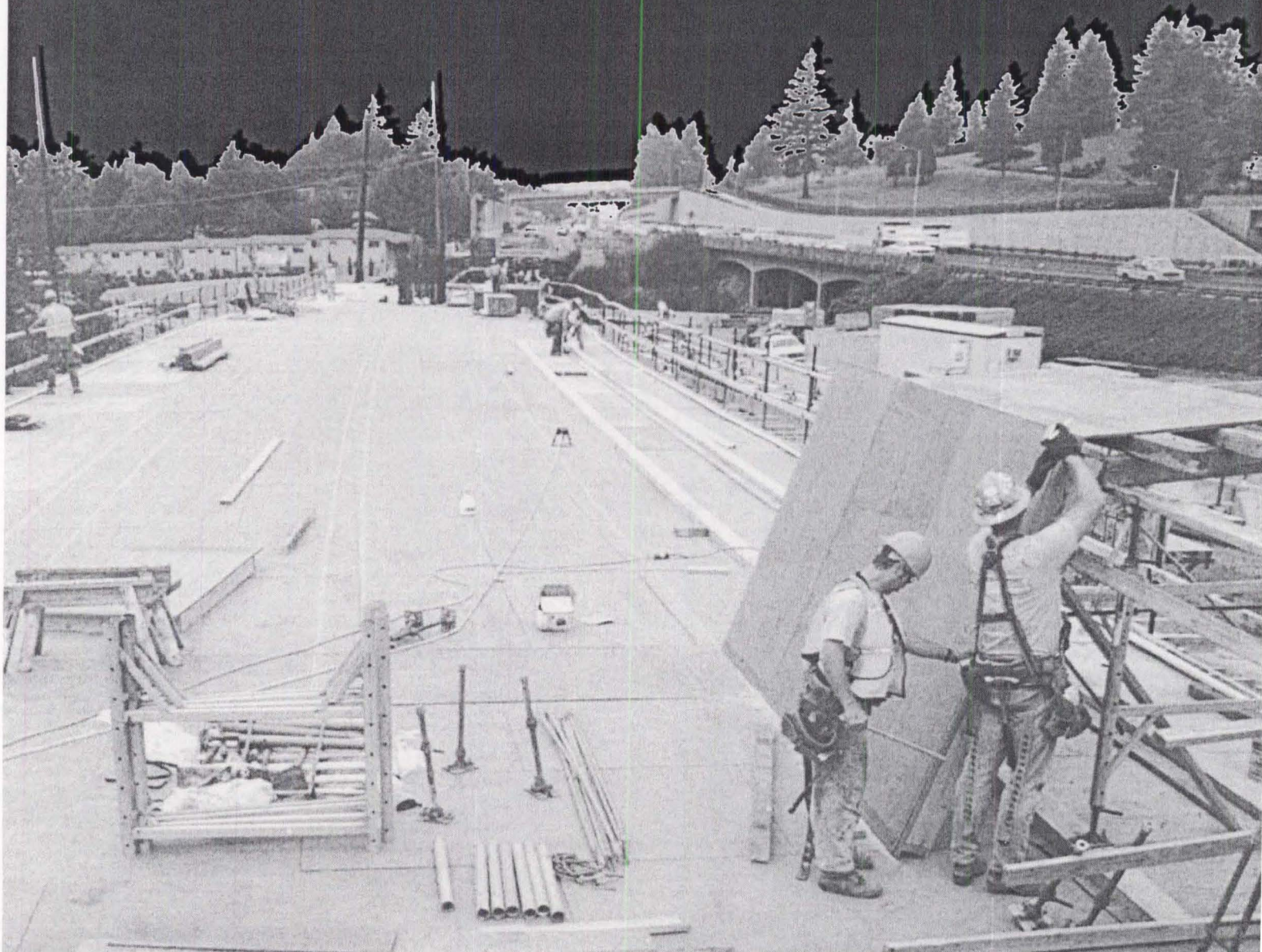


Public-Private Partnerships for Oregon Transportation Projects

Final report of the
Innovative Finance Advisory Committee

Prepared for
**The 72nd Legislative Assembly
of the Oregon State Legislature**

February 2003



In 2001, Senate Bill 966 directed the Oregon Transportation Commission to explore the feasibility of involving the private sector as a partner with the public sector in transportation projects. In 2002, the commission appointed the Innovative Finance Advisory Committee to study the issue. Members of the committee have had extensive experience with transportation projects that involved the private sector, at both the national and international levels.

