of transportation projects including public transit, airport projects, bridge projects, highway and road improvements, as well as non-transportation related projects
- Commitment to using and success with implementing P3s

### Major Projects:

- The Eagle – commuter rail
- Central 70 - I-70
- US 36 Express Lanes

## Key State: Maryland

- MDOT P3 Office was created in 2010
- Wide variety of transportation projects including public transit, port infrastructure, bridge and highway projects, and cycling and pedestrian infrastructure
- Commitment to using and success with implementing P3s

### Major Projects:

- Purple Line – commuter rail
- Seagirt Marine Terminal
- I-395 Express Lanes

# Model state law: Virginia summary of key P3 provisions

## Funding & Financing

- Parties involved in a transportation project can decide the amount and terms of financing.
- Parties can use any and all revenue sources available to them as permitted by law, including project revenues, to fund the project.
- Parties have the authority to use methods like issuing debt, seeking grants, and using their property as collateral to secure loans for financing the project.

## Procurement/Alternative Contracting

- The public entity can request proposals using competitive bidding, considering various factors, including price, qualifications, design, feasibility, and safety.
- The public entity can charge fees for processing and review and develop guidelines for proposal acceptance and review.
- Private entities can request approval from the public entity to develop and operate a transportation facility.

## Project Approval Processes

- The public entity can grant approval of the development and/or operation of the transportation facility if the public entity determines that it is in the best interest of the public.
- The public entity can not enter into the agreement unless the chief executive officer of the public entity certifies the project.
- 30 days prior to final RFP, public comments must be accepted. Proposals must be posted to the public within 10 working days after acceptance.

## Operations & Maintenance

- The private entity has the power to develop and/or operate the qualifying transportation facility and impose user fees and/or enter into service contracts.
- The private entity must develop and/or operate the transportation facility in a manner that meets the standards of the public entity, keep the facility open for use by members of the public, and maintain the facility.

# Key comparative state: summary of Colorado P3 provisions

## Funding & Financing

- The public entity may impose user fees, issue or reissue revenue bonds and other available moneys, contract with any other source of funding for loans or grants, and seek out P3s.
- The transportation enterprise may issue or reissue revenue bonds payable from the revenues and other moneys of the enterprise.
- A “transportation special fund” for revenues collected is created. Money may be expended from the fund to pay bond obligations.

## Procurement/Alternative Contracting

- The DOT may solicit proposals, enter into agreements, grant benefits, and accept contributions for public-private initiatives.
- The DOT is permitted to evaluate and accept unsolicited proposals.
- The solicitation process must be competitive.
- Public input may be a part of the evaluation, including public meetings, surveying or polling, and focus groups.

## Project Approval Processes

- Limited negotiations may be allowed if determined appropriate.
- Following evaluation and negotiation (if any), all proposers are notified of the selection and finalization of the P3 terms.
- A P3 subcommittee reviews and provides recommendations on anticipated contracts within 60 days of receipt.

## Operations & Maintenance

- The state DOT is authorized to make and enter contracts with one or more private entities to design, finance, construct, operate, maintain, reconstruct or improve a transportation facility.
- Colorado Transportation Investment Office (CTIO) and CDOT work together to develop the monitoring requirements as part of the operations management plans, including specific monitoring and reporting requirements.



# Key comparative state: summary of Maryland P3 provisions

## Funding & Financing

- Any combination of federal, state, or local funds, grants, loans, debt, or other public sources of funding or financing may be used and combined with any private sources of funding for a P3.
- Funds of income obtained by the public entity through a P3 which are not provided to the private entity are directed to the fund that would typically receive such funds.

## Procurement/Alternative Contracting

- Potential P3 opportunities may be identified through transportation planning, communication, and evaluation processes.
- The Department is permitted to evaluate and accept unsolicited proposals.
- The solicitation process must be competitive.

## Project Approval Processes

- Submitted proposals are evaluated against specified evaluation criteria from the solicitation and the DOT.
- One or more evaluation committees are established on a case-by-case basis.
- The Secretary may request multiple iterations of best and final offers from private entities determined by the committee(s).
- Negotiations are allowed after the selection of a best value entity.

## Operations & Maintenance

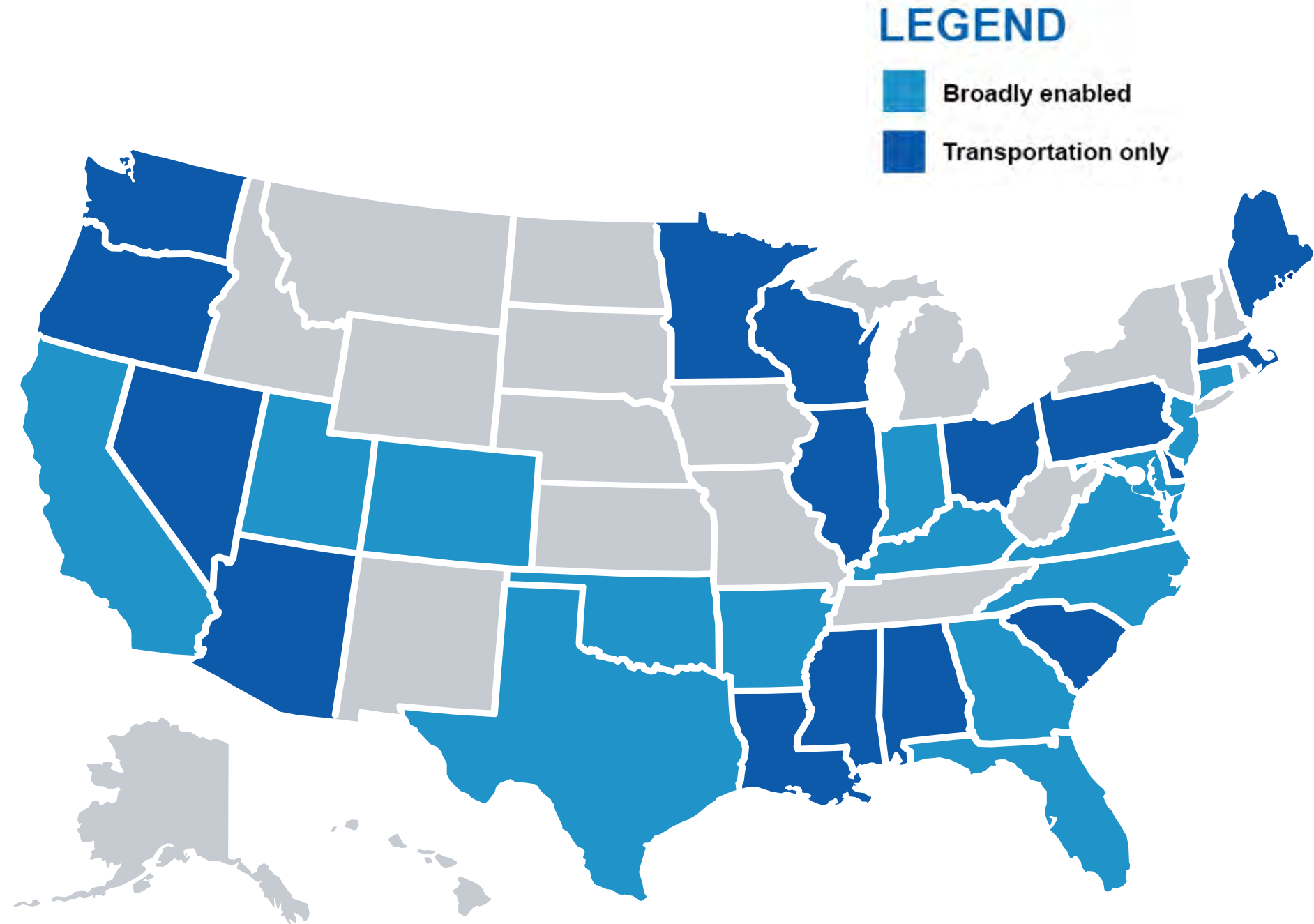
- A P3 agreement shall include provisions for operations and maintenance at minimum quality standards set by the state.
- The agreement may also include the rights for inspection by the state.
- The pre-solicitation report or detailed level screening phase may include an evaluation of operations and maintenance requirements.

