

STATE OF OKLAHOMA

1st Session of the 56th Legislature (2017)

COMMITTEE SUBSTITUTE

FOR ENGROSSED

SENATE BILL NO. 430

By: Leewright of the Senate

and

Montgomery of the House

COMMITTEE SUBSTITUTE

An Act relating to infrastructure development; creating the Oklahoma Public and Private Facilities and Infrastructure Act; providing short title; defining terms; clarifying applicability of act; clarifying scope of eminent domain use; providing procedure and requirements for proposals for qualifying projects; requiring adoption of certain guidelines; providing approval process for qualifying projects; authorizing governmental entities to enter into certain contracts; requiring notice to effected jurisdiction; providing for the dedication and conveyance of public property; specifying the powers and duties of contracting person; providing for and specifying the powers and contents of comprehensive agreements; providing for interim agreements; specifying funding sources for qualifying projects; requiring certain performance bonds; specifying remedies for material defaults; providing for use of eminent domain; providing procedures concerning effected facility owners; clarifying police powers; providing for posting of certain notice and public comment; providing for public access to certain procurement records; providing for codification; and providing an effective date.

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

1 SECTION 1. NEW LAW A new section of law to be codified
2 in the Oklahoma Statutes as Section 5151 of Title 74, unless there
3 is created a duplication in numbering, reads as follows:

4 This act shall be known and may be cited as the "Oklahoma Public
5 and Private Facilities and Infrastructure Act".

6 SECTION 2. NEW LAW A new section of law to be codified
7 in the Oklahoma Statutes as Section 5153 of Title 74, unless there
8 is created a duplication in numbering, reads as follows:

9 As used in the Oklahoma Public and Private Facilities and
10 Infrastructure Act:

11 1. "Contract" means any purchase and sale agreement, lease,
12 service agreement, franchise agreement, concession agreement or
13 other written agreement entered into under this act with respect to
14 the provision of a public service and any project related thereto;

15 2. "Improvement" means any instruction, reconstruction,
16 rehabilitation, renovation, installation, improvement, enlargement
17 or extension of property or improvements to property;

18 3. "Partnership Committee" means a committee consisting of nine
19 (9) members, three members appointed by the President Pro Tempore of
20 the Senate, three members appointed by the Speaker of the House of
21 Representatives and three representatives of the Office of
22 Management and Enterprise Services (OMES), to be appointed by the
23 Governor. Five members of the Partnership Committee shall
24

1 constitute a quorum. The Partnership Committee shall act only upon
2 a decision of a majority of appointed members;

3 4. "Private sector entity" means any corporation, whether for
4 profit or not for profit, limited liability company, partnership,
5 limited liability partnership, sole proprietorship, business trust,
6 joint venture or other entity, but shall not mean the state, a
7 political subdivision of the state, or a public or governmental
8 entity, agency or instrumentality of the state;

9 5. "Project" means real or personal property, or both, and
10 improvements thereto or in support thereof, including undivided and
11 other interests therein, used for or in the provision of a public
12 service;

13 6. "Proposer" means a private sector entity, a local or
14 regional public entity or agency, or any group or combination
15 thereof, submitting qualifications or a proposal for a public-
16 private partnership contract;

17 7. "Public service" means a service provided for a public
18 purpose of a responsible state agency and identified in an
19 invitation for qualifications or proposals under this act;

20 8. "Responsible state agency" means the agency, department,
21 commission, authority or other instrumentality of the state
22 responsible for the provision of the public service which is or is
23 proposed to be the subject of a contract. Any such agency that is
24 subject to the Oklahoma Central Purchasing Act, the Public

1 Competitive Bidding Act, the Oklahoma State Finance Act and the
2 Oklahoma Privatization of the State Functions Act shall comply with
3 these laws; and

4 9. The Oklahoma Department of Transportation and the Oklahoma
5 Turnpike Authority shall be exempt from this act. However, the
6 Oklahoma Department of Transportation and the Oklahoma Turnpike
7 Authority may utilize the general provisions and process described
8 herein to develop a public-private partnership contract for a
9 transportation improvement in consultation with the Director of the
10 Office of Management and Enterprise Services (OMES) and subject to
11 the approval of the Oklahoma Transportation Commission or the
12 Oklahoma Turnpike Authority Board as applicable.

