STATE OF OKLAHOMA

2nd Session of the 54th Legislature (2014)

HOUSE BILL 2898 By: Morrissette

AS INTRODUCED

An Act relating to public-private partnerships; defining terms; allowing solicitation of proposals; allowing different procurement approaches; providing factors for evaluation of proposals; specifying process for determination of confidentiality; allowing unsolicited proposals; setting time limit for Department of Transportation response; allowing Department to enter public-private agreements; requiring certain issues be addressed in agreement; permitting certain additional issues be addressed; providing for termination; specifying default procedures; allowing use of bonds; defining scope of permissible bonds; directing payment from certain sources; allowing use of certain federal programs; prohibiting certain limitation; allowing use of federal funds and gifts; permitting combination of funds; allowing exercise of eminent domain; specifying jurisdiction and applicability of certain laws within the limits of the transportation facility; requiring certain utility crossing cooperation; prohibiting interference with waiver of sovereign immunity; allowing for promulgation of rules; amending 61 O.S. 2011, Section 202.1, as last amended by Section 8, Chapter 302, O.S.L. 2013 (61 O.S. Supp. 2013, Section 202.1), which relates to design-build projects; expanding permitted uses of design-build methods, expanding criteria; defining terms; allowing use of design-build methods; requiring approval of Director; requiring projects meet certain criteria; addressing application of certain competitive bidding provisions; prohibiting application to certain projects; providing for the promulgation of rules; providing for codification; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 4041 of Title 69, unless there is created a duplication in numbering, reads as follows:

For purposes of Sections 2 through 13 of this act:

1. "Affected jurisdiction" means any county, city, or town or municipal corporation, or other unit of government within the state in which all or part of a transportation facility is located or any other public entity directly affected by the transportation facility;

2. "Department" means the Department of Transportation;

3. "Force majeure" means an uncontrollable force or natural disaster not within the power of the operator or the state;

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

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

6. "Operate" means any action to maintain, rehabilitate, improve, equip, or modify a transportation facility;

7. "Operator" means a private entity that has entered into a public-private agreement under this act;

8. "Private entity" means any natural person, corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public benefit corporation, nonprofit entity, or other business entity;

9. "Public-private agreement" means the agreement between a private entity and the Department that relates to the development, financing, maintenance, or operation of a transportation facility subject to this act;

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

a. acceptance of a private contribution, including a money payment, for a project or service for a transportation facility,

b. sharing of resources and the means of providing a project or service for a transportation facility, and

c. cooperation in researching, developing, and implementing projects or services for a transportation facility;

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

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

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

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 4042 of Title 69, unless there is created a duplication in numbering, reads as follows:

A. The Public Competitive Bidding Act of 1974 shall not apply to solicited proposals under this act.

B. The Department of Transportation may solicit, receive, consider, evaluate, and accept a proposal for a public-private initiative.

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

1. Sealed bidding;

2. Selection of proposals, with or without negotiations, based on qualifications, best value, or both; or

3. Any competitive selection process that the Department determines to be appropriate or reasonable.

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

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

2. The proposed cost of and financial plan for the transportation facility;

3. The general reputation, qualifications, industry experience, and financial capacity of the private entity;

4. The proposed design, operation, and feasibility of the transportation facility;

5. Comments from local citizens and affected jurisdictions;

6. Benefits to the public;

7. The safety record of the private entity; and

8. Other criteria that the Department deems appropriate.

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

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

G. 1. A private entity may request a review, prior to submission of a solicited proposal, by the Department of information that the private entity has identified as confidential or proprietary to determine whether such information would be subject to disclosure under the Oklahoma Open Records Act.

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

3. The Department shall review any information identified as confidential or proprietary by a private entity as part of a solicited proposal and shall determine if such information is exempt from disclosure under the Oklahoma Open Records Act.

4. The Department shall inform the private entity that submitted the information of its determination of whether

information identified by the private entity as confidential or proprietary is subject to disclosure under the Oklahoma Open Records Act.

5. The private entity shall have the opportunity to object to the determination that the information is subject to disclosure under the Oklahoma Open Records Act or to withdraw its proposal.

