

Public-Private Partnerships
for Public Facilities

LEGISLATIVE RESOURCE GUIDE



INTRODUCTION

This Legislative Resource Guide (the “Guide”) was developed in recognition of the challenge that public entities face in meeting public facility infrastructure demands with constrained budgets.¹ Public-private partnerships, used properly, can address this challenge by giving public entities the option to contract with private entities to provide design, build, finance, operate and maintain turnkey services when the building project meets certain criteria. Because private sector financing for public works raises rightful concerns for corruption and increased costs to the taxpayer, the process for engaging in these transactions must be transparent and should demonstrate a process that prioritizes quality over short-sightedness, resource and risk sharing over unnecessary duplication of efforts and risk exposure, and operational efficiencies over costly and wasteful spending. If enacted improperly without sufficient guidance, however, partnerships will unfortunately cost taxpayers more money and will eventually preclude the use of a legitimate, long-term sustainable project delivery method.

The American Institute of Architects commenced researching the global legislative landscape for public-private partnerships in 2012. What we found is that for more than a decade, jurisdictions in the United States, especially with regard to horizontal infrastructure (civil works—roads, bridges, water treatment), have engaged the private sector in various ways to partner in the delivery of public construction programs; some have explicit statutory authority, others piecemeal. Many US jurisdictions² have begun to address the current “patchwork” statutory landscape with comprehensive legislative enactments to enable public-private partnerships, unequivocally. Several other US jurisdictions are in the process of developing or

debating comprehensive statutory authority.³ And others have limited authority for certain building types or are in a “pilot” structure.⁴ Countries such as Canada, Australia and the United Kingdom have utilized public-private partnerships for more than a decade for both horizontal and vertical infrastructure (public facilities). In those years, mistakes were made and successes were had that beg the attention of lawmakers in the US. Learning from their experiences is an extraordinary opportunity from which US jurisdictions can undoubtedly profit. The AIA has taken the lessons learned and incorporated them into the legislative provisions herein.

This Guide consists of a main section and two appendices. The main section walks the reader through important elements in a successful PPP law. Each element is accompanied by (1) background information explaining why the element should be included in a PPP law, (2) sample legislative language that can be cut, pasted, and amended to suit an existing statutory context, and (3) a reference section for applicable words or phrases that should be defined. Appendix A provides recommended definition language. Appendix B sets forth the suggested legislation comprehensively.

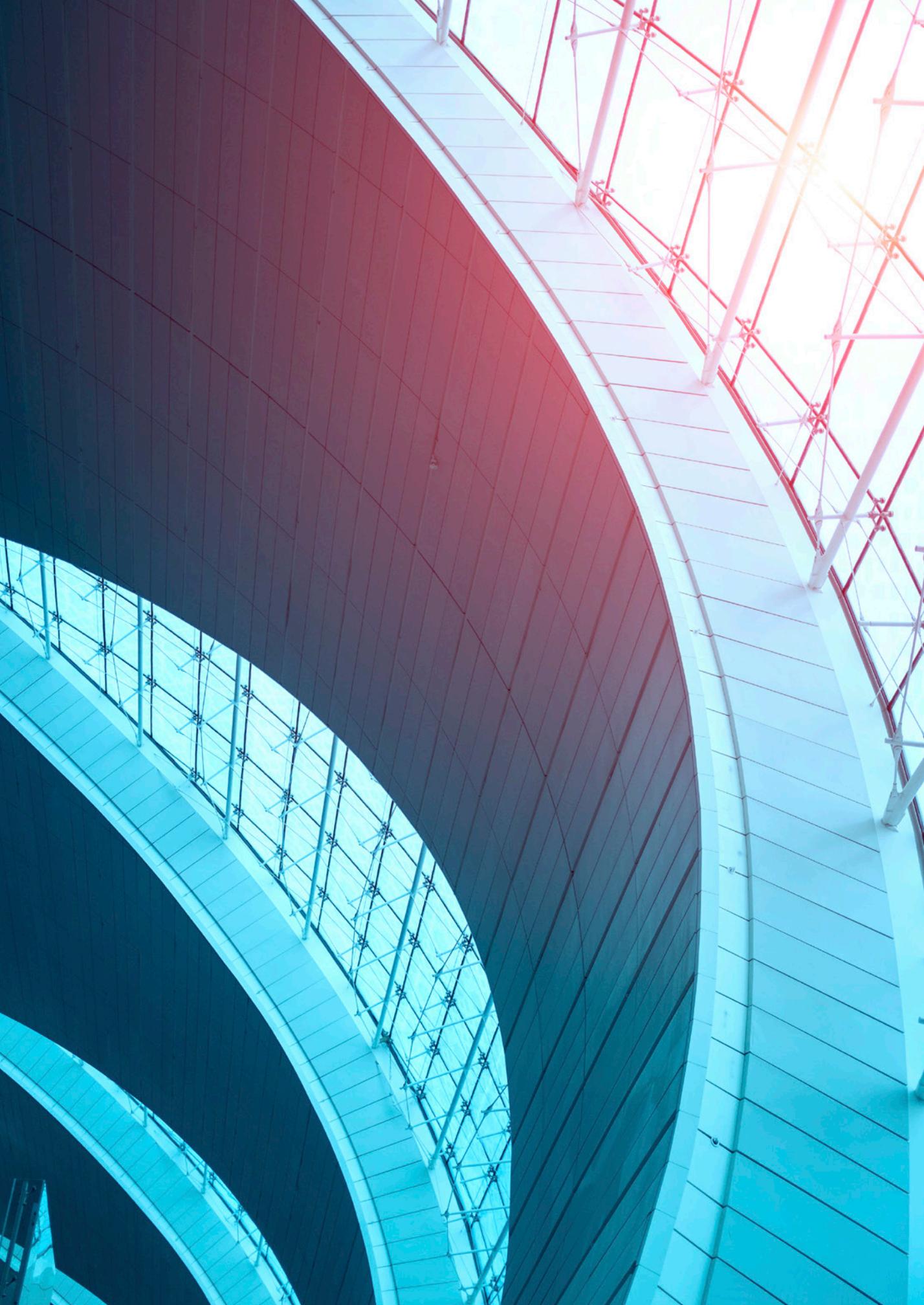
¹ The Institute is engaged in a coalition-building effort with national industry organizations whose expertise and member-focus relates to horizontal public construction (roads, bridges, water, etc) in an effort to broaden the reach and desired application of these legislative provisions to both vertical and horizontal construction. In the interim, these legislative provisions are intended only for vertical infrastructure (i.e. public facilities).

² Including Virginia, Texas, Florida, Maryland, North Carolina, Oregon, Pennsylvania, Puerto Rico

³ Including Tennessee, New York, Kentucky, Georgia, Hawaii, Pennsylvania, Missouri, New Mexico, Colorado, Indiana, Arizona, Arkansas, South Carolina, District of Columbia

⁴ Including Connecticut, New Jersey, California, Kentucky, Colorado, South Carolina, Washington, Georgia

> For more information, please contact the AIA Local Government Division at govaffs@aia.org.



Understanding P3s: What Are They and How Do They Work?

Public-Private Partnerships (“PPP”), as a concept, can mean many different things. At a very basic level it involves any contractual partnership between a public and a private entity. When this simple concept, however, is applied to the complex process of getting public facilities built, a proverbial “iceberg” of issues beneath the surface should be considered. As with all construction projects for public use, there is an extensive and necessary feasibility and planning process that occurs prior to the design phase of the project. After the feasibility and planning phase, numerous basic design concepts are developed and considered with the client end-user. Once the client-end user approves the direction of the conceptual design, there’s an intensive design-development phase that involves transforming the concepts and ideas into a physical form and structure that is depicted in architectural floor plans, building elevations and sections. This back-and-forth design process with the end-user client will continue until the designs are developed to become the technical instructions to build with materials specifications, details and overlaying engineering systems (e.g. structural, mechanical, electrical, plumbing). Laws that acknowledge this complex planning and design process before construction even begins will reap rewards for taxpayers and society.

The process of codifying the concept (described above) is a critical first step. We view the best definition to be one that sets reasonable parameters and incorporates best practices and lessons learned from

public entities with real-world experiences. A codified public private partnership project delivery method for getting public facilities built *should be* “a long-term performance-based approach to procuring public infrastructure where the private sector assumes a major share of the risks in terms of financing and construction and ensuring effective performance of the infrastructure, from design and planning, to long-term maintenance.”⁵ In more practical terms, this means the public entity typically:

- Has a single point of responsibility for the design, construction, financing, maintenance, and sometimes the operation, of the asset;
- Does not pay for the asset until it is occupied;
- Pays the cost of the design and construction of the asset “over the life of the asset and only if it is properly maintained and performs according to specifications...”⁶ and;
- Knows the costs for a long-term portion of the asset’s lifespan upfront, “meaning that taxpayers are not on the financial hook for cost overruns, delays or any performance issues over the asset’s life.”⁷

⁵ PPP Canada, *About P3s, Frequently Asked Questions*, P3CANADA, <http://www.p3canada.ca/en/about-p3s/frequently-asked-questions/> (last visited Nov. 17, 2014).

⁶ *Id.*

⁷ *Id.*

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By assuming long-term maintenance responsibility, the private entity is held more accountable for the delivered asset and is therefore incentivized to produce a high-quality, long-lasting asset. The payment structure (a.k.a. the “availability payment”) is performance-based, meaning that payments are not made unless and until the asset is delivered and functioning at the standards specified in the contract. Using an output-oriented approach, where the public entity specifies *what* it wants rather than *how* it wants it, maximizes opportunities for innovation and competition and enables the private sector to develop the best solution.

Because PPP projects should be long-term business transactions for the reasons described above, their use requires careful consideration, significant public capacity, and sufficient private market interest. The legislative framework, therefore, must strike a delicate balance between protecting public interests with legislative provisions that encourage a smart vetting process for suitability and value for money while still encouraging private sector engagement through a flexible and nimble framework.