# Broad P3 authority

Statutes that empower numerous agencies and enable a wide variety of eligible projects.

Broad authority laws vary regarding:

- The creation of a P3 board or committee.
- The types of projects that may be pursued.
- Acceptance of unsolicited proposals.
- Project term limits.



# Limited P3 authority

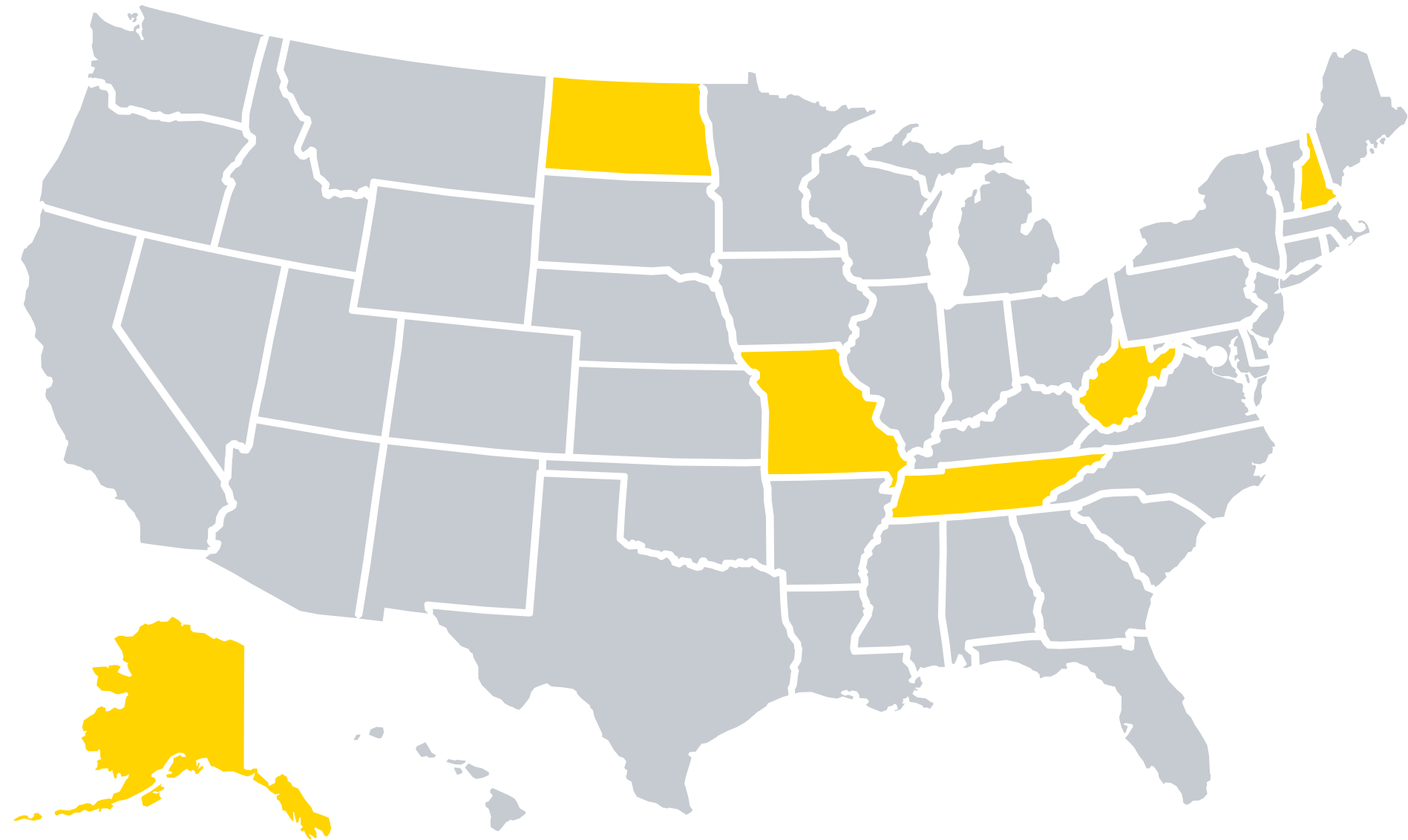
## LEGEND

■ Limited (project-specific)

Laws tailored for specific projects or confined to a restricted scope of eligible projects or a predetermined set of projects or agencies.

Limited authority laws vary regarding:

- The types of projects being pursued.
- Acceptance of unsolicited proposals.
- The types of P3 structures being used.
- The population of the location of the project.



# States indirectly enabling P3 project delivery



## Michigan

- No comprehensive P3 legislation exists but P3s are indirectly enabled through the Home Rule.
- The home rule grants local governments a certain degree of authority to make decisions about local issues, including P3 procurement.

**Example Project:** Michigan Department of Transportation Freeway Lighting P3 (DBFOM)



## New York

- P3 project delivery is enabled on a case-by-case basis, with specific provision through the Empire State Development (ESD).
- The ESD is a NY state government agency that promotes economic development and growth. ESD may support local agencies and authorities in the P3 procurement process.

**Example Project:** Goethals Bridge Replacement (DBFM)

# States with past P3 pilots



## Hawaii (2016-2018)

This two-year pilot program was enacted in 2016 to enable water-related P3 project delivery. The goals of the pilot were to increase groundwater recharge, encourage reuse of water, and improve efficiency of water use. A total of \$750,000 was awarded for the pilot.

**Example Project:** Restoration of the Hakioawa Watershed (awarded \$100,000)



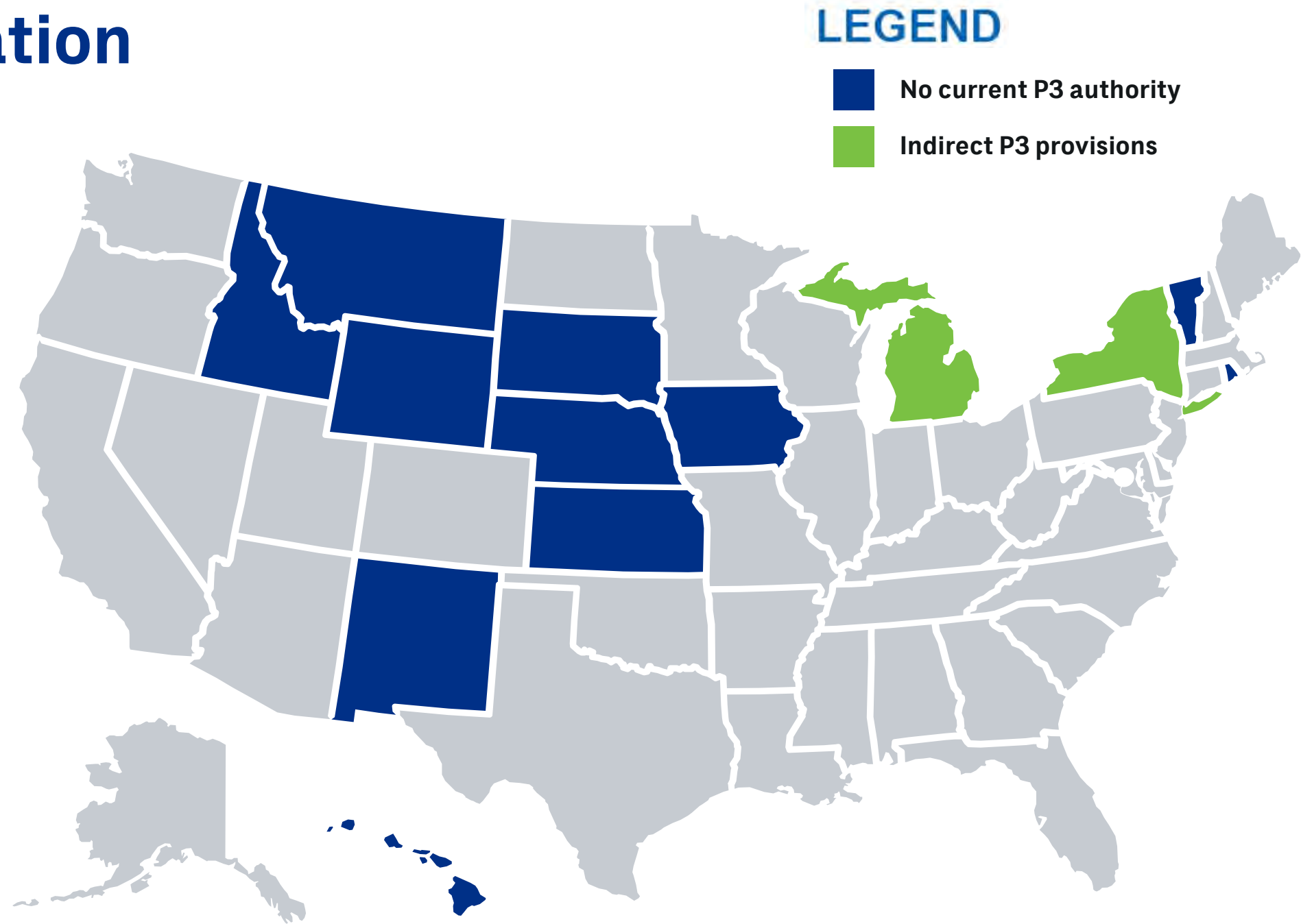
## Vermont (2019-2023)