6. Any information determined by the state to be confidential or proprietary shall be exempt from disclosure under the Oklahoma Open Records Act.

7. Any information not determined to be confidential or proprietary may be subject to disclosure under the Oklahoma Open Records Act.

SECTION 3. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 4043 of Title 69, unless there is created a duplication in numbering, reads as follows:

A. The Public Competitive Bidding Act of 1974 shall not apply to this section.

B. 1. The Department of Transportation may receive, consider, evaluate, and accept an unsolicited proposal for a public-private initiative if the proposal:

a. is independently originated and developed by the proposer,

b. benefits the public,

c. is prepared without Department supervision, and

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

2. Within thirty (30) days after receiving an unsolicited proposal, the Department shall undertake a preliminary evaluation of the unsolicited proposal to determine if the proposal complies with the requirements under paragraph 1 of this subsection.

C. 1. A private entity may request a review, prior to submission of an unsolicited proposal, by the Department of information that the private entity has identified as confidential or proprietary to determine whether such information would be subject to disclosure under the Oklahoma Open Records Act.

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

3. The Department shall review any information identified as confidential or proprietary by a private entity as part of an unsolicited proposal and shall determine if such information is exempt from disclosure under the Oklahoma Open Records Act.

4. The Department shall inform the private entity that submitted the information of its determination of whether information identified by the private entity as confidential or

proprietary is subject to disclosure under the Oklahoma Open Records Act.

5. The private entity shall have the opportunity to object to the determination that the information is subject to disclosure under the Oklahoma Open Records Act or to withdraw its proposal.

6. Any information determined by the state to be confidential or proprietary shall be exempt from disclosure under the Oklahoma Open Records Act.

7. Any information not determined to be confidential or proprietary may be subject to disclosure under the Oklahoma Open Records Act.

SECTION 4. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 4044 of Title 69, unless there is created a duplication in numbering, reads as follows:

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

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

B. A public-private agreement under this act shall provide for the following:

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

2. The term of the public-private agreement;

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

4. A description of the actions the Department may take to ensure proper maintenance of the transportation facility;

5. Whether user fees will be collected on the transportation facility and the basis by which such user fees shall be determined and modified;

6. Compliance with applicable federal, state, and local laws;

7. Grounds for termination of the public-private agreement by the Department or operator; and

8. Procedures for amendment of the agreement.

C. A public-private agreement under this act may provide for the following:

1. Review and approval by the Department of the operator's plans for the development and operation of the transportation facility;

2. Inspection by the Department of construction of or improvements to the transportation facility;

3. Maintenance by the operator of a policy of liability insurance or self-insurance;

4. Filing by the operator, on a periodic basis, of appropriate financial statements in a form acceptable to the Department;

5. Filing by the operator, on a periodic basis, of traffic reports in a form acceptable to the Department;

6. Financing obligations of the operator and the Department;

7. Apportionment of expenses between the operator and the Department;

8. The rights and duties of the operator, the Department, and other state and local governmental entities with respect to use of the transportation facility;

9. The rights and remedies available in the event of default or delay;

10. The terms and conditions of indemnification of the operator by the Department;

11. Assignment, subcontracting, or other delegation of responsibilities of the operator or the Department under the agreement to third parties, including other private entities and other state agencies;

12. Sale or lease to the operator of private property related to the transportation facility;

13. Traffic enforcement and other policing issues including any reimbursement by the private entity for such services; or

14. Other terms and conditions.

SECTION 5. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 4045 of Title 69, unless there is created a duplication in numbering, reads as follows:

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

SECTION 6. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 4046 of Title 69, unless there is created a duplication in numbering, reads as follows:

A. Upon the occurrence and during the continuation of material default by an operator, not related to an event of force majeure, the Department of Transportation may:

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

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

B. In the event that the Department elects to take over a transportation facility under subsection A of this section, the Department:

1. Shall collect and pay any revenues that are subject to lien to satisfy any obligation;

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

3. May solicit proposals for the maintenance and operation of the transportation facility under Section 4 of this act.

SECTION 7. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 4047 of Title 69, unless there is created a duplication in numbering, reads as follows:

A. 1. The Department of Transportation may issue and sell bonds or notes of the Department for the purpose of providing funds to carry out the provisions of this act with respect to the development, financing, or operation of a transportation facility or the refunding of any bonds or notes, together with any costs associated with the transaction.