One of the advantages of PPPs is that they can provide public entities access to private capital, but with this access comes a heightened level of scrutiny (and rightfully so) to protect taxpayers. After all, PPP doesn’t change the fact that the public is still “on the hook” over the long-term for paying for the project. By having a legislative framework that is consistent and predictable, it will provide transparency and enable the private market to gauge the risks and rewards.



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ELEMENT RECOMMENDATIONS

Provide Explicit Statutory Authority

BACKGROUND

With explicit authority, public entities can, without hesitation, explore the use of this project delivery method. Likewise, private entities can assess, in a meaningful manner, the risks and rewards of engaging in this kind of long-term business transaction.

SAMPLE LEGISLATIVE PROVISION

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Section A. Authorization; Applicability

(a) This Act:

- (1) Creates a process by which Public Entities may partner with Private Entities for the Development of Vertical Infrastructure through the use of Public-Private Partnerships; and
- (2) Authorizes Public Entities to partner with other Public Entities for the Development of infrastructure through the use of Public-Public Partnerships.

(b) All Vertical Infrastructure Public-Private Partnerships shall be procured in the manner described by this Act.

(c) This Chapter does not apply to Horizontal Infrastructure.

APPLICABLE DEFINITIONS [REFERENCE APPENDIX A]

- (i) “Develop” or “Development”
- (ii) “Horizontal Infrastructure”
- (iii) “Private Entity”
- (iv) “Public Entity”
- (v) “Public-Private Partnership”
- (vi) “Public-Public Partnership”
- (vii) “Vertical Infrastructure”

> For more information, please contact the AIA Local Government Division at govaffs@aia.org.

Create an Oversight or Advisory Entity

BACKGROUND

Evaluating whether PPP delivers the best value to the public requires a high level of expertise in finance, law, procurement, planning, and design. The requisite level of expertise in these disciplines is unlikely to be available in existing government agencies and localities interested in PPP procurement. The establishment of an oversight/advisory entity or housing it within an existing agency, also known as a “PPP Entity,” is internationally recognized as a best practice and key to PPP success. Public-private partnerships involve large-scale investment, long-term obligations, and significant expertise. This entity can identify, analyze, and monitor PPP opportunities and projects and its creation is received by the private sector as a signal that the public entity has taken proper steps to create a consistent and predictable regulatory environment for private sector investment.

As expressed in the below provisions, an oversight/advisory entity builds institutional knowledge on the complex process within the state; can provide the legislature with PPP policy guidance; evaluates proposed PPP projects and objectively analyzes whether PPP is appropriate; assists governmental entities in managing private financing and the complex and long-term contracts when necessary; and reduces transactional and other costs borne by the public by harnessing the efficiencies of having this specialized expertise at the state level, instead of inefficiently and unrealistically relying on individual governmental subdivisions. These duties protect the taxpayer by ensuring PPP is only utilized in appropriate situations and is done in a responsible, cost-effective manner.

SAMPLE LEGISLATIVE PROVISION

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Section A. Office of Vertical Infrastructure Planning and Partnerships

(a) The Office of Vertical Infrastructure Planning and Partnerships (OVIPP) shall hereby be established as a public advisory agency.

(b) The OVIPP shall be responsible for administering the provisions of this Act and the guidelines established pursuant thereto. The role of the OVIPP shall involve, but is not limited to:

- (1) providing technical assistance, expertise, and capacity necessary for a successful partnership program;
- (2) creating an attractive, predictable, prosperous, and transparent environment that encourages private investment within the State and protects the public interest;
- (3) gauging and promoting private market interest and investment in the Development of public Vertical Infrastructure within the State;
- (4) assisting in establishing a comprehensive strategy for meeting the State’s Vertical Infrastructure needs;
- (5) identifying, cultivating, and sharing best practices that optimize the value provided to the public and satisfy public accountability, policy, and transparency objectives;

- (6) screening and approving the use of Public-Private Partnerships;
- (7) creating and adopting guidelines establishing a consistent framework to identify, procure, and execute Public-Private Partnerships;
- (8) strengthening public capacity and expertise on partnerships;
- (9) providing guidance on Public-Private Partnership laws, policies, and best practices;
- (10) evaluating and synthesizing any asset inventories submitted by Public Entities to identify current and future Vertical Infrastructure needs within the State, opportunities to utilize Public-Private Partnerships, and maximize resources and efficiency;
- (11) consulting with persons and jurisdictions affected by proposed or potential partnership projects;
- (12) establishing reporting requirements related to the use of Public-Private Partnerships within the State, which shall include, at a minimum, that an evaluative report be prepared within 120 days of Service Delivery of each Qualifying Project;
- (13) submitting an annual report to the Governor describing the nature of all approved partnerships; and
- (14) other duties necessary to effectuate the policies and objectives of this Act.

(c) The OVIPP shall be under the supervision and control of a qualified executive director whose role and function is dedicated to the performance and activities of the OVIPP.

(d) The OVIPP shall, at a minimum, employ or retain the services of persons with expertise in the following:

- (1) Regional or municipal planning;
- (2) Private investment or finance;
- (3) Public real estate development, contract, or procurement law;
- (4) Public Vertical Infrastructure development or financing;
- (5) Architectural and engineering design; and
- (6) Public-Private Partnerships.

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APPLICABLE DEFINITIONS

[REFERENCE APPENDIX A]

- (i) “Develop” or “Development”
- (ii) “Horizontal Infrastructure”
- (iii) OVIPP
- (iv) “Private Entity”
- (v) “Public Entity”
- (vi) “Public-Private Partnership”
- (vii) “Public-Public Partnership”
- (viii) Qualifying Project
- (ix) “Vertical Infrastructure”

Provide for Infrastructure Planning

BACKGROUND

Before determining what infrastructure improvements are needed, it is a best practice for jurisdictions to first evaluate the current inventory of its infrastructure assets (i.e. public facilities). For example: What does it own? Where are the assets located? What is their condition? This is an important assessment prior to approving a PPP and will help jurisdictions make informed, comprehensive decisions.

As expressed in the provisions below, the entity may submit a list of its assets to the oversight/advisory entity to create a “master” asset inventory, allowing the oversight/advisory entity to prioritize the state’s capital needs so that both public and private resources are used in the most efficient way possible.

SAMPLE LEGISLATIVE PROVISION

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Section A. Vertical Infrastructure Planning

(a) A Public Entity may identify and assess Vertical Infrastructure and real property assets within their jurisdiction. Any such asset inventory should include the geographical location and condition of the assets identified.

(b) A Public Entity may submit their inventory to the OVIPP and inventories may be used to assist Public Entities and the OVIPP in prioritizing Vertical Infrastructure funding, capital improvement needs and identifying opportunities for potential partnerships. The OVIPP may evaluate and synthesize the inventories into a comprehensive asset description and prioritization tool for current and future Vertical Infrastructure needs within the State.

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APPLICABLE DEFINITIONS

[REFERENCE APPENDIX A]

- (i) “OVIPP”
- (ii) “Public Entity”
- (iii) “Vertical Infrastructure”

Require an Objective Analysis to Determine Whether the Proposed Project is Suitable

BACKGROUND

The project identification process is essential because it determines whether a prospective project can and should be delivered as a PPP instead of using traditional public procurement methods; this is especially true because PPPs are not suitable for all projects, and projects for which they are suitable typically involve very large-stakes. A finding that PPP is a viable option does not mean that it is the best option. Consequently, such a project must undergo a subsequent evaluation in which the total costs of the project as delivered as a PPP are compared with the total costs of using traditional procurement methods to design/construct and then operate and maintain over a long-term period. This apples-to-apples comparison protects tax dollars by ensuring that a PPP is used only when it delivers the best value out of the available options.

SAMPLE LEGISLATIVE PROVISION

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Section A. Project Identification

(a) In accordance with the guidelines established by the OVIPP, a Public Entity or a Private Entity may present or propose an idea or concept for a project or potential Public-Private Partnership scheme to the OVIPP for discussion or feedback. Any idea or concept presented or proposed by a Private Entity shall be general in nature and shall not include any detailed or specific proposals or plans or be of the nature that would restrict or limit the competitive procurement process required by this Act. A Public Entity shall not solicit, receive, consider, evaluate, or accept any proposal from a Private Entity regarding the Development of any Vertical Infrastructure that is not procured through the processes described in this Act.

(b) A Public Entity that is interested in pursuing the use of a Public-Private Partnership for a specific project may initiate a request for the OVIPP to conduct a screening of that project through the processes and procedures established by OVIPP guidelines, which may include an assessment of:

- (1) whether the Partnership Agreement will be long-term and the Private Developing Entity will carry the Risk of life-cycle costs, including the initial capital outlay for design and construction and operational, maintenance and refurbishment requirements for the length of the contract term;

- (2) whether the Partnership Agreement will or can include measurable performance outputs that are linked to payments or to an otherwise beneficial Business Arrangement;
- (3) whether the project is sufficiently complex to encourage design and technology innovations;
- (4) whether the project creates a genuine business opportunity that is likely to attract a sufficient number of Private Entities and a competitive procurement process;
- (5) whether there are commercial opportunities that add value to the project and will either reduce service payments to the Private Developing Entity or otherwise provide a beneficial Business Arrangement; and
- (6) whether the total life-cycle costs of the project exceed \$100 million dollars.

(c) If, based upon the screening, the OVIPP determines a Public-Private Partnership is suitable for a project, the OVIPP may proceed and conduct a Value for Money Analysis to determine whether a Public Private Partnership is the optimal method, as compared to other Traditional Delivery Methods, through which to deliver the project. Prior to or in conjunction with a Value for Money Analysis, the OVIPP may consider whether the project is consistent with comprehensive Vertical Infrastructure planning and needs.

(d) The OVIPP guidelines shall establish the methodology for carrying out a Value for Money Analysis. This methodology shall include, but is not limited to: a qualitative assessment, a quantitative assessment, a Business Case analysis, and comparison of the net present value of the total, risk-adjusted costs of delivering a project through a Public-Private Partnership and through other Traditional Delivery Methods.