13 SECTION 3. NEW LAW A new section of law to be codified
14 in the Oklahoma Statutes as Section 5155 of Title 74, unless there
15 is created a duplication in numbering, reads as follows:

16 The Oklahoma Public and Private Facilities and Infrastructure
17 Act does not alter the eminent domain laws of this state or grant
18 the power of eminent domain to any person who is not expressly
19 granted that power under other state law.

20 SECTION 4. NEW LAW A new section of law to be codified
21 in the Oklahoma Statutes as Section 5156 of Title 74, unless there
22 is created a duplication in numbering, reads as follows:

23 A. The Partnership Committee shall have the ability to identify
24 potential public-private partnerships, to review and endorse a short

1 list of qualified bidders, to approve requests for proposals and to
2 approve template contracts before they are sent to bidders. The
3 Partnership Committee shall operate with the assistance of the
4 Office of Public-Private Partnerships. In order to protect the
5 Separation of Power set out in Article IV of the Oklahoma
6 Constitution, the Partnership Committee shall not have the power to
7 enter into any contract, nor shall it have the power to block any
8 contract negotiated by the Director of OMES and the authorized
9 representative of any responsible state agency.

10 B. There shall be established within the Office of Management
11 and Enterprise Services (OMES) an Office of Public-Private
12 Partnerships, which shall have the authority to charge fees for
13 services it shall render as part of the procedures to establish
14 partnerships in accordance with this act and to receive money to
15 cover its operating expenses and to accomplish the purposes of this
16 act.

17 C. The Director of OMES and the authorized representative of a
18 responsible state agency shall jointly take any action and execute
19 any public-private partnership contract, authorized under this act,
20 for the provision of a public service in order to more efficiently
21 and effectively provide public services, including by generating
22 additional resources in support of those public services and related
23 projects.

1 SECTION 5. NEW LAW A new section of law to be codified
2 in the Oklahoma Statutes as Section 5157 of Title 74, unless there
3 is created a duplication in numbering, reads as follows:

4 A. Selection of Projects. Any proposer or responsible state
5 agency may submit to the Partnership Committee one or more proposals
6 for partnership projects in connection with any public service. The
7 Partnership Committee shall identify potential projects and public
8 services for which a public-private partnership may be appropriate
9 from those received from a proposer, a responsible state agency or
10 those identified by the Partnership Committee itself. The
11 Partnership Committee shall select such projects based on the
12 partnership's potential to improve public operational efficiencies,
13 improve environmental performance, promote public safety, attract
14 private investment in the state and minimize governmental
15 liabilities.

16 B. Public-Sector Comparators. After the Partnership Committee
17 identifies a potential partnership for a public project or public
18 service, the Office of Public-Private Partnerships shall conduct a
19 public-sector comparator study of the potential partnership. The
20 Partnership Committee shall determine the scope of each public
21 sector comparator, which scope shall depend on the type of proposed
22 partnership and the nature of the public service under consideration
23 for the partnership. The following issues shall be considered as
24 components of a public sector comparator:

1 1. The definition of the need served by the proposed
2 partnership;

3 2. The cost required to meet the public need served by the
4 public service under traditional procurements or traditional state
5 agency operations;

6 3. An analysis of alternative methods for providing the public
7 services under consideration, including but not limited to design-
8 build, design-build-finance, design-build-finance-operate-maintain,
9 service contracts or leases and how the alternative method(s) would
10 meet the need served by the public service; and

11 4. An evaluation of the cost/benefit of using an alternative
12 method or public-private partnership to render a public service,
13 which cost/benefit analysis shall include:

- 14 a. the potential cost of utilizing an alternative method,
- 15 b. the operational and technological risks involved in
16 utilizing an alternative method,
- 17 c. a comparative analysis of rendering the public service
18 by allowing the responsible state agency to utilize
19 traditional methods,
- 20 d. the financial impact the partnership will have on the
21 responsible state agency, and
- 22 e. the impact a partnership would have on job formation,
23 economic growth and the community in which the public
24 service is to be rendered.