2. Any bond or note issued under this section:

a. constitutes the corporate obligation of the Department,

b. does not constitute the indebtedness of the state within the meaning or application of any constitutional provision or limitation, and

c. is payable solely as to both principal and interest from:

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

(2) proceeds of bonds or notes, if any,

(3) investment earnings on proceeds of bonds or notes, if any, or

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

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

2. Any bonds debt, other securities, or other financing issued for the purpose of this act shall not be considered to be a debt of the state or any political subdivision of the state or a pledge of the faith and credit of the state or any political subdivision of the state.

C. Nothing in this section shall limit a local government or any authority of the state to issue bonds for transportation projects.

SECTION 8. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 4048 of Title 69, unless there is created a duplication in numbering, reads as follows:

A. 1. The Department of Transportation may accept from the United States or any of its agencies funds that are available to the state for carrying out this act, whether the funds are made available by grant, loan, or other financial assistance.

2. The state assents to any federal requirements, conditions, or terms of any federal funding accepted by the Department under this section.

3. The Department may enter into agreements or other arrangements with the United States or any of its agencies as may be necessary for carrying out the purposes of this act.

B. The Department may accept from any source any grant, donation, gift, or other form of conveyance of land, money, other real or personal property, or other item of value made to the state or the Department for carrying out the purposes of this act.

C. Any transportation facility may be financed in whole or in part by contribution of any funds or property made by any private entity or affected jurisdiction that is party to a public-private agreement under this act.

D. The Department may combine federal, state, local, and private funds to finance a transportation facility under this act.

SECTION 9. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 4049 of Title 69, unless there is created a duplication in numbering, reads as follows:

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

SECTION 10. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 4050 of Title 69, unless there is created a duplication in numbering, reads as follows:

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

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

C. Punishment for violations of traffic and motor vehicle laws of the state or, if applicable, any affected local jurisdiction on the transportation facility shall be as prescribed by law for

conduct occurring on similar transportation facilities in the state or local jurisdiction.

SECTION 11. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 4051 of Title 69, unless there is created a duplication in numbering, reads as follows:

An operator under this act and any utility whose facility is to be crossed or relocated shall cooperate fully in planning and arranging the manner of the crossing or relocation of the utility facility.

SECTION 12. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 4052 of Title 69, unless there is created a duplication in numbering, reads as follows:

Nothing in this act shall be construed or deemed to limit any waiver of the sovereign immunity of the state or any officer or employee of the state with respect to the participation in or approval of all or any part of the transportation facility or its operation.

SECTION 13. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 4053 of Title 69, unless there is created a duplication in numbering, reads as follows:

The Department of Transportation may adopt rules necessary to carry out the provisions of this act.

SECTION 14. AMENDATORY 61 O.S. 2011, Section 202.1, as last amended by Section 8, Chapter 302, O.S.L. 2013 (61 O.S. Supp. 2013, Section 202.1), is amended to read as follows:

Section 202.1 A. The design-build and construction management project delivery methods shall not be used without the written approval of the Director of the Office of Management and Enterprise Services, or the Director's designee, when those projects are constructed for a state agency or by an act of the Legislature specifying design-build or at-risk construction management for a project. In all instances where the design-build project or at-risk construction management delivery method is authorized, construction administration shall be performed by the State Facilities Director, the SFD's designee or designees, or otherwise by contract or contract provision approved by the Director of the Office of Management and Enterprise Services for construction administration by another party.

B. Municipalities, counties, public trusts, or any other political subdivision in this state shall not be required to get approval of any other state agency in order to use agency construction management or at-risk construction management as a construction delivery method. However, municipalities, counties, public trusts, and any other political subdivision shall be subject to Section 220 of this title.