- (e) Where a Value for Money Analysis results in the conclusion that a Public-Private Partnership provides Value for Money and is the most suitable procurement method for Developing the Vertical Infrastructure project, the OVIPP may approve the project to proceed as a Public-Private Partnership. A project that is approved to and does proceed as a Public-Private Partnership shall be procured and Developed in accordance with this Act and will be considered a Qualifying Project.

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APPLICABLE DEFINITIONS
[REFERENCE APPENDIX A]

- (i) “Business Arrangement”
- (ii) “Business Case”
- (iii) “Develop” or “Development”
- (iv) “OVIPP”
- (v) “Partnership Agreement”
- (vi) “Private Entity”
- (vii) “Private Developing Entity”
- (viii) “Public Entity”
- (ix) “Public-Private Partnership”
- (x) “Qualifying Project”
- (xi) “Risk”
- (xii) “Traditional Delivery Method”
- (xiii) “Value for Money”
- (xiv) “Value for Money Analysis”
- (xv) “Vertical Infrastructure”

Ensure Adequate Public Capacity to Manage PPP Contracts

BACKGROUND

Because of the project complexity, which shifts the responsibility of designing, constructing, financing, maintaining, and oftentimes operating the infrastructure asset to the private entity over a long-term period (potentially 30–35 years), it is critical that public entities have unbiased, professional, technical advice before entering into a PPP contract. To protect taxpayer investment, prudent jurisdictions should require public entities to retain professional advisors, if they don't already have them in-house, including design professionals, legal and financial professionals and any other professionals who can assist the public entity in understanding the process and executing it in a way that best serves the public. Retaining these experts has proven to be a critical best practice in other countries that utilize PPP as well as a best practice in the transportation sector.

SAMPLE LEGISLATIVE PROVISION

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Section A. Professional Advisors

(a) Prior to issuing a request for qualifications, a Responsible Public Entity shall, as appropriate or otherwise recommended by the OVIPP, engage Professional Advisors, if such Professional Advisors have not already been retained. In retaining the services of the Professional Advisors, the Responsible Public Entity may utilize the services of professionals already in its employ, where qualified. If the Responsible Public Entity does not have in its employ the qualified professionals, the Responsible Public Entity shall procure the services of professionals pursuant to [insert State's professional services procurement statute or Brooks Act]. The Professional Advisors shall provide technical assistance and consulting services to the Responsible Public Entity and shall not be eligible to participate in any way with the Private Entities competing for the award of the Qualifying Project.

(b) The Professional Advisors shall provide unbiased, expert technical and professional advice, and other related services to the Responsible Public Entity. The Responsible Public Entity's lead staff architect and engineer shall participate in all meaningful and relevant Professional Advisor activities.

(c) The Professional Advisors may, but are not limited to, provide the following services:

- (1) preparing and evaluating procurement documentation;

- (2) reviewing the Private Entities' qualifications and proposed designs;
- (3) preparing and executing the Interim and Partnership Agreements;
- (4) evaluating and measuring performance requirements, including whether Service Delivery has been achieved; and
- (5) performing other duties and services required by the Responsible Public Entity, Partnership Agreement, or OVIPP.

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APPLICABLE DEFINITIONS
[REFERENCE APPENDIX A]

- (i) "OVIPP"
- (ii) "Partnership Agreement"
- (iii) "Professional Advisors"
- (iv) "Private Entity"
- (v) "Public Entity"
- (vi) "Public Private Partnership"
- (vii) "Responsible Public Entity"
- (viii) "Qualifying Project"
- (ix) "Service Delivery"

Provide for a Quality-Based Procurement Process

BACKGROUND

A competitive, transparent, and fair procurement process is critical for selecting the right private partner. This two-step procurement process in which private entities are vetted first on qualifications, with only the most qualified participating in the second step, proposals, accomplishes this goal. In addition to ensuring that a project will be awarded to only the most capable and experienced entity, only inviting short-listed private entities to participate in the expensive proposal process (and providing those entities with stipends to offset the significant costs involved) creates a more competitive process. This is because this process better aligns the varying cost of participating in the procurement with the varying likelihood of being awarded the contract (low cost and unknown likelihood of being awarded the contract in the first step, high cost (slightly offset by a stipend) with increased and predictable odds of being awarded the contract in the second). The result is a two-step process that promotes and attracts a larger pool of talent, creating more options and better value for the public.

SAMPLE LEGISLATIVE PROVISION

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Section A. Request for Qualifications

The Responsible Public Entity, with the assistance of any Professional Advisors, shall prepare and issue a public notice, pursuant to [insert State's public notice requirement statute], of the request for qualifications for the Qualifying Project. The request for qualifications shall include, but is not limited to, details on the following:

- (a) Project background, site, scope, budget and schedule;
- (b) Procurement requirements and procedures that will apply throughout the selection process;
- (c) Qualifications evaluation and scoring criteria, including the relative weighting of criteria;
- (d) Notice of any rules, ordinances, or goals established by the Responsible Public Entity, including: goals for minority- and women-owned, and small business participation and general performance requirements and applicable standards including, but not limited to, energy use, water consumption, security provisions;
- (e) The requirement that each Private Entity submit in its response to the request for qualifications the names and qualifications of the key personnel, including architects, professional engineers, builders, and financiers, whom the Private Entity proposes to use for the Development of the Qualifying Project;

(f) Notice that key personnel identified in a response to the request for qualifications may not be substituted or replaced without prior written approval of the Responsible Public Entity; and

(g) Other information that assists potential Private Entities in understanding the requirements of, and submitting qualifications for, the Qualifying Project.

Section B. Evaluation of Responses to Request for Qualifications

(a) The Responsible Public Entity, with the assistance of any Professional Advisors, shall evaluate and score the qualifications of each Private Entity it received in response to the request for qualifications in accordance with the guidelines prepared by the OVIPP and identified in the published request.

(b) The evaluation and scoring mechanism contained in the OVIPP guidelines shall consider, but is not limited to, the following criteria:

- (1) general reputation, qualifications, and industry experience, including key personnel;
- (2) financial capacity and capability to perform all services throughout the term of the contract;
- (3) managerial resources and management plan;
- (4) safety record;
- (5) past performance and capacity to perform, including key personnel;
- (6) ability to complete work in a timely and satisfactory manner;
- (7) technical competence and experience with similar projects, except that

cost-related or price-related evaluation factors are not permitted at this stage; and

- (8) experience with local and regional climate and geographical conditions.

(c) Each Private Entity must:

- (1) select or designate organizations and professional key personnel that are members of its team based on demonstrated competence and qualifications, in the manner provided by [insert State's professional services procurement statute or Brooks Act];
- (2) certify to the Responsible Public Entity that each selection or designation was based on demonstrated competence and qualifications, in the manner provided by [insert State's professional procurement statute or Brooks Act]; and
- (3) commit that all key personnel have been identified and will not be changed, except for Cause, throughout the proposed project development and operation.

(d) The Responsible Public Entity, with the advice of Professional Advisors, shall analyze responses and shortlist the three highest scoring Private Entities who will be invited to respond to the request for proposals.

Section C. Request for Proposals

(a) The Responsible Public Entity, with the assistance of Professional Advisors, shall prepare and issue a public notice, pursuant to [insert State's public notice requirement statute], of the request for proposals from the three most qualified Private Entities identified under section [Insert Request for Qualifications Section, supra.].

(b) The request for proposals must include, at a minimum, details and documentation of the:

- (1) initial design concept;
- (2) output specifications;
- (3) performance specifications;
- (4) service requirements;
- (5) payment structure mechanism(s);
- (6) proposed risk allocation and key contractual provisions;
- (7) requested elements of the cost proposal or Business Arrangement;
- (8) requested elements of the design proposal, which, at minimum shall require the proposal to:
 - i. build upon the initial design concept, or offer alternative design approaches consistent with the programming needs of the Responsible Public Entity; and
 - ii. anticipate problems with the initial design concept or alternative design approach and offer alternative design solutions.
- (9) proposal scoring criteria, including the relative weighting of proposal elements; notice of any rules, ordinances, or goals established by the Responsible Public Entity, including: goals for minority- and women-owned and small business participation, and general performance requirements and applicable standards including, but not limited to, energy use, water consumption, security provisions; and
- (10) the Responsible Public Entity shall offer an unsuccessful Private Entity

that submits a responsive response to the Public Entity's request for proposals under section [insert Request for Qualifications section, supra.] a stipend for preliminary services fees associated with the development of the proposal, included in the Request for Proposals; and,

- (11) other aspects of the Qualifying Project or evaluation process as the OVIPP or Responsible Public Entity determine necessary.

(c) The Responsible Public Entity shall conduct structured, interactive meetings or workshops with shortlisted Private Entities prior to the submission of proposals that facilitate open and equitable dialogue between the parties and enhance the Private Entities' understanding of the Responsible Public Entity's requirements and expectations. The OVIPP shall create guidelines that establish an efficient fair, impartial, and reliable framework for these interactions.

(d) Proposal responses shall not be required to be received earlier than the 60th day after the date the Responsible Public Entity makes a public request for the proposals from the shortlisted Private Entities.

(e) Proposals shall be submitted so that the cost proposal and the design proposal, that includes the long-term service proposal, are sealed and submitted separately.

(f) Proposals that are not responsive to the request for proposals or do not meet the requirements established by the Responsible Public Entity for the Qualifying Project shall be returned to the Private Entity without further action.

(g) Any materials or data submitted to, or made available to, or received by the Responsible Public Entity, to the extent that the material or data consist of trade secrets, are confidential and are not public

records. Financial information received by the Responsible Public Entity that is related to a proposal is confidential and is not a public record until such time as a proposal is selected.