This P3 pilot program was enacted from 2019 to 2023 to permit P3 project delivery for transportation infrastructure. Eligible projects were required to have an estimated lifetime cost of \$2,000,000 or less.

No P3 engagements occurred. However, Vermont has completed projects with Design + Build (D + B) and Construction Manager/General Contractor (CMGC) project delivery models.

# No enabling P3 legislation

- There are **thirteen states without dedicated P3 legislation**.
- **Eleven of these states provide no current authority** to undertake P3 project delivery.
- Two states, Michigan and New York, do not have dedicated P3 legislation, but **they can enable P3 delivery (in New York on a case-by-case basis) through indirect provisions**.



# Design + build project delivery

The states that do not have P3 enabling legislation do allow for alternative project delivery in the forms of **Design + Build (D + B)** and/or **General Contractor/Construction Manager (GCCM)** (also known as CM/GC).

### D + B

- Combines the design and build components of project delivery into a single contract
- The design-builder takes on the work and associated risks for a fixed fee

### GCCM

- Prior to construction, a construction manager is hired to provide feedback on design and construction of a project
- The construction manager can then transition into the role of general contractor during construction



Hawaii



Idaho



Iowa



Kansas



Missouri



Montana



New Mexico



South Dakota



Rhode Island



Vermont



Wyoming



Section 3



# Gaps Between Best Practices for P3 Enabling Statutes and Current Washington Law



# The 2012 P3 study recommended changes in Washington law

The 2012 P3 study included dozens of recommendations for changes to the current state law, administrative code rules, processes, organizational structure, policy stances, and governance of P3 projects in Washington.

**Below are key recommendations from the 2012 P3 study that require changes to RCW 47.29 to be implemented.**

- Enable the use of privately-arranged or issued debt financing, and allow the private partner to realize a return on equity
- Allow the use of any excess revenue collections to be subject to negotiation between the state agency (WSDOT) and the P3 partner
- Revise the restrictions on the deposit and use of user fee and toll revenues: make such revenue available without legislative appropriation, and allow the revenue to be used to support private financing
- Enable the use of continuing appropriations that would allow availability payments to have priority status, without risk of non-appropriation
- Eliminate post-procurement discretionary actions (i.e., review and approval) by WSTC, advisory boards, Legislature, Governor, citizen panels.
- Modify the applicability of the state personnel system reform act to P3 projects as necessary to make P3 projects more attractive to the private sector

# Gap analysis: key differences between Washington law and leading practices

## Funding & Financing

Leading statutory practice	Washington statute	Effect of Washington statute
Enable private debt issuance	RCW 47.29.060 (3) requires any transportation project debt to be issued by the State Treasurer.	Prohibits P3 partner from using privately borrowed funds to develop the project.
Allow use of excess revenue collections to be subject to negotiation and distribution between state and private partner	Washington law is silent whether revenue-sharing in a P3 agreement is allowable.	Ambiguous whether excess revenue collections can be used for revenue-sharing or incentive payments. Past budget proviso (1995) in Washington prohibited this practice.
Allow project revenues (e.g., tolls) to be leveraged by private partner to support private financing	RCW 47.29.020 (7) defines taxes, fees, charges, and toll revenue as “public funds.”  RCW 47.29.060(3) requires any “project debt” to be issued by the state.	While it’s clear that project debt must be provided by the state, private financing is broader and includes equity investments, which are not debt. Unclear whether equity investments can be repaid with project revenue.
Revenue earmarked for availability payments should not be subject to legislative appropriation; alternatively, allow continuing appropriations rather than annual or biennial appropriations to make availability payments (ex: California, Presidio Parkway P3).	No provision in Washington law to allow P3 project funds to be expended without legislative appropriation.	Unless revenue from a P3 project is structured like a self-sustaining enterprise (i.e., made not subject to appropriation), availability payments require the legislature to appropriate them.
Specifically identify if availability payments impact the state’s debt limit	Washington law is silent on whether availability payments are considered “debt”, subject to RCW 47.29.060 (3)	Without an explicit finding that availability payments do not constitute “debt,” the state and rating agencies are likely to take the least favorable view of the impact of the P3 availability payment on the state’s credit.

# Gap analysis: key differences between Washington law and leading practices

## Procurement/Alternative Contracting

Leading statutory practice	Washington statute	Effect of Washington statute
<p>Allow all methods of procurement and contracting to be utilized under the P3 statute</p>	<p>RCW 47.29.030 (2)(b) authorizes WSTC to adopt rules related to the "types of contracts allowed". RCW 47.29.030(2)(e) authorizes WSTC to adopt rules for "procedures for the proper solicitation, acceptance, review, and evaluation" of proposals.</p> <p>RCW 47.20.780 allows for Design-Build contracts, where the bid price is determinative in selection.</p> <p>RCW 39.10 allows for alternative contracting methods, including Design-Build, to be used even where lowest bid is not determinative.</p>	<p>Although many types of procurement and project delivery methods are allowed under Washington law, the authority to undertake variations of alternative contracting resides in different RCW chapters, each with varying procedures and review processes.</p> <p>Washington's P3 law seems to grant broad authority to WSDOT to use any procurement and contracting process so long as administrative rules are adopted. The dispersed statutory authority for alternative contracting methods may be too ambiguous for private partners to rely upon in developing P3 proposals.</p>