C. The design-build and construction management project delivery methods ~~shall not~~ may be used for any project ~~unless~~ if the project meets the criteria established by the administrative rules promulgated as required by this act. Such methods ~~shall not~~ may be used ~~unless~~ if there is a need for compressed construction time as required to respond to a natural disaster or other emergency situation affecting public health and safety, or ~~all~~ if one or a combination of the following criteria for designation are met:

1. The project benefits the public;

2. There is a need for cost control; ~~and~~

3. The need exists for specialized or complex construction methods due to the unique nature of the project;

4. The project is of an urgent nature;

5. The project presents an opportunity for innovation;

6. The project presents an opportunity for risk transfer;

7. The project presents an opportunity for overall cost savings;

8. The project presents an opportunity for higher quality;

9. The project is part of a State project-initiative; or

10 The state agency lacks the required in-house resources to complete the project.

D. The use of design-build and construction management project delivery methods shall not interfere or inhibit the opportunity for subcontractors to openly and freely compete for subcontracts

pursuant to the Public Competitive Bidding Act of 1974 with respect to public notices.

E. The provisions of subsections A and B of this section shall not apply to projects by contract pursuant to an interagency agreement under Section 581 of Title 74 of the Oklahoma Statutes or to projects a state agency performs solely with the staff of the agency.

F. The Office of Management and Enterprise Services shall, pursuant to the Administrative Procedures Act, promulgate rules to effect procedures, processes and design-build/construction management fee guidelines necessary to the fulfillment of its responsibilities under this section.

G. As used in the Public Facilities Act, public trusts shall not include state beneficiary public trusts.

SECTION 15. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 306.3 of Title 69, unless there is created a duplication in numbering, reads as follows:

Section 306.3 A. As used in this section:

1. "Construction" means the process of planning, acquiring, designing, building, equipping, altering, repairing, improving, maintaining, or demolishing any roads, highways, bridges, railroads, tunnels, or appurtenances thereto including facilities, utilities, or other improvements to any real property;

2. "Construction administration" means a series of actions required to ensure the full, timely, and proper performance of all phases of a construction project by all contractors, suppliers, and other persons having responsibility for project work and any guarantees or warranties pertaining thereto;

3. "Construction management" means a project delivery method based on an agreement whereby the Department acquires from a construction entity a series of services that include, but are not necessarily limited to, design review, scheduling, cost control, value engineering, constructability evaluation, preparation and coordination of bid packages, and construction administration; "construction management" includes:

a. "agency construction management" whereby the construction entity provides services to the Department without taking on financial risks for the execution of the actual construction, and

b. "at-risk construction management" whereby the construction entity, after providing agency services during the preconstruction period, takes on the financial obligation to carry out construction under a specified cost agreement;

4. "Department" means the Department of Transportation;

5. "Design-build" means a project delivery method whereby the Department acquires both design and construction services in the

same contract from a single legal entity, referred to as the design-builder, without the bid component of the traditional design-bid-build process; and

6. "Director" means the Director of the Department of Transportation.

B. The Department of Transportation may use design-build and construction management project delivery methods with the written approval of the Director of the Department, or the designee of the Director. In all instances where the design-build project method is authorized, construction administration shall be performed by the Department, the designee or designees of the Director, or otherwise by contract or contract provision approved by the Director for construction administration by another party.

C. The design-build and construction management project delivery methods shall not be used for any project unless the project meets the criteria established by the administrative rules promulgated as required by this section and at least one or a combination of the following criteria are met:

1. The project is of an urgent nature;

2. The project presents an opportunity for innovation;

3. The project presents an opportunity for risk transfer;

4. The project presents an opportunity for overall cost savings;

5. The project presents an opportunity for higher quality;

6. The project is part of a State project-initiative;

7 The state agency lacks the required in-house resources to complete the project; or

8. The project is part of a Federal project-initiative.

D. The use of design-build and construction management project delivery methods shall not interfere or inhibit the opportunity for subcontractors to openly and freely compete for subcontracts pursuant to the Public Competitive Bidding Act of 1974.

E. The provisions of subsections B and C of this section shall not apply to projects by contract pursuant to an interagency agreement under Section 581 of Title 74 of the Oklahoma Statutes or to projects a state agency performs solely with the staff of the agency.

F. The Department shall, pursuant to the Administrative Procedures Act, promulgate any rules to effect procedures, processes and design-build and construction management fee guidelines necessary to the fulfillment of its responsibilities under this section.

SECTION 16. This act shall become effective November 1, 2014.

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