(h) An unsuccessful responsive Private Entity shall retain all rights to the work product submitted in their proposals. The Responsible Public Entity may not release or disclose to any person, including the successful Private Developing Entity, the work product contained in an unsuccessful responsive proposal. The Responsible Public Entity or its agents may not make use of any unique or non-ordinary design element, technique, method, or process contained in the unsuccessful responsive proposal that was not also contained in the successful proposal at the time of the original submittal, unless the Private Developing Entity acquires a license from the unsuccessful Private Entity. The Responsible Public Entity shall return all copies of any proposal or other information submitted by an unsuccessful responsive Private Entity.

(i) Prior to submission of a proposal, a Private Entity may request a review by the Responsible Public Entity of any information that the Private Entity has identified as confidential, to determine whether information would be subject to disclosure under applicable public records laws.

Section D. Evaluation of Responses to Request for Proposals

(a) The Responsible Public Entity, with the assistance of Professional Advisors and the OVIPP, shall first evaluate and score the sealed design proposal, including the long-term service proposal, in accordance with the criteria and weighting process and other applicable procedures established by the OVIPP and specified in the request for proposals

(b) The Responsible Public Entity, with the assistance of the Professional Advisors and the OVIPP, shall subsequently evaluate and score the sealed preliminary estimated Project cost proposal or Business Arrangement proposal associated with each design proposal, if designs were requested, in accordance with the criteria and weighting process and other applicable procedures established by the OVIPP and specified in the request for proposals. This evaluation shall include a revised Value for Money Analysis that substitutes the proposed Public-Private Partnership Project Costs for the official cost estimates.

(c) Each Private Entity's qualifications and proposal scores shall be combined in the manner described by OVIPP guidelines and the request for proposals and each Private Entity will subsequently be ranked based on that combined score.

(d) A Responsible Public Entity may require an independent audit of any and all cost estimates associated with a Private Entity's proposal, as well as a review of all public costs and potential liabilities to which taxpayers could be exposed. For any Qualifying Project with an estimated construction cost of over \$20 million dollars, the Responsible Public Entity also shall require the Private Entity to pay the costs for the independent audit.

Section E. Negotiation

After ranking the shortlisted Private Entities, the Responsible Public Entity shall first attempt to negotiate a Partnership Agreement with the highest overall ranked Private Entity. If the Responsible Public Entity is unable to reasonably negotiate a satisfactory Partnership Agreement with the selected Private Entity, the Responsible Public Entity shall, formally and in writing, end all negotiations with the Private Developing Entity and proceed to negotiate with the next Private Entity in the order of the

selection ranking until a Partnership Agreement is reached or reasonable negotiations with all ranked Private Entities end.

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APPLICABLE DEFINITIONS

[REFERENCE APPENDIX A]

(i) “Business Arrangement”

(ii) “Cause”

(iii) “Develop” or “Development”

(iv) “OVIPP”

(v) “Partnership Agreement”

(vi) “Private Developing Entity”

(vii) “Private Entity”

(viii) “Professional Advisors”

(ix) “Public-Private Partnership Project Costs”

(x) “Qualifying Project”

(xi) “Responsible Public Entity”

(xii) “Value for Money Analysis”

(xiii) “Vertical Infrastructure”

Allow for Unsolicited Ideas and Concepts, Not Unsolicited Proposals

BACKGROUND

Allowing unsolicited concepts and ideas to be submitted to a public entity or the OVIPP enables public entities to harness the innovation and efficiency of the private sector without creating an uneven and anti-competitive procurement process that can result from permitting unsolicited proposals.

SAMPLE LEGISLATIVE PROVISION

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Section A. Unsolicited Ideas and Concepts

(a) A Public Entity shall not solicit, receive, consider, evaluate, or accept any proposal from a Private Entity to Develop any Vertical Infrastructure that is not procured through the processes described in this Chapter. This does not preclude a Public Entity from receiving and considering unsolicited ideas and development concepts from a Private Entity.

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APPLICABLE DEFINITIONS

[REFERENCE APPENDIX A]

(i) "Public Entity"

(ii) "Private Entity"

(iii) "Develop"

(iv) "Vertical Infrastructure"

Provide for a Stipend to Unsuccessful, but Responsive, Bidders

BACKGROUND

Awarding stipends to unsuccessful bidders, whose proposals were responsive to the request for proposal, will lessen the financial burden for firms submitting design and other required work. Pre-construction design work requires extensive effort by architectural and engineering firms. Prior to developing the architectural plan and incorporating the appropriate engineering systems within, design professionals will usually initiate feasibility and environmental studies, assess site conditions and legal limitations for development (e.g. environmental and zoning), prepare site analyses, analyze scale and access issues in relation to surrounding buildings and infrastructure (utilities and transit), analyze the impact of sun path, lines of sight and circulation patterns, and develop a building “program” that outlines how the space within the building will be used and occupied and how its occupants will circulate and relate to each other. After all of this preliminary work has been completed, the design process can begin.

These professional services are inextricably intertwined with design services and are costly in terms of dollars and work hours. Providing reasonable compensation for the work produced, as proposed in the below provision, may increase competition and proposal quality by making the endeavor more economically feasible, thus expanding the pool of firms able to participate. The alternative, and better, scenario would involve elimination of all design competitions in the procurement process to foster a more meaningful design process, between the selected design team and the end-user client.

SAMPLE LEGISLATIVE PROVISION

Content may be copied and pasted as needed.

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Section A. Stipends for Unsuccessful Bidders

(a) The Responsible Public Entity shall offer an unsuccessful Private Entity that submits a responsive response to the Public Entity’s request for proposals under section [insert request for proposals section, supra.] a stipend for preliminary services fees associated with the development of the proposal.

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APPLICABLE DEFINITIONS

[REFERENCE APPENDIX A]

- (i) “Responsible Public Entity”
- (ii) “Private Entity”
- (iii) “Public Entity”

Provide a *General Framework of Critical Elements for PPP Contracts*

BACKGROUND

The content and implementation of a PPP contract are critical to managing the terms, expectations, and risks of the project. Though PPP contracts, like the projects for which they are created, are typically unique, there are certain fundamental contractual elements that should—and must—be addressed in each agreement. Requiring that these contractual elements be addressed (and *not* how they will be addressed) provides public and private parties a predictable and flexible framework both before and during contract negotiations.

SAMPLE LEGISLATIVE PROVISION

Content may be copied and pasted as needed.

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Section A. Partnership Contract

(a) The Responsible Public Entity, subject to any relevant guidelines established by the OVIPP, shall enter into a Partnership Agreement with the Private Entity selected pursuant to processes prescribed in this Act.

(b) The Partnership Agreement shall address the following:

- (1) Scope and term of the agreement;
- (2) Performance specifications;
- (3) Property interests and authorization to occupy throughout the term of the agreement;
- (4) Names and contact information for all team members, including a provi-

sion that commits to maintaining the identified team composition throughout the Partnership Agreement term, except for Cause;

- (5) Process for reviewing the Private Developing Entity's plans and specifications for the Development of the Qualifying Project to ensure that if the plans and specifications conform to standards acceptable to the Responsible Public Entity;
- (6) Delivery schedule, including the date for the acquisition of or the beginning of construction or improvements to the Public Project, and Service Delivery;
- (7) Rights and duties of the Private Developing Entity and Responsible Public Entity through the course of the Development of the Qualifying Project, including in the event of force majeure and other unforeseeable natural events;
- (8) Inspection and monitoring of the Qualifying Project by the Responsible Public Entity, or a representative thereof, to ensure that the Private Developing Entity's Development of the Qualifying Project is in accordance with the Partnership Agreement;
- (9) Specific Service Delivery plan and standards, including mechanism to measure the Service Delivery at the specified performance standards;
- (10) Specific plan to ensure proper maintenance of the Qualifying Project

throughout the term of the Partnership Agreement;

- (11) Specific plan for the disposition and condition of the Qualifying Project upon completion of the Partnership Agreement, and other necessary end of term arrangements;
- (12) Financing obligations of the Private Developing Entity and the Responsible Public Entity;
- (13) Delivery of performance and payment bonds in connection with the development and/or operation of the Qualifying Project and in the forms and amounts satisfactory to the Responsible Public Entity and in compliance with applicable laws for all construction activities;
- (14) Compensation to the Private Developing Entity and the payment structure mechanism. Such compensation and payment structure mechanism shall take into account the conditions in which payment may be adjusted, suspended, or otherwise affected in case of failure to deliver a service or perform an obligation required by the Partnership Agreement;
- (15) Reimbursement to be paid to the Responsible Public Entity for services provided by the Responsible Public Entity;
- (16) Apportionment of expenses between the Private Developing Entity and the Responsible Public Entity;
- (17) Periodic filing by the Private Developing Entity of appropriate financial statements and other Qualifying Project-related reports in a form acceptable to the Responsible Public Entity;

(18) Grounds for, and the policies and procedures governing the rights, responsibilities, and remedies of, the parties in the event the Interim or Partnership Agreements are terminated or there is a Material Default;

(19) Rights and remedies available in the event of default or delay, such as liquidated damages in the event of Service Delivery delays;

(20) Procedures for resolving disputes between the Private Developing Entity and the Responsible Public Entity, including whether arbitration or other alternative dispute resolution mechanisms, such as dispute boards, may be used or required;

(21) Maintenance of a policy or policies of public liability insurance, copies of which shall be filed with the Responsible Public Entity accompanied by proofs of coverage, or self-insurance, each in form and amount satisfactory to the Responsible Public Entity and reasonably sufficient to insure coverage of tort liability to the public employees and to enable continued operation of the Qualifying Project;

(22) Procedures for amendment of the Partnership Agreement, including any scope changes or modifications;

(23) Whether fees and rents may be imposed and collected from members of the public for the use of the Qualifying Project and the basis by which such user fees or rents shall be determined and modified;

(24) Regulation of revenues received from use of the Qualifying Project and the specific portion of revenues from any fee-generating uses to be returned to the Responsible Public Entity and the OVIPP over the life of the agreement; and

(25) A statement ensuring compliance with applicable federal, state and local labor and public work laws.