# Gap analysis: key differences between Washington law and leading practices

## Project Approval

Leading statutory practice	Washington statute	Effect of Washington statute
<p>Empower a single authority within state government to negotiate and enter binding P3 agreements (Ex: Virginia).</p> <p>Eliminate post-procurement discretionary actions (i.e., review and approval by WSTC, advisory boards, Legislature, Governor, citizen panels).</p>	<p>RCW 47.29.090 empowers WSDOT to negotiate P3 agreements.</p> <p>RCW 47.29.160 – empowers WSTC to finally approve any negotiated P3 agreements.</p> <p>RCW 47.29.280 directs an Independent Expert Review Panel to review and advise Governor and WSTC on proposed P3 agreements prior to WSTC final approval.</p> <p>RCW 47.29.180 for projects in excess of \$300 million, directs establishment of a Citizen Advisory Committee, to review and comment on P3 agreements, plus ongoing development and operations, post-contract execution.</p>	<p>Once WSDOT has negotiated a P3 agreement, RCW 47.29.280 requires an Expert Review Panel to advise the Governor and WSTC whether the negotiated agreement is in the state’s best interest. Thereafter, WSTC can decide whether to approve the agreement, or send it back to the parties (WSDOT and P3 partner) for further negotiation.</p> <p>These provisions have been cited by the private sector as posing too much “process risk,” given the time and expense of advancing a proposal to the point of contract execution.</p>
<p>Final P3 agreements are disclosable and available to the public upon request after the agreements have been signed; no requirement for pre-execution contract publication.</p>	<p>RCW 47.29.150(1) requires a public involvement and participation plan to accompany the proposed P3 contract.</p> <p>RCW 47.29.160 requires WSTC to prepare a financial analysis that discloses all costs associated with the P3 project. This information and the proposed P3 contract must be published at least 20 days prior to a public hearing on the contract.</p>	<p>These provisions require public involvement, document disclosure, and public hearings specific to the P3 contract prior to its execution.</p> <p>Only after these public hearings and disclosures may the WSTC decide whether to execute the negotiated P3 agreement.</p>

# Gap analysis: key differences between Washington law and leading practices

## Operations & Maintenance

Leading statutory practice	Washington statute	Effect of Washington statute
<p>Allow the private partner to provide labor for development, operations, and maintenance of the P3 project, while complying with all labor laws.</p>	<p>RCW 47.29.030(2)– requires the provision of P3 partner’s maintenance and operations services to be provided in a manner “consistent with RCW 41.80, the state’s Civil Service Reform Act.”</p> <p>RCW 47.29.140 (a): any project that proposes terms for stand-alone maintenance or asset management services for a public facility, those services must be provided in a manner consistent with any collective bargaining agreements, the personnel system reform act (chapter 41.80 RCW), and civil service laws that are in effect for the public facility.</p>	<p>While the effect of this provision is not fully understood, it generally requires labor provided by a P3 partner to be provided on terms consistent with any applicable labor agreements that would otherwise apply if state employees or other unions were providing the services.</p> <p>When conducting a Value for Money analysis, one of the largest advantages P3 projects typically hold over public sector developed projects is the lifecycle maintenance and operational costs. It’s unclear how RCW 47.29.140 might alter this situation.</p>

# Key P3 provisions that are allowed – and unallowed – under Washington law

## ALLOWED under WA laws (P3, D/B, Alt Contracting)

- WSDOT select projects for P3 development
- Design/Build contracting
- Progressive Design/Build contracting
- General Contractor/Construction Manager contracting
- Use any revenue made available for the project, including federal funds, loans, etc.
- Value for Money (VfM) analysis
- Performance-based payments

## NOT AUTHORIZED/ PROHIBITED in WA laws

- WSDOT is not authorized to select projects to become tolled facilities (legislature alone approves imposition of tolls on state facilities)
- Private or quasi-private entity setting toll rates on state facilities
- Privately-issued debt used for P3 project development

### May be allowed, but law is unclear

- Availability payment structures?
- Equity investments in P3 project financing?
- Gain-sharing provisions to share any excess revenue collections?
- Contracting out maintenance/operations?

APPENDIX A



# Washington's Current P3 Law, RCW 47.29

**Chapter 47.29 RCW**  
**TRANSPORTATION INNOVATIVE PARTNERSHIPS**

**Sections**

- 47.29.010 Finding—Intent.
- 47.29.020 Definitions.
- 47.29.030 Transportation commission powers and duties.
- 47.29.040 Purpose.
- 47.29.050 Eligible projects.
- 47.29.060 Eligible financing.
- 47.29.070 Use of federal funds and similar revenues.
- 47.29.080 Other sources of funds or property.
- 47.29.090 Project review, evaluation, and selection.
- 47.29.100 Administrative fee.
- 47.29.110 Funds for proposal evaluation and negotiation.
- 47.29.120 Expert consultation.
- 47.29.130 Contracted studies.
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**RCW 47.29.010 Finding—Intent.** (1) The legislature finds that the public-private transportation initiatives act created under chapter 47.46 RCW has not met the needs and expectations of the public or private sectors for the development of transportation projects. The legislature intends to phase out chapter 47.46 RCW coincident with the completion of the Tacoma Narrows Bridge - SR 16 public-private partnership. From July 24, 2005, this chapter will provide a more desirable and effective approach to developing transportation projects in partnership with the private sector by applying lessons learned from other states and from this state's ten-year experience with chapter 47.46 RCW.

(2) It is the legislature's intent to achieve the following goals through the creation of this new approach to public-private partnerships:

- (a) To provide a well-defined mechanism to facilitate the collaboration between public and private entities in transportation;
- (b) To bring innovative thinking from the private sector and other states to bear on public projects within the state;



(c) To provide greater flexibility in achieving the transportation projects; and

(d) To allow for creative cost and risk sharing between the public and private partners.

(3) The legislature intends that the powers granted in this chapter to the commission or department are in addition to any powers granted under chapter 47.56 RCW.

(4) It is further the intent of the legislature that an expert review panel be established for each project developed under chapter 334, Laws of 2006. Expert review panels shall be responsible for reviewing selected proposals, analyzing and reviewing tentative agreements, and making recommendations to the governor and the transportation commission on the advisability of executing agreements under chapter 334, Laws of 2006. [2006 c 334 § 48; 2005 c 317 § 1.]

**Effective date—2006 c 334:** See note following RCW 47.01.051.

**RCW 47.29.020 Definitions.** The definitions in this section apply throughout this chapter.

(1) "Authority" means the transportation commission.

(2) "Commission" means the transportation commission.

(3) "Department" means the department of transportation.

(4) "Eligible project" means any project eligible for development under RCW 47.29.050.

(5) "Eligible public works project" means only a project that meets the criteria of either RCW 47.29.060 (3) or (4).

(6) "Private sector partner" and "private partner" means a person, entity, or organization that is not the federal government, a state, or a political subdivision of a state.

(7) "Public funds" means all moneys derived from taxes, fees, charges, tolls, etc.

(8) "Public sector partner" and "public partner" means any federal or state unit of government, bistate transportation organization, or any other political subdivision of any state.

(9) "Transportation innovative partnership program" or "program" means the program as outlined in RCW 47.29.040.

(10) "Transportation project" means a project, whether capital or operating, where the state's primary purpose for the project is to preserve or facilitate the safe transport of people or goods via any mode of travel. However, this does not include projects that are primarily for recreational purposes, such as parks, hiking trails, off-road vehicle trails, etc.

(11) "Unit of government" means any department or agency of the federal government, any state or agency, office, or department of a state, any city, county, district, commission, authority, entity, port, or other public corporation organized and existing under statutory law or under a voter-approved charter or initiative, and any intergovernmental entity created under chapter 39.34 RCW or this chapter. [2005 c 317 § 2.]

**RCW 47.29.030 Transportation commission powers and duties.** In addition to the powers it now possesses, the commission shall:

(1) Approve or review contracts or agreements authorized in this chapter;

(2) Adopt rules to carry out this chapter and govern the program, which at a minimum must address the following issues:

(a) The types of projects allowed; however, all allowed projects must be included in the Washington transportation plan or identified by the authority as being a priority need for the state;

(b) The types of contracts allowed, with consideration given to the best practices available;

(c) The composition of the team responsible for the evaluation of proposals to include:

(i) Washington state department of transportation staff;

(ii) An independent representative of a consulting or contracting field with no interests in the project that is prohibited from becoming a project manager for the project and bidding on any part of the project;

(iii) An observer from the state auditor's office or the joint legislative audit and review committee;

(iv) A person appointed by the commission, if the secretary of transportation is a cabinet member, or appointed by the governor if the secretary of transportation is not a cabinet member; and

(v) A financial expert;

(d) Minimum standards and criteria required of all proposals;

(e) Procedures for the proper solicitation, acceptance, review, and evaluation of projects;

(f) Criteria to be considered in the evaluation and selection of proposals that includes:

(i) Comparison with the department's internal ability to complete the project that documents the advantages of completing the project as a partnership versus solely as a public venture; and

(ii) Factors such as, but not limited to: Priority, cost, risk sharing, scheduling, and management conditions;

(g) The protection of confidential proprietary information while still meeting the need for public disclosure that is consistent with RCW 47.29.190;

(h) Protection for local contractors to participate in subcontracting opportunities;

(i) Specifying that maintenance issues must be resolved in a manner consistent with the personnel system reform act, chapter 41.80 RCW;

(j) Specifying that provisions regarding patrolling and law enforcement on a public facility are subject to approval by the Washington state patrol;

(3) Adopt guidelines to address security and performance issues.