1 C. The Partnership Committee shall use the results of the
2 public sector comparator to determine which public services and
3 projects are appropriate for partnership. The Office of Public-
4 Private Partnerships shall publish on its website the public sector
5 comparator for each project to provide a public service for which a
6 request for qualifications is initiated.

7 D. The Office of Public-Private Partnerships shall publish
8 notice of the intent to enter into a contract for a partnership for
9 public service or related project and shall prepare a request for
10 qualifications for private sector entities interested in serving as
11 proposers for the partnership. The notice shall notify interested
12 parties of the opportunity to submit their qualifications for
13 consideration and shall be published at least sixty (60) days prior
14 to the deadline for submitting those qualifications. The Office
15 also may advertise the information contained in the notice in
16 appropriate trade journals and otherwise notify parties believed to
17 be interested in providing the public service and in any related
18 project.

19 E. After inviting proposers to bid on the project, the
20 Partnership Committee shall evaluate the qualifications submitted
21 and may hold discussions with proposers to further explore their
22 qualifications. Following this evaluation, the Partnership
23 Committee may determine a list of qualified proposers based on
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1 criteria in the invitation and invite only those proposers to submit
2 a proposal.

3 F. The Office of Public-Private Partnerships shall prepare a
4 request for proposal, which may include proposal stipends and the
5 proposed partnership contract, both of which shall be approved by
6 the Partnership Committee. After the Partnership Committee's
7 approval of the request for proposal and the partnership contract,
8 the project shall be deemed an Approved Partnership Procurement.

9 G. Partnership contracts may contain the terms and conditions
10 to carry out and effect the purposes of this act, including the
11 duration of the contract, which shall not exceed ninety-nine (99)
12 years, rates or fees for the public services to be provided or
13 methods or procedures for the determination of such rates or fees,
14 standards for the public services to be provided, responsibilities
15 and standards for operation and maintenance of any related project,
16 required financial assurances, financial and other data reporting
17 requirements, bases and procedures for termination of the contract
18 and retaking of possession or title to the project, and events of
19 default and remedies upon default, including mandamus, a suit in
20 equity, an action at law or any combination of those remedial
21 actions. Partnership contracts may also include a requirement for
22 the delivery of performance and payment bonds required for all
23 construction activities and letters of credit, surety bonds or other
24 security in connection with the development or operation of the

1 qualifying project in the forms and amounts satisfactory to the
2 responsible governmental entity.

3 H. After proposals are received, the Office of Public-Private
4 Partnerships, using the criteria established in the request for
5 proposal by the Partnership Committee, shall evaluate the proposals
6 submitted and may hold discussions with proposers to further explore
7 their proposals, the scope and nature of the public service(s) they
8 would provide and the various technical approaches they may take
9 regarding the public service and any related project. Following
10 this evaluation, the Partnership Committee shall select and rank no
11 fewer than three proposers that the Partnership Committee considers
12 to be the most qualified to enter into the contract, except when the
13 Partnership Committee determines that fewer than three qualified
14 proposers are available, in which case the Partnership Committee
15 shall select and rank them.

16 I. After the proposers have been ranked by the Partnership
17 Committee, the Director of OMES and the authorized representative of
18 the responsible state agency shall negotiate the contract with the
19 proposer ranked most qualified to provide the public service at a
20 compensation determined in writing to be fair and reasonable and to
21 purchase, lease or otherwise take a legal interest in the project.

22 J. Upon failure to negotiate a contract with the proposer
23 ranked most qualified, the Director of OMES shall inform the
24 proposer in writing of the termination of negotiations and may

1 enter, with the responsible state agency, into negotiations with the
2 proposer ranked next most qualified. If negotiations again fail,
3 the same procedure may be followed with each next most qualified
4 proposer selected and ranked, in order of ranking, until a contract
5 is negotiated and executed or the request for proposal is withdrawn.