Section B. Interim Agreement

Before or in connection with the negotiation of a Partnership Agreement, the Responsible Public Entity may enter into an Interim Agreement. An Interim Agreement does not obligate the Responsible Public Entity to enter into a Partnership Agreement. An Interim Agreement shall be limited to provisions terms and conditions that:

- (a) authorize the Private Entity to commence activities for which it may be compensated related to the proposed Qualifying Project, including, but not limited to: project planning and development; design; environmental analysis and mitigation; surveying; and financial and revenue analysis, including ascertaining the availability of financing;
- (b) establish the process and timing of the negotiation of the Partnership Agreement; and
- (c) relate to any aspect of the Development of a Qualifying Project that the OVIPP or parties consider appropriate.

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APPLICABLE DEFINITIONS [REFERENCE APPENDIX A]

- (i) “Cause”
- (ii) “Develop” or “Development”
- (iii) “Interim Agreement”
- (iv) “Material Default”
- (v) “OVIPP”
- (vi) “Partnership Agreement”
- (vii) “Private Developing Entity”
- (viii) “Private Entity”
- (ix) “Public Entity”
- (x) “Qualifying Project”
- (xi) “Responsible Public Entity”
- (xii) “Service Delivery”

Consider Other Miscellaneous Legal Provisions

BACKGROUND

Because of their unique nature—using a single-contract for the design, construction, finance, maintenance, and sometimes operation of an infrastructure asset—the PPP procurement process often entails an unusual, closed-universe framework in which laws that would typically apply to any public procurement, no longer apply to PPP unless expressly included in the PPP law. While this approach seems appropriate given the unique circumstances of PPP procurement, it is important to ensure that any laws intended to apply to PPP, such as eminent domain authority, are clearly identified (and explained, if necessary) in the PPP law to prevent ambiguity or confusion.

SAMPLE LEGISLATIVE PROVISIONS

Content may be copied and pasted as needed.

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Section A. Diversity and Community Engagement

(a) A Private Developing Entity and its contractors shall make a good-faith effort to comply with [insert State’s relevant minority, women, and small business participation statute(s)] and recruit and select minority- and woman-owned and small business entities.

(b) A Private Developing Entity and its contractors shall make a good-faith effort to encourage and utilize qualified, locally-based businesses.

Section B. Notice to Affected Jurisdictions and Public Comment

(a) A Public Entity shall notify each Affected Jurisdiction of its intent to use a Public-Private Partnership before the Public Entity issues the request for qualifications for a Qualifying Project.

(b) A Public Entity shall hold at least one public hearing before the Public Entity begins the process for procuring a project.

Section C. Eminent Domain

This Act does not alter the eminent domain laws of this state or grant the power of eminent domain to any person who is not expressly granted that power under other state law.

Section D. Sovereign Immunity

This Act does not waive the sovereign immunity of a Responsible Public Entity, an Affected Jurisdiction, or an officer or employee thereof with respect to participation in, or approval of, any part of a Qualifying Project or its operation, including, but not limited to, interconnection of the Qualifying Project with any other Vertical Infrastructure. A county or municipality in which a Qualifying Project is located possesses sovereign immunity with respect to the project, including, but not limited to, its design, construction, and operation.

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APPLICABLE DEFINITIONS

[REFERENCE APPENDIX A]

(i) “Affected Jurisdiction”

(ii) “Private Developing Entity”

(iii) “Private Entity”

(iv) “Public Entity”

(v) “Qualifying Project”

(vi) “Vertical Infrastructure”

(vii) “Responsible Public Entity”



APPENDIX A: APPLICABLE DEFINITIONS

- (a) **“Affected Jurisdiction”** shall mean any county, city, town, school district, or municipality in which all or a portion of the Qualifying Project is located in or is affected.
- (b) **“Ancillary Costs”** shall mean the indirect costs of delivering a Project, including: costs incurred by Public Entities related to up-front procurement costs; project management costs; architectural, engineering, financial, legal, risk, and technical advisor fees; and contract management costs over the life of the Project.
- (c) **“Base Costs”** shall mean all capital and operating costs associated with Developing, delivering, and owning the project and related services over a pre-determined period of time.
- (d) **“Business Arrangement”** shall mean the offered or finalized components of an overall agreement between the Public and Private Entities. It can include joint use of final Vertical Infrastructure, additional capabilities, and other factors in addition to cost payments.
- (e) **“Business Case”** shall mean a detailed statement of project objectives and characteristics, owner expectations and requirements, feasibility and Risk analyses, funding sources, and other relevant project information identified by the OVIPP.
- (f) **“Cause”** shall mean an action, such as the termination of a contract or a relationship of employment, that it is based on a breach, misfeasance, or other inappropriate action of the other party.
- (g) **“Develop”** or **“Development”** shall mean the design, construction, alteration, finance, maintenance, or operation of Vertical Infrastructure.
- (h) **“Financing Costs”** shall mean the costs associated with borrowing and issuing public debt.
- (i) **“Horizontal Infrastructure”** shall mean any and all government-funded infrastructure that does not involve a public building except incidental structures with limited public access and use.
- (j) **“Interim Agreement”** shall mean the agreement, including a memorandum of understanding or binding preliminary agreement, authorized by section [insert interim agreement section number] between the Responsible Public Entity and a Private Entity that proposes to Develop a Qualifying Project.
- (k) **“Material Default”** shall mean any default by the Private Developing Entity in the performance of its duties under the Partnership Agreement or Interim Agreement that jeopardizes adequate service to the public from a Qualifying Project.
- (l) **“OVIPP”** shall mean the Office of Vertical Infrastructure Planning and Partnerships established in section [insert OVIPP section number].
- (m) **“Partnership Agreement”** shall mean the agreement required by section [insert Partnership Agreement section number] between a Responsible Public Entity and a Private Developing Entity to Develop a Qualifying Project.

> For more information, please contact the AIA Local Government Division at govaffs@aia.org.

- (n) **“Premium Costs”** shall mean the costs paid to the Private Developing Entity as compensation for the added Risks transferred to them under the Partnership Agreement.
- (o) **“Private Developing Entity”** shall mean the Private Entity that enters into a Partnership Agreement or Interim Agreement with a Responsible Public Entity to Develop a Qualifying Project under this Chapter.
- (p) **“Private Entity”** shall mean any natural person, corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public-benefit corporation, nonprofit entity, special purpose vehicle, or other private business entity.
- (q) **“Professional Advisors”** shall mean the accounting, architecture, construction, engineering, finance, legal, and project and risk management specialists retained or employed to provide professional expertise and guidance to a Responsible Public Entity pursuant to section [insert Professional Advisors section number].
- (r) **“Public Entity”** shall mean the State and any agency or authority thereof; any county, city or town and any other political subdivision of the State; any public body politic or corporate; or any regional entity that serves a public purpose.
- (s) **“Public-Private Partnership”** (or “PPP”) shall mean a single, long-term, performance-based agreement between a Responsible Public Entity and a Private Developing Entity for the Development of a Qualifying Project, in which appropriate Risks and benefits can be allocated in a cost-effective manner between the contractual partners and where ownership of the Qualifying Project remains with the Responsible Public Entity, and the operation, if any, and maintenance of the Qualifying Project may revert to the Responsible Public Entity at the end of the contract term.
- (t) **“Public-Private Partnership Project Costs”** shall mean the risk-adjusted, net present value of the costs associated with Developing a project through a Public-Private Partnership which include, but are not limited to: Ancillary Costs, Base Costs, Premium Costs, Financing Costs; and value of relevant Risks.
- (u) **“Public-Public Partnership”** shall mean an agreement between two or more Public Entities to jointly develop and use Vertical Infrastructure.
- (v) **“Qualifying Project”** shall mean a Vertical Infrastructure project approved by the OVIPP to proceed as a Public-Private Partnership pursuant to this Chapter.
- (w) **“Responsible Public Entity”** shall mean a Public Entity that has been approved by the OVIPP to Develop a Qualifying Project using a Public-Private Partnership.
- (x) **“Risk”** shall mean any risk associated with the project and the Development thereof that must be identified, assessed, allocated, and managed throughout the life of a project for the project to be successful.
- (y) **“Service Delivery”** shall mean the point in which a Qualifying Project is available and ready to use at the specified performance standards prescribed in the Partnership Agreement.
- (z) **“Traditional Delivery Method”** shall mean a delivery method other than a Public-Private Partnership that Public Entities are authorized to

utilize, individually or in combination, pursuant to [cite State’s procurement method statute(s)] to deliver Vertical Infrastructure.

- (aa) **“Traditional Project Costs”** shall mean the risk-adjusted, net present value of costs associated with Developing a project through Traditional Delivery Methods which include, but are not limited to: Ancillary Costs; Base Costs; Financing Costs; and value of relevant Risks.
- (bb) **“Value for Money”** shall mean an objective assessment of whether a Public Entity’s spending optimizes its use of resources to achieve the intended outcome. Achieving Value for Money is based on the totality of circumstances and may be described in terms of the following criteria:
 - (1) reducing the cost, time, or effort of resources used, with a regard for maintaining quality or;
 - (2) delivering the same level of service, or better, for less cost, time, or effort, with a regard for maintaining quality; and
 - (3) delivering a better service or getting a better return for the same amount of expense, time, or effort.

(cc) **“Value for Money Analysis”** shall mean the value calculated, in percentage terms, when comparing the costs to Develop a project as delivered through a Traditional Delivery Method versus a Public-Private Partnership to determine which procurement approach produces the best value to the public over the long-term.

(dd) **“Vertical Infrastructure”** shall mean any and all buildings funded or owned by a Public Entity to serve a public purpose.



APPENDIX B: AIA COMPREHENSIVE LEGISLATION

The Vertical Infrastructure Planning and Partnership Act

SECTION 1. SHORT TITLE

This Chapter shall be known and may be cited as the “Vertical Infrastructure Planning and Partnership Act”, (“VIPPA”).