Preliminary rules and guidelines developed under this section must be submitted to the chairs and ranking members of both transportation committees by November 30, 2005, for review and comment. All final rules and guidelines must be submitted to the full legislature during the 2006 session for review. [2005 c 317 § 3.]

**RCW 47.29.040 Purpose.** The Transportation Innovative Partnerships Act is created for the planning, acquisition, design, financing, management, development, construction, reconstruction, replacement, improvement, maintenance, preservation, repair, and operation of transportation projects. The goals of this chapter are to:

(1) Reduce the cost of transportation project delivery;

(2) Recover transportation investment costs;

- (3) Develop an expedited project delivery process;
  - (4) Encourage business investment in public infrastructure;
  - (5) Use any fund source outside the state treasury, where financially advantageous and in the public interest;
  - (6) Maximize innovation;
  - (7) Develop partnerships between and among private entities and the public sector for the advancement of public purposes on mutually beneficial terms;
  - (8) Create synergies between and among public sector entities to develop projects that serve both transportation and other important public purposes; and
  - (9) Access specialized construction management and project management services and techniques available in the private sector.
- [2005 c 317 § 4.]

**RCW 47.29.050 Eligible projects.** Projects eligible for development under this chapter include:

- (1) Transportation projects, whether capital or operating, where the state's primary purpose for the project is to facilitate the safe transport of people or goods via any mode of travel. However, this does not include projects that are primarily for recreational purposes, such as parks, hiking trails, off-road vehicle trails, etc.; and
- (2) Facilities, structures, operations, properties, vehicles, vessels, or the like that are developed concurrently with an eligible transportation project and that are capable of (a) providing revenues to support financing of an eligible transportation project, or (b) that are public projects that advance public purposes unrelated to transportation. [2005 c 317 § 5.]

**RCW 47.29.060 Eligible financing.** (1) Subject to the limitations in this section, the department may, in connection with the evaluation of eligible projects, consider any financing mechanisms identified under subsections (3) through (5) of this section or any other lawful source, either integrated as part of a project proposal or as a separate, stand-alone proposal to finance a project. Financing may be considered for all or part of a proposed project. A project may be financed in whole or in part with:

- (a) The proceeds of grant anticipation revenue bonds authorized by 23 U.S.C. Sec. 122 and applicable state law. Legislative authorization and appropriation is required in order to use this source of financing;
- (b) Grants, loans, loan guarantees, lines of credit, revolving lines of credit, or other financing arrangements available under the Transportation Infrastructure Finance and Innovation Act under 23 U.S.C. Sec. 181 et seq., or any other applicable federal law;
- (c) Infrastructure loans or assistance from the state infrastructure bank established by RCW 82.44.195;
- (d) Federal, state, or local revenues, subject to appropriation by the applicable legislative authority;
- (e) User fees, tolls, fares, lease proceeds, rents, gross or net receipts from sales, proceeds from the sale of development rights, franchise fees, or any other lawful form of consideration. However, projects financed by tolls or equivalent funding sources must first be authorized by the legislature under RCW 47.56.820.

(2) As security for the payment of financing described in this section, the revenues from the project may be pledged, but no such pledge of revenues constitutes in any manner or to any extent a general obligation of the state. Any financing described in this section may be structured on a senior, parity, or subordinate basis to any other financing.

(3) For any transportation project developed under this chapter that is owned, leased, used, or operated by the state, as a public facility, if indebtedness is issued, it must be issued by the state treasurer for the transportation project.

(4) For other public projects defined in RCW 47.29.050(2) that are developed in conjunction with a transportation project, financing necessary to develop, construct, or operate the public project must be approved by the state finance committee or by the governing board of a public benefit corporation as provided in the federal Internal Revenue Code section 63-20;

(5) For projects that are developed in conjunction with a transportation project but are not themselves a public facility or public project, any lawful means of financing may be used. [2008 c 122 § 18; 2005 c 317 § 6.]

**RCW 47.29.070 Use of federal funds and similar revenues.** The department may accept from the United States or any of its agencies such funds as are available to this state or to any other unit of government for carrying out the purposes of this chapter, whether the funds are made available by grant, loan, or other financing arrangement. The department may enter into such agreements and other arrangements with the United States or any of its agencies as may be necessary, proper, and convenient for carrying out the purposes of this chapter, subject to RCW 47.29.080. [2005 c 317 § 7.]

**RCW 47.29.080 Other sources of funds or property.** 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 valuable thing made to the state of Washington, the department, or a local government for carrying out the purposes of this chapter.

Any eligible project may be financed in whole or in part by contribution of any funds or property made by any private entity or public sector partner that is a party to any agreement entered into under this chapter. [2005 c 317 § 8.]

**RCW 47.29.090 Project review, evaluation, and selection.** (1) Subject to subsection (2) of this section, the commission may:

(a) Solicit concepts or proposals for eligible projects from private entities and units of government;

(b) On or after January 1, 2007, accept unsolicited concepts or proposals for eligible projects from private entities and units of government, subject to RCW 47.29.170;

(c) Direct the department to evaluate projects for inclusion in the transportation innovative partnerships program that are already programmed or identified for traditional development by the state;

(d) Direct the department to evaluate the concepts or proposals received under this section; and

(e) Select potential projects based on the concepts or proposals. The evaluation under this subsection must include consultation with any appropriate unit of government.

(2) Before undertaking any of the activities contained in subsection (1) of this section, the commission must have:

(a) Completed the tolling feasibility study; and

(b) Adopted rules specifying procedures for the proper solicitation, acceptance, review, and evaluation of projects, which procedures must include:

(i) A comparison with the department's internal ability to complete the project that documents the advantages of completing the project as a partnership versus solely as a public venture; and

(ii) Factors such as priority, cost, risk sharing, scheduling, and management conditions. [2005 c 317 § 9.]

**RCW 47.29.100 Administrative fee.** The department may charge a reasonable administrative fee for the evaluation of an unsolicited project proposal. The amount of the fee will be established in rules of the commission. [2005 c 317 § 10.]

**RCW 47.29.110 Funds for proposal evaluation and negotiation.** The department may spend, out of any funds identified for the purpose, such moneys as may be necessary for the evaluation of concepts or proposals for eligible projects and for negotiating agreements for eligible projects authorized by this chapter. The department may employ engineers, consultants, or other experts the department determines are needed for the purposes of doing the evaluation and negotiation. Expenses incurred by the department under this section before the issuance of transportation project bonds or other financing must be paid by the department and charged to the appropriate project. The department shall keep records and accounts showing each amount so charged.

Unless otherwise provided in the omnibus transportation budget the funds spent by the department under this section in connection with the project must be repaid from the proceeds of the bonds or other financing upon the sale of transportation project bonds or upon obtaining other financing for an eligible project, as allowed by law or contract. [2005 c 317 § 11.]

**RCW 47.29.120 Expert consultation.** The commission and department may consult with legal, financial, and other experts inside and outside the public sector in the evaluation, negotiation, and development of projects under this chapter, consistent with RCW 43.10.040 where applicable. [2005 c 317 § 12.]

**RCW 47.29.130 Contracted studies.** Notwithstanding any other provision of law, and in the absence of any direct federal funding or direction, the department may contract with a private developer of a selected project proposal to conduct environmental impact studies and engineering and technical studies. [2005 c 317 § 13.]