6 K. If the Director of OMES and the authorized representative of
7 the responsible state agency fail to negotiate a contract with any
8 of the ranked proposers, the Director of the Office of Management
9 and Enterprise Services, in consultation with the responsible state
10 agency, may terminate the process or select and rank additional
11 proposers based on their qualifications or proposals, and
12 negotiations shall continue as with the proposers selected and
13 ranked initially until a contract is negotiated.

14 L. The Director of OMES and the authorized representative of
15 the responsible state agency may jointly reject any and all
16 submissions of qualifications or proposals and may jointly terminate
17 the procurement process at any point.

18 M. The Director of OMES and the authorized representative of
19 the responsible state agency shall have the authority to make
20 commercially reasonable changes to the partnership contract approved
21 by the Partnership Committee. Any such contract may contain the
22 terms and conditions to carry out and effect the purposes of this
23 act.

1 N. Any submission not selected by the responsible state agency
2 shall be considered intellectual property that shall remain the
3 property of the proposer.

4 SECTION 6. NEW LAW A new section of law to be codified
5 in the Oklahoma Statutes as Section 5158 of Title 74, unless there
6 is created a duplication in numbering, reads as follows:

7 A. Partnership contracts shall be signed by both the Director
8 of OMES and the authorized representative of the responsible state
9 agency for which the public service at issue in the contract
10 relates.

11 B. The Director of OMES is authorized to receive and deposit
12 any money received under the contract. Any such contract shall be
13 sufficient to effect its purpose notwithstanding any provision of
14 law to the contrary, including other laws governing the sale, lease
15 or other disposition of property or interests therein, service
16 contracts or financial transactions by or for the state.

17 C. The Office of Public-Private Partnerships shall provide a
18 report to the Speaker of the House of Representatives and the
19 President Pro Tempore of the Senate explaining the value of the
20 contract to the state and describing the procurement process by
21 which the contract was reached.

22 SECTION 7. NEW LAW A new section of law to be codified
23 in the Oklahoma Statutes as Section 5159 of Title 74, unless there
24 is created a duplication in numbering, reads as follows:

1 The exercise of the powers granted by this act will be for the
2 benefit of the people of the state and shall be liberally construed
3 to effect the purposes thereof. As the performance of public
4 services will constitute the performance of essential government
5 functions, any project or part thereof owned by the state and used
6 for performing any public service pursuant to a contract entered
7 into under this act that would be exempt from taxation or
8 assessments in the absence of such contract shall remain exempt from
9 taxation and assessments levied by the state and its subdivisions to
10 the same extent as if not subject to that contract. The gross
11 receipts and income of a successful proposer derived from providing
12 public services under a contract through a project owned by the
13 state shall be exempt from taxation levied by the state and its
14 subdivisions. Any transfer or lease between a proposer and the
15 state of a project or part thereof, or item included or to be
16 included in the project, shall be exempt from any taxes levied if
17 the state is retaining ownership of the project or part thereof that
18 is being transferred or leased.

19 SECTION 8. NEW LAW A new section of law to be codified
20 in the Oklahoma Statutes as Section 5160 of Title 74, unless there
21 is created a duplication in numbering, reads as follows:

22 The Director of OMES, in consultation with the responsible state
23 agency, may retain or contract for the services of commercial
24 appraisers, engineers, investment bankers, financial advisers,

1 accounting experts and other consultants, independent contractors or
2 providers of professional services as are necessary in the judgment
3 of the Director to carry out the Director's powers and duties under
4 this act. This may include the identification of public services
5 and any related projects to be subject to invitations for
6 qualifications or proposals under this act, the development of those
7 invitations and related evaluation criteria, the evaluation of those
8 invitations and the negotiation of any contract under this act.

9 SECTION 9. This act shall become effective November 1, 2017.

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