SECTION 2. PUBLIC POLICY

Vertical Infrastructure is essential to a vibrant economy. [Insert State] has a growing backlog of unmet Vertical Infrastructure needs, with limited public funds to pay for them. To assist in mitigating expected funding gaps and to secure a sound and resilient economy now and in the future, Public Entities in the State should approach Development of Vertical Infrastructure innovatively and efficiently. Innovation and efficiency can be fully optimized through intergovernmental planning, resource-sharing, and properly applied and approved financing tools to authorize, encourage, and guide Public Entities to partner with other Public and Private Entities to Develop Vertical Infrastructure.

When used appropriately, partnership opportunities have the potential to meet some of the [Insert State]’s Vertical Infrastructure needs by leveraging and supplementing the limited public funds available for projects, delivering improved services and Value for Money, and providing other measurable, long-term benefits to the public. However, partnerships are a sophisticated model for delivering Vertical Infrastructure

that require informed policies, procedures, internal controls, risk management measures, and private sector market interest that are established prior to their use in order to ensure optimal project outcomes and protect the public’s best interest. Comprehensive infrastructure partnership policies will enable and encourage Public Entities to creatively Develop Vertical Infrastructure in a way that reduces financial burdens on taxpayers, makes full use of land resources and buildings, reduces wasteful construction spending, optimizes performance of buildings, minimizes government expenses and public Risk, and maximizes opportunities for private sector investment.

SECTION 3. DEFINITIONS

The following definitions shall apply to this Chapter:

(a) **“Affected Jurisdiction”** shall mean any county, city, town, school district, or municipality in which all or a portion of the Qualifying Project is located in or is affected.

(b) **“Ancillary Costs”** shall mean the indirect costs of delivering a project, including: costs incurred by Public Entities related to up-front procurement costs; project management costs; architectural, engineering, financial, legal, risk, and technical advisor fees; and contract management costs over the life of the project.

> For more information, please contact the AIA Local Government Division at govaffs@aia.org.

(c) **“Base Costs”** shall mean all capital and operating costs associated with Developing, delivering, and owning the project and related services over a pre-determined period of time.

(d) **“Business Arrangement”** shall mean the offered or finalized components of an overall agreement between the Public and Private Entities. It can include joint use of final Vertical Infrastructure, additional capabilities, and other factors in addition to cost payments.

(e) **“Business Case”** shall mean a detailed statement of project objectives and characteristics, owner expectations and requirements, feasibility and Risk analyses, funding sources, and other relevant project information identified by the OVIPP.

(f) **“Cause”** shall mean an action, such as the termination of a contract or a relationship of employment, that it is based on a breach, misfeasance, or other inappropriate action of the other party.

(g) **“Develop”** or **“Development”** shall mean the design, construction, alteration, finance, maintenance, or operation of Vertical Infrastructure.

(h) **“Financing Costs”** shall mean the costs associated with borrowing and issuing public debt.

(i) **“Horizontal Infrastructure”** shall mean any and all government-funded infrastructure that does not involve a public building except incidental structures with limited public access and use .

(j) **“Interim Agreement”** shall mean the agreement, including a memorandum of understanding or binding preliminary agreement, authorized by section 17 between the Responsible Public Entity and a Private Entity that proposes to Develop a Qualifying Project.

(k) **“Material Default”** shall mean any default by the Private Developing Entity in the performance of its duties under the Partnership Agreement or Interim Agreement that jeopardizes adequate service to the public from a Qualifying Project.

(l) **“OVIPP”** shall mean the Office of Vertical Infrastructure Planning and Partnerships established in section 6.

(m) **“Partnership Agreement”** shall mean the agreement required by section 16 between a Responsible Public Entity and a Private Developing Entity to Develop a Qualifying Project.

(n) **“Premium Costs”** shall mean the costs paid to the Private Developing Entity as compensation for the added Risks transferred to them under the Partnership Agreement.

(o) **“Private Developing Entity”** shall mean the Private Entity that enters into a Partnership Agreement or Interim Agreement with a Responsible Public Entity to Develop a Qualifying Project under this Chapter.

(p) **“Private Entity”** shall mean any natural person, corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public-benefit corporation, nonprofit entity, special purpose vehicle, or other private business entity.

(q) **“Professional Advisors”** shall mean the accounting, architecture, construction, engineering, finance, legal, and project and risk management specialists retained or employed to provide professional expertise and guidance to a Responsible Public Entity pursuant to section 9.

(r) **“Public Entity”** shall mean the State and any agency or authority thereof; any county, city or town and any other political subdivision of the State; any public body

politic or corporate; or any regional entity that serves a public purpose.

(s) **“Public-Private Partnership”** (or “PPP”) shall mean a single, long-term, performance-based agreement between a Responsible Public Entity and a Private Developing Entity for the Development of a Qualifying Project, in which appropriate Risks and benefits can be allocated in a cost-effective manner between the contractual partners and where ownership of the Qualifying Project remains with the Responsible Public Entity, and the operation, if any, and maintenance of the Qualifying Project may revert to the Responsible Public Entity at the end of the contract term.

(t) **“Public-Private Partnership Project Costs”** shall mean the risk-adjusted, net present value of the costs associated with Developing a project through a Public-Private Partnership which include, but are not limited to: Ancillary Costs, Base Costs, Premium Costs, Financing Costs; and value of relevant Risks.

(u) **“Public-Public Partnership”** shall mean an agreement between two or more Public Entities to jointly develop and use Vertical Infrastructure.

(v) **“Qualifying Project”** shall mean a Vertical Infrastructure project approved by the OVIPP to proceed as a Public-Private Partnership pursuant to this Chapter.

(w) **“Responsible Public Entity”** shall mean a Public Entity that has been approved by the OVIPP to Develop a Qualifying Project using a Public-Private Partnership.

(x) **“Risk”** shall mean any risk associated with the project and the Development thereof that must be identified, assessed, allocated, and managed throughout the life of a project for the project to be successful.

(y) **“Service Delivery”** shall mean the point in which a Qualifying Project is available and ready to use at the specified performance standards prescribed in the Partnership Agreement.

(z) **“Traditional Delivery Method”** shall mean a delivery method other than a Public-Private Partnership that Public Entities are authorized to utilize, individually or in combination, pursuant to [cite State’s procurement method statute(s)] to deliver Vertical Infrastructure.

(aa) **“Traditional Project Costs”** shall mean the risk-adjusted, net present value of costs associated with Developing a project through Traditional Delivery Methods which include, but are not limited to: Ancillary Costs; Base Costs; Financing Costs; and value of relevant Risks.

(bb) **“Value for Money”** shall mean an objective assessment of whether a Public Entity’s spending optimizes its use of resources to achieve the intended outcome. Achieving Value for Money is based on the totality of circumstances and may be described in terms of the following criteria:

- a. reducing the cost, time, or effort of resources used, with a regard for maintaining quality or;
- b. delivering the same level of service, or better, for less cost, time, or effort, with a regard for maintaining quality; and
- c. delivering a better service or getting a better return for the same amount of expense, time, or effort.

(cc) **“Value for Money Analysis”** shall mean the value calculated, in percentage terms, when comparing the costs to Develop a project as delivered through a Traditional Delivery Method versus a Public-Private Partnership to determine which procurement approach produces the best value to the public over the long-term.

(dd) “Vertical Infrastructure” shall mean any and all buildings funded or owned by a Public Entity to serve a public purpose.

SECTION 4. AUTHORIZATION; APPLICABILITY

(a) This Chapter:

- (1) Creates a process by which Public Entities may partner with Private Entities for the Development of Vertical Infrastructure through the use of Public-Private Partnerships; and
- (2) Authorizes Public Entities to partner with other Public Entities for the Development of Vertical Infrastructure through the use of Public-Public Partnerships.

(b) All Vertical Infrastructure Public-Private Partnerships shall be procured in the manner described by this Chapter.

(c) A Public Entity shall not solicit, receive, consider, evaluate, or accept any proposal from a Private Entity to Develop any Vertical Infrastructure that is not procured through the processes described in this Chapter. This does not preclude a Public Entity from receiving and considering unsolicited ideas and development concepts from a Private Entity.

(d) This Chapter does not apply to Horizontal Infrastructure.

SECTION 5. VERTICAL INFRASTRUCTURE PLANNING

(a) A Public Entity may identify and assess Vertical Infrastructure assets within their jurisdiction. This inventory shall include the geographical location and condition of such assets.

(b) A Public Entity may submit their inventory to the OVIPP and inventories may be used to assist Public Entities and the OVIPP in prioritizing Vertical Infrastructure funding, capital improvement needs and identifying opportunities for potential partnerships. The OVIPP may evaluate and synthesize the inventories into a comprehensive asset description and prioritization tool for current and future Vertical Infrastructure needs within the State.

SECTION 6. OFFICE OF VERTICAL INFRASTRUCTURE PLANNING AND PARTNERSHIPS

(a) The Office of Vertical Infrastructure Planning and Partnerships (OVIPP) shall hereby be established as a public advisory agency.

(b) The OVIPP shall be responsible for administering the provisions of this Act and the guidelines established pursuant thereto. The role of the OVIPP shall involve, but is not limited to:

- (1) providing technical assistance, expertise, and capacity necessary for a successful partnership program;
- (2) creating an attractive, predictable, prosperous, and transparent environment that encourages private investment within the State and protects the public interest;
- (3) gauging and promoting private interest and investment in the Development of Vertical Infrastructure within the State;
- (4) assisting in establishing a comprehensive strategy for meeting the State’s Vertical Infrastructure needs;
- (5) identifying, cultivating, and sharing best practices that optimize the value provided to the public and satisfy

public accountability, policy, and transparency objectives;

- (6) screening and approving the use of Public-Private Partnerships for Vertical Infrastructure;
- (7) creating and adopting guidelines establishing a consistent framework to identify, procure, and execute Public-Private Partnerships;
- (8) strengthening public capacity and expertise on partnerships;
- (9) providing guidance on Public-Private Partnership laws, policies, and best practices;
- (10) evaluating and synthesizing the asset inventories submitted by Public Entities to identify current and future Vertical Infrastructure needs within the State, opportunities to utilize Public-Private Partnerships, and maximize resources and efficiency;
- (11) consulting with persons and jurisdictions affected by proposed Vertical Infrastructure projects;
- (12) establishing reporting requirements related to the use of Public-Private Partnerships within the State, which shall include, at a minimum, that an evaluative report be prepared within 120 days of Service Delivery of each Qualifying Project;
- (13) submitting an annual report to the Governor describing the nature of all approved partnerships; and
- (14) other duties necessary to effectuate the policies and objectives of this Chapter.