**RCW 47.29.140 Partnership agreements.** (1) The following provisions must be included in any agreement to which the state is a party:

(a) For any project that proposes terms for stand-alone maintenance or asset management services for a public facility, those services must be provided in a manner consistent with any collective bargaining agreements, the personnel system reform act (chapter 41.80 RCW), and civil service laws that are in effect for the public facility;

(b) Transportation projects that are selected for development under this chapter must be identified in the Washington transportation plan or be identified by the authority as being a priority need for the state;

(c) If there is a tolling component to the project, then it must be specified that tolling technology used in the project must be consistent with tolling technology standards adopted by the department for transportation-related projects;

(d) Provisions for bonding, financial guarantees, deposits, or the posting of other security to secure the payment of laborers, subcontractors, and suppliers who perform work or provide materials as part of the project;

(e) All projects must be financed in a manner consistent with RCW 47.29.060. This chapter is null and void if this subsection or RCW 47.29.060 fails to become law or is held invalid by a court of final jurisdiction.

(2) Agreements between the state and private sector partners entered into under this section must specifically include the following contractual elements:

(a) The point in the project at which public and private sector partners will enter the project and which partners will assume responsibility for specific project elements;

(b) How the partners will share management of the risks of the project;

(c) How the partners will share the costs of development of the project;

(d) How the partners will allocate financial responsibility for cost overruns;

(e) The penalties for nonperformance;

(f) The incentives for performance;

(g) The accounting and auditing standards to be used to evaluate work on the project;

(h) For any project that reverts to public ownership, the responsibility for reconstruction or renovations that are required in order for a facility to meet all applicable government standards upon reversion of the facility to the state; and

(i) Provisions for patrolling and law enforcement on transportation projects that are public facilities. [2005 c 317 § 14.]

**RCW 47.29.150 Public involvement and participation.** (1) Before final approval, agreements entered into under this chapter must include a process that provides for public involvement and participation with respect to the development of the projects. This plan must be submitted along with the proposed agreement, and both must be approved under RCW 47.29.160 before the state may enter a binding agreement.

(2) All workshops, forums, open houses, meetings, public hearings, or similar public gatherings must be administered and attended by representatives of the state and any other public entities that are party to an agreement authorized by this chapter. [2005 c 317 § 15.]

**RCW 47.29.160 Approval and execution.** (1) Before approving an agreement under subsection (2) of this section, the commission, with the technical assistance of the department, must:

(a) Prepare a financial analysis that fully discloses all project costs, direct and indirect, including costs of any financing;

(b) Publish notice and make available the contents of the agreement, with the exception of patent information, at least twenty days before the public hearing required in (c) of this subsection; and

(c) Hold a public hearing on the proposed agreement, with proper notice provided at least twenty days before the hearing. The public hearing must be held within the boundaries of the county seat of the county containing the project.

(2) The commission must allow at least twenty days from the public hearing on the proposed agreement required under subsection (1)(c) of this section before approving and executing any agreements authorized under this chapter. [2005 c 317 § 16.]

**RCW 47.29.170 Unsolicited proposals.** Before accepting any unsolicited project proposals, the commission must adopt rules to facilitate the acceptance, review, evaluation, and selection of unsolicited project proposals. These rules must include the following:

(1) Provisions that specify unsolicited proposals must meet predetermined criteria;

(2) Provisions governing procedures for the cessation of negotiations and consideration;

(3) Provisions outlining that unsolicited proposals are subject to a two-step process that begins with concept proposals and would only advance to the second step, which are fully detailed proposals, if the commission so directed;

(4) Provisions that require concept proposals to include at least the following information: Proposers' qualifications and experience; description of the proposed project and impact; proposed project financing; and known public benefits and opposition; and

(5) Provisions that specify the process to be followed if the commission is interested in the concept proposal, which must include provisions:

(a) Requiring that information regarding the potential project would be published for a period of not less than thirty days, during which time entities could express interest in submitting a proposal;

(b) Specifying that if letters of interest were received during the thirty days, then an additional sixty days for submission of the fully detailed proposal would be allowed; and

(c) Procedures for what will happen if there are insufficient proposals submitted or if there are no letters of interest submitted in the appropriate time frame.

The commission may adopt other rules as necessary to avoid conflicts with existing laws, statutes, or contractual obligations of the state.

The commission may not accept or consider any unsolicited proposals before July 1, 2018. [2017 c 313 § 711; 2015 1st sp.s. c 10 § 704; 2013 c 306 § 708; 2011 c 367 § 701; 2009 c 470 § 702; 2007 c 518 § 702; 2006 c 370 § 604; 2005 c 317 § 17.]

**Effective date—2017 c 313:** See note following RCW 43.19.642.

**Effective date—2015 1st sp.s. c 10:** See note following RCW 43.19.642.

**Effective date—2013 c 306:** See note following RCW 47.64.170.

**Effective date—2011 c 367:** "Except for sections 703, 704, 705, 716, 719, and 722 of this act, this act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 16, 2011]." [2011 c 367 § 1102.]

**Effective date—2009 c 470:** See note following RCW 46.68.170.

**Severability—Effective date—2007 c 518:** See notes following RCW 46.68.170.

**Severability—2006 c 370:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [2006 c 370 § 701.]

**Effective date—2006 c 370:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [March 31, 2006]." [2006 c 370 § 702.]

**RCW 47.29.180 Advisory committees.** For projects with costs, including financing costs, of three hundred million dollars or greater, advisory committees are required.

(1) The commission must establish an advisory committee to advise with respect to eligible projects. An advisory committee must consist of not fewer than five and not more than nine members, as determined by the public partners. Members must be appointed by the commission, or for projects with joint public sector participation, in a manner agreed to by the commission and any participating unit of government. In making appointments to the committee, the commission shall consider persons or organizations offering a diversity of viewpoints on the project.

(2) An advisory committee shall review concepts or proposals for eligible projects and submit comments to the public sector partners.

(3) An advisory committee shall meet as necessary at times and places fixed by the department, but not less than twice per year. The state shall provide personnel services to assist the advisory committee within the limits of available funds. An advisory committee may adopt rules to govern its proceedings and may select officers.

(4) An advisory committee must be dissolved once the project has been fully constructed and debt issued to pay for the project has been fully retired. [2005 c 317 § 18.]



**RCW 47.29.190 Confidentiality.** A proposer shall identify those portions of a proposal that the proposer considers to be confidential, proprietary information, or trade secrets and provide any justification as to why these materials, upon request, should not be disclosed by the authority. Patent information will be covered until the patent expires. Other information such as originality of design or records of negotiation may only be protected under this section until an agreement is reached. Disclosure must occur before final agreement and execution of the contract. Projects under federal jurisdiction or using federal funds must conform to federal regulations under the Freedom of Information Act. [2005 c 317 § 19.]

**RCW 47.29.200 Prevailing wages.** If public funds are used to pay any costs of construction of a public facility that is part of an eligible project, chapter 39.12 RCW applies to the entire eligible public works project. [2005 c 317 § 20.]

**RCW 47.29.210 Government agreements.** The state may, either separately or in combination with any other public sector partner, enter into working agreements, coordination agreements, or similar implementation agreements, including the formation of bistate transportation organizations, to carry out the joint implementation of a transportation project selected under this chapter. The state may enter into agreements with other units of government or Canadian provinces for transborder transportation projects. [2005 c 317 § 21.]

**RCW 47.29.220 Eminent domain.** The state may exercise the power of eminent domain to acquire property, rights-of-way, or other rights in property for projects that are necessary to implement an eligible project developed under this chapter, regardless of whether the property will be owned in fee simple by the state. [2005 c 317 § 22.]

**RCW 47.29.230 Transportation innovative partnership account.**

(1) The transportation innovative partnership account is established in the custody of the state treasurer separate and distinct from the state general fund. Interest earned by the transportation innovative partnership account must be credited to the account. The account is subject to allotment procedures under chapter 43.88 RCW.

