APPENDIX D. FHWA KEY ELEMENTS OF STATE PPP ENABLING STATUTES FOR HIGHWAY PROJECTS

This list of 28 key elements of state PPP enabling statutes for highway projects was developed by Nossaman, Guthner, Knox and Elliott LLP for the Federal Highway Administration (FHWA) in 2005. They are presented here as potentially relevant issues for state legislators to consider in relation to PPP legislation.

1. Does the relevant law allow solicited and unsolicited proposals for P3 projects?
2. Does the relevant law permit local/state/federal funds to be combined with private sector funds on a P3 project?
3. Who has rate-setting authority to impose user fees and under what circumstances may they be changed or otherwise reviewed?
4. Does the relevant law permit TIFIA loans to be used on P3 projects?
5. Is the number of P3 projects limited to only a few “pilot” or “demonstration” projects?
6. Are there restrictions concerning the geographic location of P3 projects?
7. Are there restrictions concerning the particular mode of transportation eligible to be developed as a P3 project (e.g., truck, passenger auto, freight rail, passenger rail)?
8. Is there a legal requirement to remove tolls after the repayment of project debt?
9. Does the relevant law permit the conversion of existing or partially constructed highways into toll roads?
10. Is there a restriction that prevents the revenues from P3 projects from being diverted to the state’s general fund or for other unrelated uses?
11. Is prior legislative approval required when an individual P3 proposal is received?
12. Are there any similar requirements that subject the P3 proposal or the negotiated P3 agreement to a local veto?
13. Does the relevant law permit all kinds of procurements for P3 project delivery? These might include, for example, calls for projects, competitive RFQ and RFPs, qualifications review followed by an evaluation of proposer concepts, use of design build, procurements based on financial terms such as return on equity rather than on price, long-term asset leases for some period of up to 60 years or longer from the time operations commence?
14. Are there explicit exemptions/supplemental procurement authority from the application of the state’s general procurement laws?
15. Does the relevant law authorize the public sector to grant long-term leases/franchises for the construction, operation and maintenance of toll facilities?
16. Does the public sector have the authority to issue toll revenue bonds or notes?
17. Does the public sector have the authority to form nonprofits and let them issue debt on behalf of a public agency?
18. Does the relevant public agency have the authority to hire its own technical and legal consultants?
19. Does the relevant law permit the public sector to make payments to unsuccessful bidders for work product contained in their proposals?
20. Can the agency charge application fees to offset its proposal review costs?
21. Does the relevant law allow adequate time for the preparation, submission and evaluation of competitive proposals? Note that the agency should have the authority to establish these deadlines on a case-by-case basis depending on the complexity and scope of the initial proposal or other factors that might promote competition (e.g., more review time during holiday periods).

22. Is the public sector required to maintain comparable non-toll routes when it establishes new toll roads?

23. Are there any noncompete clause prohibitions?

24. Is the authority to enter into P3s restricted to the state DOT or state turnpike authority or may regional or local entities also do so?

25. Does the relevant law specify evaluation criteria for P3 proposals received under a given procurement approach?

26. Does the relevant law specify the structure and participants for the review process involving P3 proposals?

27. Does the relevant law protect the confidentiality of P3 proposals and any related negotiations in the period prior to execution of the P3 agreement?

28. Does the relevant law provide for the ability of the public sector to outsource long-term operations and maintenance and other asset management duties to the private sector?