(c) The OVIPP shall be under the supervision and control of a qualified executive director whose role and function is dedicat-

ed to the performance and activities of the OVIPP.

(d) The OVIPP shall, at a minimum, employ or retain the services of persons with expertise in the following:

- (7) Regional or municipal planning;
- (8) Private investment or finance;
- (9) Public real estate development, contract, or procurement law;
- (10) Public infrastructure development or financing;
- (11) Architectural and engineering design; and
- (12) Public-Private Partnerships.

SECTION 7. PROJECT IDENTIFICATION

(a) In accordance with the guidelines established by the OVIPP, a Public Entity or a Private Entity may present or propose an idea or concept for a project or potential Public-Private Partnership scheme to the OVIPP for discussion or feedback. Any idea or concept presented or proposed by a Private Entity shall be general in nature and shall not include any detailed or specific proposals or plans or be of the nature that would restrict or limit the competitive procurement process required by this Chapter. A Public Entity shall not solicit, receive, consider, evaluate, or accept any proposal from a Private Entity regarding the Development of any Vertical Infrastructure that is not procured through the processes described in this Chapter.

(b) A Public Entity that is interested in pursuing the use of a Public-Private Partnership for a specific project may initiate a request for the OVIPP to conduct a screening of that project through the processes and

procedures established by OVIPP guidelines, which may include an assessment of:

- (1) whether the Partnership Agreement will be long-term and the Private Developing Entity will carry the Risk of life-cycle costs, including the initial capital outlay for design and construction and operational, maintenance and refurbishment requirements for the length of the contract term;
- (2) whether the Partnership Agreement will or can include measurable performance outputs that are linked to payments or to an otherwise beneficial Business Arrangement;
- (3) whether the project is sufficiently complex to encourage design and technology innovations;
- (4) whether the project creates a genuine business opportunity that is likely to attract a sufficient number of Private Entities and a competitive procurement process;
- (5) whether there are commercial opportunities that add value to the project and will either reduce service payments to the Private Developing Entity or otherwise provide a beneficial Business Arrangement; and
- (6) whether the total life-cycle costs of the project exceed \$100 million dollars.

(c) If, based upon the screening, the OVIPP determines a Public-Private Partnership is suitable for a project, the OVIPP may proceed and conduct a Value for Money Analysis to determine whether a Public-Private Partnership is the optimal method, as compared to other Traditional Delivery Methods, through which to deliver the project. Prior to or in conjunction with a Value for Money Analysis, the OVIPP may

consider whether the project is consistent with comprehensive Vertical Infrastructure planning and needs.

(d) The OVIPP guidelines shall establish the methodology for carrying out a Value for Money Analysis. This methodology shall include, but is not limited to: a qualitative assessment, a quantitative assessment, a Business Case analysis, and comparison of the net present value of the total, risk-adjusted costs of delivering a project through a Public-Private Partnership and through other Traditional Procurement Methods.

(e) Where a Value for Money Analysis results in the conclusion that a Public-Private Partnership provides Value for Money and is the most suitable procurement method for Developing the Vertical Infrastructure project, the OVIPP may approve the project to proceed as a Public-Private Partnership. A project that is approved to and does proceed as a Public-Private Partnership shall be procured and Developed in accordance with this Chapter and will be considered a Qualifying project.

SECTION 8. NOTICE TO AFFECTED JURISDICTIONS AND PUBLIC COMMENT

(a) Public Entity shall notify each Affected Jurisdiction of its intent to use a Public-Private Partnership before the Public Entity issues the request for qualifications for a Qualifying Project.

(b) A Public Entity shall hold at least one public hearing before the Public Entity begins the process for procuring a Qualifying Project.

SECTION 9. PROFESSIONAL ADVISORS

(a) Prior to issuing a request for qualifications pursuant to section 10, a Responsible

Public Entity shall, as appropriate or otherwise recommended by the OVIPP, engage Professional Advisors, if such Professional Advisors have not already been retained. In retaining the services of the Professional Advisors, the Responsible Public Entity may utilize the services of professionals already in its employ, where qualified. If the Responsible Public Entity does not have in its employ the qualified professionals, the Responsible Public Entity shall procure the services of professionals pursuant to [insert State's professional services procurement statute or Brooks Act]. The Professional Advisors shall provide technical assistance and consulting services to the Responsible Public Entity and shall not be eligible to participate in any way with the Private Entities competing for the award of the Qualifying Project.

(b) The Professional Advisors shall provide unbiased, expert technical and professional advice, and other related services to the Responsible Public Entity. The Responsible Public Entity's lead staff architect and engineer shall participate in all meaningful and relevant Professional Advisor activities.

(c) The Professional Advisors may, but are not limited to provide the following services:

- (1) preparing and evaluating procurement documentation;
- (2) reviewing the Private Entities' qualifications and proposed designs;
- (3) preparing and executing the Interim and Partnership Agreements;
- (4) evaluating and measuring performance requirements, including whether Service Delivery has been achieved; and
- (5) performing other duties and services required by the Responsible Public Entity, Partnership Agreement, or OVIPP.

SECTION 10. REQUEST FOR QUALIFICATIONS

The Responsible Public Entity, with the assistance of any Professional Advisors, shall prepare and issue a public notice, pursuant to [insert State's public notice requirement statute], of the request for qualifications for the Qualifying Project. The request for qualifications shall include, but is not limited to, details on the following:

(a) project background, site, scope, budget and schedule;

(b) Procurement requirements and procedures that will apply throughout the selection process;

(c) Qualifications evaluation and scoring criteria, including the relative weighting of criteria;

(d) Notice of any rules, ordinances, or goals established by the Responsible Public Entity, including: goals for minority- and women-owned, and small business participation and general performance requirements and applicable standards including, but not limited to, energy use, water consumption, security provisions;

(e) The requirement that each Private Entity submit in its response to the request for qualifications the names and qualifications of the key personnel, including architects, professional engineers, builders, and financiers, whom the Private Entity proposes to use for the Development of the Qualifying Project.

(f) Notice that key personnel identified in a response to the request for qualifications may not be substituted or replaced without prior written approval of the Responsible Public Entity; and

(g) Other information that assists potential Private Entities in understanding the

requirements of, and submitting qualifications for, the Qualifying Project.

SECTION II. EVALUATION OF RESPONSES TO REQUEST FOR QUALIFICATIONS

(a) The Responsible Public Entity, with the assistance of any Professional Advisors, shall evaluate and score the qualifications of each Private Entity it received in response to the request for qualifications in accordance with the guidelines prepared by the OVIPP and identified in the published request.

(b) The evaluation and scoring mechanism contained in the OVIPP guidelines shall consider, but is not limited to, the following criteria:

- (1) general reputation, qualifications, and industry experience, including key personnel;
- (2) financial capacity and capability to perform all services throughout the term of the contract;
- (3) managerial resources and management plan;
- (4) safety record;
- (5) past performance and capacity to perform, including key personnel;
- (6) ability to complete work in a timely and satisfactory manner;
- (7) technical competence and experience with similar projects, except that cost-related or price-related evaluation factors are not permitted at this stage; and
- (8) experience with local and regional climate and geographical conditions.

(c) Each Private Entity must:

- (9) select or designate organizations and professional key personnel that are members of its team based on demonstrated competence and qualifications, in the manner provided by [insert State's professional services procurement statute or Brooks Act];
- (10) certify to the Responsible Public Entity that each selection or designation was based on demonstrated competence and qualifications, in the manner provided by [insert State's professional procurement statute or Brooks Act]; and
- (11) commit that all key personnel have been identified and will not be changed, except for Cause, throughout the proposed project development and operation.

(d) The Responsible Public Entity, with the advice of Professional Advisors, shall analyze responses and shortlist the three highest scoring Private Entities who will be invited to respond to the request for proposals.

SECTION 12. REQUEST FOR PROPOSALS

(a) The Responsible Public Entity, with the assistance of Professional Advisors, shall prepare and issue a public notice, pursuant to [insert State's public notice requirement statute], of the request for proposals from the three most qualified Private Entities identified under section 11(d).

(b) The request for proposals must include, at a minimum, details and documentation of the:

- (1) initial design concept;
- (2) output specifications;

- (3) performance specifications;
- (4) service requirements;
- (5) payment structure mechanism(s);
- (6) proposed risk allocation and key contractual provisions;
- (7) requested elements of the cost proposal or Business Arrangement;
- (8) requested elements of the design proposal, which, at minimum shall require the proposal to:
 - i. build upon the initial design concept, or offer alternative design approaches consistent with the programming needs of the Responsible Public Entity; and
 - ii. anticipate problems with the initial design concept or alternative design approach and offer alternative design solutions.
- (9) proposal scoring criteria, including the relative weighting of proposal elements;
- (10) notice of any rules, ordinances, or goals established by the Responsible Public Entity, including: goals for minority- and women-owned and small business participation, and general performance requirements and applicable standards including, but not limited to, energy use, water consumption, security provisions; and
- (11) any anticipated stipend for unsuccessful but responsive proposals; and
- (12) other aspects of the Qualifying Project or evaluation process as the OVIPP or Responsible Public Entity determine necessary.

(c) The Responsible Public Entity shall conduct structured, interactive meetings or workshops with shortlisted Private Entities, pursuant to section 11(d), prior to the submission of proposals that facilitate open and equitable dialogue between the parties and enhance the Private Entities' understanding of the Responsible Public Entity's requirements and expectations.