(2) The following moneys must be deposited into the transportation innovative partnership account:

(a) Proceeds from bonds or other financing instruments issued under RCW 47.29.250;

(b) Revenues received from any transportation project developed under this chapter or developed under the general powers granted to the department; and

(c) Any other moneys that are by donation, grant, contract, law, or other means transferred, allocated, or appropriated to the account.

(3) Moneys in the transportation innovative partnership account may only be expended upon evidence of approval by the Washington state legislature, either upon appropriation of supporting state funds or by other statutory direction.

(4) The state treasurer shall serve as a fiduciary for the purpose of carrying out this chapter and implementing all or portions of any transportation project financed under this chapter.

(5) Moneys in the transportation innovative partnership account that were derived from revenue subject to Article II, section 40 (Amendment 18) of the Washington state Constitution, may be used only for purposes authorized by that provision of the state Constitution.

(6) The state treasurer shall establish separate subaccounts within the transportation innovative partnership account for each transportation project that is initiated under this chapter or under the general powers granted to the department. Except as provided in subsection (5) of this section, the state may pledge moneys in the transportation innovative partnership account to secure revenue bonds or any other debt obligations relating to the project for which the account is established. [2005 c 317 § 23.]

**RCW 47.29.240 Use of account.** (1) The state may use moneys in the transportation innovative partnership subaccount to ensure the repayment of loan guarantees or extensions of credit made to or on behalf of private entities engaged in the planning, acquisition, financing, development, design, construction, reconstruction, replacement, improvement, maintenance, preservation, management, repair, or operation of any eligible project that is related to a subaccount established under this chapter.

(2) The lien of a pledge made under this section is subordinate to the lien of a pledge securing bonds payable from moneys in the motor vehicle fund established in RCW 46.68.070, or the transportation innovative partnership account established in RCW 47.29.230. [2005 c 317 § 24.]

**RCW 47.29.250 Issuing bonds and other obligations.** (1) In addition to any authority the commission or department has to issue and sell bonds and other similar obligations, this section establishes continuing authority for the issuance and sale of bonds and other similar obligations in a manner consistent with this section. To finance a project in whole or in part, the commission may request that the state treasurer issue revenue bonds on behalf of the public sector partner. The bonds must be secured by a pledge of, and a lien on, and be payable only from moneys in the transportation innovative partnership account established in RCW 47.29.230, and any other revenues specifically pledged to repayment of the bonds. Such a pledge by the public partner creates a lien that is valid and binding from the time the pledge is made. Revenue bonds issued under this section are not general obligations of the state or local government and are not secured by or payable from any funds or assets of the state other than the moneys and revenues specifically pledged to the repayment of such revenue bonds.

(2) Moneys received from the issuance of revenue bonds or other debt obligations, including any investment earnings thereon, may be spent:

(a) For the purpose of financing the costs of the project for which the bonds are issued;

(b) To pay the costs and other administrative expenses of the bonds;

(c) To pay the costs of credit enhancement or to fund any reserves determined to be necessary or advantageous in connection with the revenue bonds; and

(d) To reimburse the public sector partners for any costs related to carrying out the projects authorized under this chapter. [2005 c 317 § 25.]

**RCW 47.29.260 Study and report.** The department shall conduct a study of:

(1) The contracting powers and project management authorities it currently possesses; those same powers and authorities authorized under this chapter; and those powers and authorities employed by other states or the private sector;

(2) Methods of encouraging competition for the development of transportation projects; and

(3) Any additional procedures that may be necessary or desirable for negotiating contracts in situations of a single qualified bidder, in either solicited or unsolicited proposals.

The department must submit its report, along with any recommended legislative changes, to the commission by November 1, 2005, and to the governor and the legislature for consideration in the 2006 legislative session. [2005 c 317 § 26.]

**RCW 47.29.270 Federal laws.** Notwithstanding any provision of this chapter, applicable federal laws, rules, and regulations govern in any situation that involves federal funds if the federal laws, rules, or regulations:

(1) Conflict with any provision of this chapter;

(2) Require procedures that are additional to or different from those provided in this chapter; or

(3) Require contract provisions not authorized in this chapter. If no federal funds are provided, state laws, rates, and rules will govern. [2005 c 317 § 27.]

**RCW 47.29.280 Expert review panel on proposed project agreements**

**—Creation—Authority.** (1) The department shall establish an expert review panel to review, analyze, and make recommendations to the governor and the transportation commission on whether to approve, reject, or continue negotiations on a proposed project agreement under this chapter. The department shall provide staff to support the expert review panel, if requested by the panel. The expert review panel may utilize any of the consultants under contract for the department, and the expert review panel may contract for consulting expertise in specific areas as it deems necessary to ensure a thorough and critical review of any proposed project agreement.

(2) The governor shall appoint members of an expert review panel that have experience in large capital project delivery, public-private partnerships, public financing of infrastructure improvements, or other areas of expertise that will benefit the panel. The panel shall consist of no less than three, but no more than five members, as determined by the governor. [2006 c 334 § 49.]

**Effective date—2006 c 334:** See note following RCW 47.01.051.

**RCW 47.29.290 Expert review panel on proposed project agreements**  
**—Execution of agreements.** Upon receiving the recommendations of the expert review panel as provided in RCW 47.29.280, and upon consultation with the governor, the transportation commission shall either execute the proposed project agreement, reject the proposed project agreement, or continue further negotiations between the state and a private partner. The execution of any agreement or the rejection of any agreement shall constitute a final action for legal or administrative purposes. [2006 c 334 § 50.]

**Effective date—2006 c 334:** See note following RCW 47.01.051.

Appendix B



# Key Elements of Virginia's P3 Legislation

# Virginia Code §33.2-1803.1: Finding of public interest

## Key features

- Prior to the meeting of the Committee the DOT shall make a finding of public interest. The Secretary of Transportation, in their role as chairman of the Board, must concur with the finding of public interest.
- At a minimum, a finding of public interest shall contain the following information:
  - A description of the benefits expected to be realized
  - An analysis of the public contribution necessary
  - A statement of the risks, liabilities, and responsibilities to be transferred, assigned, or assumed by the private entity
  - The determination of whether the project has a high, medium, or low level of project delivery risk and how the public's interest will be protected.

# Virginia Code §33.2-1803.2 P3 Steering Committee

## Key features

- There is hereby established the Transportation P3 Steering Committee to evaluate and review financing options for transportation facilities.
- The Committee members will come from the Transportation Board; House Appropriations; Senate Committee on Finance and Appropriations; Deputy Secretary of Transportation; the CFO of the DOT; and a nonagency public financial expert, as selected by the Secretary of Transportation.
- Prior to the initiation of any procurement the DOT shall meet to review the public sector analysis and concur that the project scope, benefits, and costs of the public sector option developed were **fully and reasonably developed**; the assumed financing costs and valuation of both financial and construction risk mitigation included in the **public sector option are financially sound**; and the terms sheet developed for the proposed procurement contains all necessary elements.

# Virginia Code §33.2-1803.2: P3 Steering Committee (cont'd)

## Key features

- **After receipt of responses to the request for qualifications, but prior to the issuance of the first draft request for proposals, the Committee shall meet to determine that the development and/or operation of the transportation facility or facilities as a qualifying transportation facility serves the public interest.** If the Committee makes an affirmative determination, as evidenced by an affirmative vote of a majority of the members of the Committee, the DOT may proceed with the procurement.
- Meetings of the Committee shall be open to the public however the Committee may convene a closed session to allow the Committee to review the public sector analysis of bids.
- Within 60 days of the execution, the DOT in a closed session, brief the Committee on the details of the final bids received.



# Virginia Code §33.2-1807: Powers and duties of the private entity

## Key features

- The private entity shall have all power allowed by law generally to a private entity having the same form of organization as the private entity and shall have the power to develop and/or operate the qualifying transportation facility and impose user fees and/or enter into service contracts in connection with the use thereof.
- In operating the qualifying transportation facility, the private entity may:
  - Make classifications according to reasonable categories for assessment of user fees; and
  - With the consent of the responsible public entity, make and enforce reasonable rules to the same extent that the responsible public entity may make and enforce rules with respect to a similar transportation facility.

