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PPP Model Legislation and Arizona's HB 2396

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Traditional Procurement Tradeoffs

Advantages:

- **Government maintains total control over design**
- **Competitive initial construction cost**
- **High transparency and low political risk**

Disadvantages:

- **No guarantee of lowest ultimate price**
 - **Limited cost control over design process**
 - **“Overdesign”**
 - **Exposure to change orders**
 - **Life cycle cost not taken into account**
- **100% public funding**

Delivery of New Projects through Long-Term PPPs

Advantages:

- **Large, new sources of capital**
- **Minimizes dependence on public revenues**
- **Developer assumes more environmental and development period risk**
- **Developer assumes revenue and operating cost risks**

Disadvantages:

- **For-profit entities require taxable financing – PABs now available**
- **Less public control over operations**
- **Limits on rates and charges must be set by contract**

PPPs: Key Public Sector Objectives

- Effective Competitive Procurement Methods
- Maximize Private Sector Investment and Risk Sharing
- Limit Public Financial Exposure
- Reasonable User Fee Structure and Profits
- Opportunity for Revenue Sharing
- Quality Design, Construction, Operation and Maintenance
- Effective Assurances of Performance
- Effective Remedies

Why special legislation is needed

- Procurements limited to low bid
- Cannot contract for final design and construction
- Cant share project revenues
- Can't contribute public funds
- 100% payment/ performance bonds
- Subject to ad valorem and property tax

Essential Elements of Authorizing Legislation

■ Scope of Legislation

- State agencies, regional, counties, municipalities?
- Specified projects?
- Types of projects – trans, water, public bldgs?

■ Types of Contracts Authorized

- Contract with private party to design, build, finance, operate and/or maintain (DB, DBO, DBFO, DBOM and concessions)
- *Build, operate in accordance with performance specifications*

Essential Elements of Authorizing Legislation

■ Procurement Methodology

- Solicited proposals
- Unsolicited proposals with opportunity for competition
- Best value / quals-based selection
- RFP should specify evaluation factors and weight

Special Provisions

- Stipends for right to use work product
- Evaluation fees
- Hire financial, legal consultants
- Alternative dispute resolution
- Public entity can condemn property to be leased to private party
 - *No delegation of condemnation power*

Authorized PPP Agreement Provisions

- Private party can collect, enforce user fees
- Public sponsor can share revenues
- Share development costs and project risks
- Acquisition of ROW
- Reconstruction and renovation

Authorized PPP Agreement Provisions

- Limitations on return on investment
- Defaults, remedies
- Record keeping and audits
- Exemption from property taxes
- Performance security

“Competing Facilities”

- May provide compensation for lost revenues due to construction of competing facilities
- ***But cannot bar public entity’s right to build any facility regardless of location***

Transparency and Confidentiality

- Need to balance public's right to know and protection of integrity of procurement process
- Proposer compliance with requirements of open records acts
- Protect proposals from release until award – except Executive Summary

Transportation-Specific Provisions

Arizona HB - 2396

- Highways, rail, BRT, ferries, intermodal
- Authorizes private party to collect tolls
 - *Increases based on formula*
- Limit return on investment
- Use variable tolls, HOT lanes
- Refund of motor fuel taxes

Some Legislative Obstacles

- Legislative approval of final contract
- Removal of tolls upon termination
- 100% payment and performance bonds
- No ad valorem property tax exemption
- Short, inflexible maximum term
- Regulated utility model for setting tolls
- No foreign investors, operators

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