(d) Proposal responses shall not be required to be received earlier than the 60th day after the date the Responsible Public Entity makes a public request for the proposals from the shortlisted Private Entities.

(e) Proposals shall be submitted so that the cost proposal and the design proposal, that includes the long-term service proposal, are sealed and submitted separately.

(f) Proposals that are not responsive to the request for proposals or do not meet the requirements established by the Responsible Public Entity for the Qualifying Project shall be returned to the Private Entity without further action.

(g) Any materials or data submitted to, or made available to, or received by the Responsible Public Entity, to the extent that the material or data consist of trade secrets, are confidential and are not public records. Financial information received by the Responsible Public Entity that is related to a proposal is confidential and is not a public record until such time as a proposal is selected.

(h) Prior to submission of a proposal, a Private Entity may request a review by the Responsible Public Entity of any information that the Private Entity has identified as confidential, to determine whether information would be subject to disclosure under applicable public records laws.

SECTION 13. EVALUATION OF RESPONSES TO REQUEST FOR PROPOSALS

(a) The Responsible Public Entity, with the assistance of Professional Advisors and the OVIPP, shall first evaluate and score the sealed design proposal, including the long-term service proposal, in accordance with the criteria and weighting process and other applicable procedures established by the OVIPP and specified in the request for proposals

(b) The Responsible Public Entity, with the assistance of the Professional Advisors and the OVIPP, shall subsequently evaluate and score the sealed preliminary estimated project cost proposal or Business Arrangement proposal associated with each design proposal, if designs were requested, in accordance with the criteria and weighting process and other applicable procedures established by the OVIPP and specified in the request for proposals. This evaluation shall include a revised Value for Money Analysis that substitutes the proposed Public-Private Partnership project Costs for the official cost estimates.

(c) Each Private Entity's qualifications and proposal scores shall be combined in the manner described by OVIPP guidelines and the request for proposals and each Private Entity will subsequently be ranked based on that combined score.

(d) A Responsible Public Entity may require an independent audit of any and all cost estimates associated with a Private Entity's proposal, as well as a review of all public costs and potential liabilities to which taxpayers could be exposed. For any Qualifying Project with an estimated construction cost of over \$20 million dollars, the Responsible Public Entity also shall require the Private Entity to pay the costs for the independent audit.

SECTION 14. NEGOTIATION

After ranking the shortlisted Private Entities under section 13, the Responsible Public Entity shall first attempt to negotiate a Partnership Agreement with the highest overall ranked Private Entity. If the Responsible Public Entity is unable to reasonably negotiate a satisfactory Partnership Agreement with the selected Private Entity, the Responsible Public Entity shall, formally and in writing, end all negotiations with the Private Developing Entity and proceed to negotiate with the next Private Entity in the order of the selection ranking until a Partnership Agreement is reached or reasonable negotiations with all ranked Private Entities end.

SECTION 15. ALTERNATIVE PROCESS FOR DESIGN PHASE

If the Responsible Public Entity and OVIPP agree that the Responsible Public Entity should complete, or have completed, the full design of the Vertical Infrastructure for any reason prior to the request for qualifications process as defined in section 10, including functional control of the final infrastructure, this Section for alternative Public-Private Partnership process may be used.

(a) A Private Entity may respond and propose on the construction, construction management, commissioning, operations, and maintenance of the project.

(b) The design and related design services during construction would remain with the Responsible Public Entity or their design contractors, as an extension of the Professional Advisors as discussed in Section 9 of this Chapter. Sections 10 through 14 of this Chapter shall still apply, except with the design function and related submissions removed.

SECTION 16. PARTNERSHIP AGREEMENT

(a) The Responsible Public Entity, subject to any relevant guidelines established by the OVIPP, shall enter into a Partnership Agreement with the Private Entity selected pursuant to processes prescribed in this Chapter.

(b) The Partnership Agreement shall address the following:

- (1) Scope and term of the agreement;
- (2) Output specifications;
- (3) Performance specifications;
- (4) Property interests and authorization to occupy throughout the term of the agreement;
- (5) Names and contact information for all team members, including a provision that commits to maintaining the identified team composition throughout the Partnership Agreement term, except for Cause;
- (6) Process for reviewing the Private Developing Entity's plans and specifications for the Development of the Qualifying Project to ensure that if the plans and specifications conform to standards acceptable to the Responsible Public Entity;
- (7) Delivery schedule, including the date for the acquisition of or the beginning of construction or improvements to the Public project, and Service Delivery;
- (8) Rights and duties of the Private Developing Entity and Responsible Public Entity through the course of the Development of the Qualifying Project, including in the event of

force majeure and other unforeseeable natural events;

- (9) Inspection and monitoring of the Qualifying Project by the Responsible Public Entity, or a representative thereof, to ensure that the Private Developing Entity's Development of the Qualifying Project is in accordance with the Partnership Agreement;
- (10) Specific Service Delivery plan and standards, including mechanism to measure the Service Delivery at the specified performance standards;
- (11) Specific plan to ensure proper maintenance of the Qualifying Project throughout the term of the Partnership Agreement;
- (12) Specific plan for the disposition and condition of the Qualifying Project upon completion of the Partnership Agreement, and other necessary end of term arrangements;
- (13) Financing obligations of the Private Developing Entity and the Responsible Public Entity;
- (14) Delivery of performance and payment bonds in connection with the development and/or operation of the Qualifying Project and in the forms and amounts satisfactory to the Responsible Public Entity and in compliance with applicable laws for all construction activities;
- (15) Compensation to the Private Developing Entity and the payment structure mechanism. Such compensation and payment structure mechanism shall take into account the conditions in which payment may be adjusted, suspended, or otherwise affected in case of failure to deliver a service or

- perform an obligation required by the Partnership Agreement;
- (16) Reimbursement to be paid to the Responsible Public Entity for services provided by the Responsible Public Entity;
 - (17) Apportionment of expenses between the Private Developing Entity and the Responsible Public Entity;
 - (18) Periodic filing by the Private Developing Entity of appropriate financial statements and other Qualifying Project-related reports in a form acceptable to the Responsible Public Entity;
 - (19) Grounds for, and the policies and procedures governing the rights, responsibilities, and remedies of, the parties in the event the Interim or Partnership Agreements are terminated or there is a Material Default;
 - (20) Rights and remedies available in the event of default or delay, such as liquidated damages in the event of Service Delivery delays;
 - (21) Procedures for resolving disputes between the Private Developing Entity and the Responsible Public Entity, including whether arbitration or other alternative dispute resolution mechanisms, such as dispute boards, may be used or required;
 - (22) Maintenance of a policy or policies of public liability insurance, copies of which shall be filed with the Responsible Public Entity accompanied by proofs of coverage, or self-insurance, each in form and amount satisfactory to the Responsible Public Entity and reasonably sufficient to insure coverage of tort liability to the public employees and to enable continued operation of the Qualifying Project;

- (23) Procedures for amendment of the Partnership Agreement, including any scope changes or modifications;
- (24) Whether fees and rents may be imposed and collected from members of the public for the use of the Qualifying Project and the basis by which such user fees or rents shall be determined and modified;
- (25) Regulation of revenues received from use of the Qualifying Project and the specific portion of revenues from any fee-generating uses to be returned to the Responsible Public Entity and the OVIPP over the life of the agreement; and
- (26) A statement ensuring compliance with applicable federal, state and local labor and public work laws.

SECTION 17. INTERIM AGREEMENT

Before or in connection with the negotiation of a Partnership Agreement, the Responsible Public Entity may enter into an Interim Agreement. An Interim Agreement does not obligate the Responsible Public Entity to enter into a Partnership Agreement. An Interim Agreement shall be limited to provisions terms and conditions that:

- (a) authorize the Private Entity to commence activities for which it may be compensated related to the proposed Qualifying Project, including, but not limited to: project planning and development; design; environmental analysis and mitigation; surveying; and financial and revenue analysis, including ascertaining the availability of financing;
- (b) establish the process and timing of the negotiation of the Partnership Agreement; and

(c) relate to any aspect of the Development of a Qualifying Project that the OVIPP or parties consider appropriate.

SECTION 18. FAIRNESS STIPEND

The Responsible Public Entity shall offer an unsuccessful Private Entity that submits a responsive response to the Public Entity's request for proposals under section 12 a stipend for preliminary services fees associated with the development of the proposal.

SECTION 19. INTELLECTUAL PROPERTY

(a) An unsuccessful responsive Private Entity shall retain all rights to the work product submitted in their proposals. The Responsible Public Entity may not release or disclose to any person, including the successful Private Developing Entity, the work product contained in an unsuccessful responsive proposal. The Responsible Public Entity or its agents may not make use of any unique or non-ordinary design element, technique, method, or process contained in the unsuccessful responsive proposal that was not also contained in the successful proposal at the time of the original submittal, unless the Private Developing Entity acquires a license from the unsuccessful Private Entity.

(b) The Responsible Public Entity shall return all copies of any proposal or other information submitted by an unsuccessful responsive Private Entity.

SECTION 20. DIVERSITY AND COMMUNITY ENGAGEMENT

(a) A Private Developing Entity and its contractors shall make a good-faith effort to comply with [insert State's relevant minority, women, and small business participation statute(s)] and recruit and select minority- and woman-owned and small business entities.

(b) A Private Developing Entity and its contractors shall make a good-faith effort to encourage and utilize qualified, locally-based businesses.

SECTION 21. EMINENT DOMAIN

This Chapter does not alter the eminent domain laws of this state or grant the power of eminent domain to any person who is not expressly granted that power under other state law.

SECTION 22. SOVEREIGN IMMUNITY

This Chapter does not waive the sovereign immunity of a Responsible Public Entity, an Affected Jurisdiction, or an officer or employee thereof with respect to participation in, or approval of, any part of a Qualifying Project or its operation, including, but not limited to, interconnection of the Qualifying Project with any other Vertical Infrastructure. A county or municipality in which a Qualifying Project is located possesses sovereign immunity with respect to the project, including, but not limited to, its design, construction, and operation.