# Virginia Code §33.2-1807: Powers and duties of the private entity (cont'd)

## ■ The private entity shall:

- Develop and/or operate the qualifying transportation facility in a manner that meets the standards of the responsible public entity in accordance with the provisions of the interim agreement or the comprehensive agreement
- Keep the qualifying transportation facility open for use by the members of the public in accordance with the terms and conditions of the interim or comprehensive agreement
- Maintain, or provide by contract for maintenance
- Cooperate with the responsible public entity
- Comply with the provisions of the interim or comprehensive agreement and any service contract.

# Virginia Code §33.2-1808: Comprehensive agreement

## Key features

- Prior to developing and/or operating the qualifying transportation facility, the private entity shall enter into a comprehensive agreement with the responsible public entity. The comprehensive agreement shall, as appropriate, provide for:
  - Delivery of performance and payment bonds.
  - Review of plans for the development and/or operation of the qualifying transportation facility by the responsible public entity.
  - Inspection of construction by the DOT.
  - Maintenance of a policy or policies of public liability insurance.
  - Monitoring of the maintenance by the DOT.

# Virginia Code §33.2-1808: Comprehensive agreement (cont'd)

## Key features

- Reimbursement to be paid to the DOT for services provided by the DOT.
- Filing of appropriate financial statements in a form acceptable to the DOT.
- Compensation to the private entity that may include a reasonable maximum rate of return on investment, and/or reimbursement of development expenses in the event of termination for convenience by the DOT.
- The date of termination and hand back to the DOT
- Cost and completion guarantees and payment of damages for failure to meet the completion guarantee.
- The DOT may agree to make grants or loans for the development and/or operation of the qualifying transportation facility from amounts received from the federal government

# Virginia Code §33.2-1808: Comprehensive agreement (cont'd)

## Key features

- The comprehensive agreement shall provide for the distribution of any earnings in excess of the maximum rate of return as negotiated in the comprehensive agreement.
- Any changes shall be added to the comprehensive agreement by written amendment.
- A comprehensive agreement, in consultation with the Virginia State Police, will include a provision requiring funding for adequate staffing by the Virginia State Police for general law enforcement services during both development and operation of the qualifying transportation facility.

# Virginia Code §33.2-1812: Financing

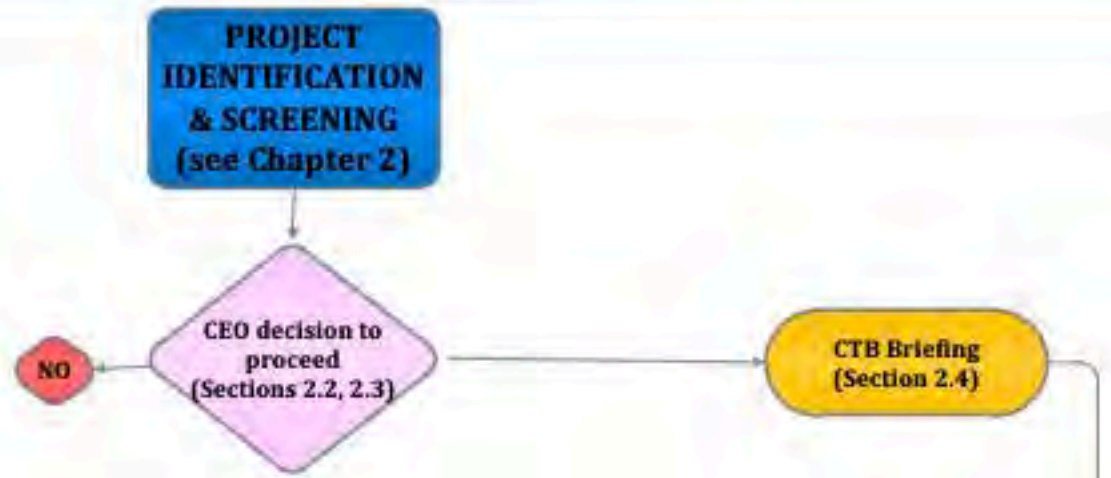
## Key features

- Any financing of a qualifying transportation facility may be in such amounts and upon such terms and conditions as may be determined by the parties.
- Without limiting the generality of the foregoing, the private entity and the responsible public entity may propose to utilize any and all revenues that may be available to them and may, to the fullest extent permitted by applicable law:
  - issue debt, equity, or other securities or obligations;
  - enter into leases, concessions, and grant and loan agreements;
  - access any designated transportation trust funds;
  - borrow or accept grants from any state infrastructure bank; and
  - secure any financing with a pledge of, security interest in, or lien on any or all of its property, including all of its property interests in the project.

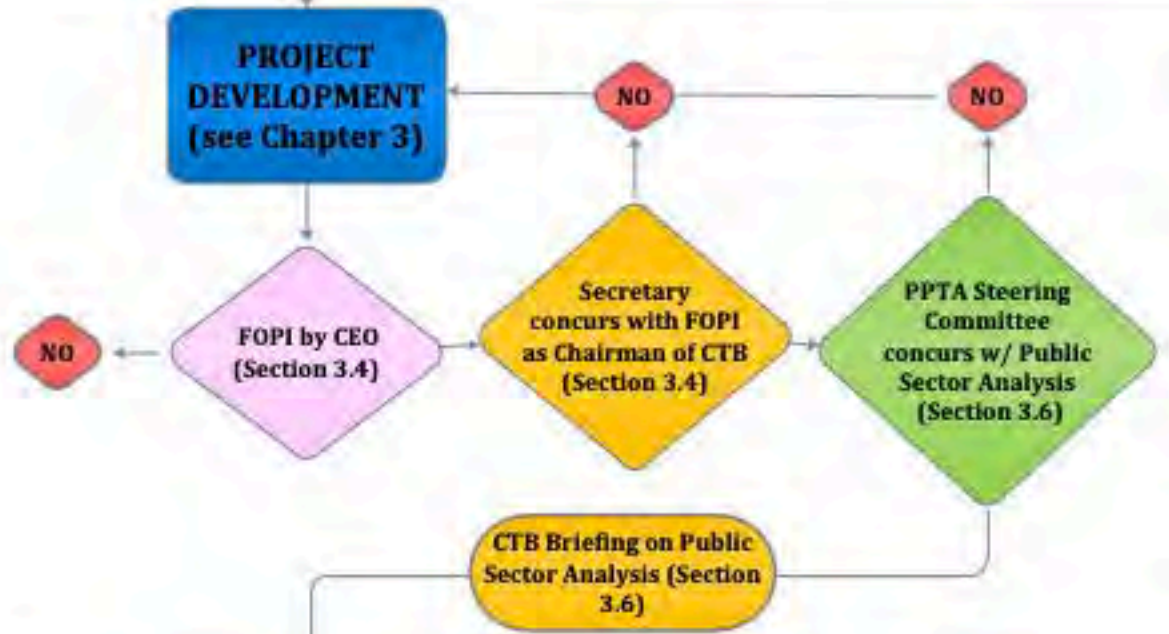
Figure 1

General P3 Process Flowchart

- Supporting Documents:**
- Screening Reports
  - Identification of potential public funds
  - Public Sector Analysis & Competition



- Supporting Documents:**
- Public Sector Analysis & Competition (cont'd)
  - Identification of maximum public contribution
  - Draft procurement documents (RFQ, RFP, Major Business Terms)
  - Risk Assessment
  - Finding of Public Interest (FOPI)
  - Request for Information



- Supporting Documents:**
- Public Sector Analysis & Competition (final)
  - Procurement documents (RFQ, RFP, draft Comprehensive Agreement, Major Business Terms)
  - PPTA Statutory Audit
  - Certification to Governor & General Assembly