The Innovative Finance Advisory Committee

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John Carter	Principal, Goldschmidt Imeson Carter, Portland, Oregon; former Executive VP and Director, Bechtel Group, Inc., San Francisco, California
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AASHTO	American Association of State Highway and Transportation Officials	OIPP	Oregon Innovative Partnerships Program
ACEC	American Council of Engineering Companies	OTC	Oregon Transportation Commission
EIS	Environmental Impact Statement	OTIB	Oregon Transportation Infrastructure Bank
GARVEE	Grant Anticipation Revenue Vehicles	PE	Preliminary Engineering
FHWA	Federal Highway Administration	STIP	State Transportation Improvement Program
IPU	Innovative Partnership Unit	TIFIA	Transportation Infrastructure Finance and Innovation Act
ODOT	Oregon Department of Transportation	USDOT	U.S. Department of Transportation

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Appendix A: Examples of Transportation Public-Private Partnerships in the U.S.

Appendix B: Innovative Finance Mechanisms

Background

The Innovative Finance Advisory Committee recommends that the legislature act boldly to encourage the private sector to work as a partner with the public sector to bring innovative solutions to desperately needed transportation projects in Oregon.

Traditional sources of funding are not meeting Oregon's transportation needs

Over the past two decades, Oregon's population has increased significantly, due largely to the state's economic opportunities and widely recognized quality of life. The transportation infrastructure, however, has not kept up with growth, jeopardizing the state's economic potential.

Oregon has traditionally relied on taxes, fees, and federal grants to fund transportation projects, but these sources are no longer meeting infrastructure needs. Given the magnitude of the projected shortfall and the clear limitations on the amount of funding that can be raised by increases in taxes and fees, it is apparent the future of Oregon's transportation infrastructure will depend on finding new sources of funding.

Oregon policymakers must look for creative solutions to meet the state's critical transportation needs.

The future of Oregon's transportation infrastructure depends on finding new sources of funding

We need to do business in a new way

In 2001, Senate Bill 966 directed the Oregon Transportation Commission to explore the feasibility of involving the private sector as a partner with the public sector in transportation projects.* Other states were already using the strategy, and it was thought the private sector might be able to bring new sources of funding to projects and at the same time improve project efficiency.

In 2002, the commission appointed the Innovative Finance Advisory Committee to study the issue. Members of the committee have had extensive experience with transportation projects that involved the private sector, at both the national and international levels.

* For purposes of this report, a transportation project is defined as one that involves highways, roads, bridges, tunnels, railroad tracks, commuter or light rail, and/or any other paved surface or structure specifically designed as a land-vehicle transportation route.

Members of the committee have extensive experience with public-private partnerships

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This report, divided into two sections, presents the results of the committee's investigation. In this section, the concept of a public-private partnership for transportation projects is explained, and background on existing partnerships in the United States is given. Next, basic criteria for projects that are appropriate for partnerships are listed, followed by a discussion of the ways the public sector must modify its method of conducting business to lead the partnerships to success. Finally, the committee's recommended policy and statutory changes are discussed.

Section II outlines the committee's vision for a new Oregon Innovative Partnerships Program.

Public-private partnerships create opportunities for both the public and private sectors

Agreements between public and private sector entities to perform a public function jointly are referred to as "public-private partnerships." The entities assume varying degrees of responsibility to identify, finance, design, build, operate, and maintain projects. Partnerships are designed to benefit both the public and private partners.

The primary difference between public-private partnerships and the way transportation projects are currently managed is the degree to which the private sector can be involved. As it is now, the private sector plays an important role in many transportation projects, providing engineering, construction, and other services, but cannot initiate projects or assume any ownership of

Partnerships are designed to benefit both public and private partners

them. In public-private partnerships, the private sector can initiate projects by submitting unsolicited proposals and can assume some ownership of or direct responsibility for the public system, ranging from none to complete. By assuming this additional responsibility, the private sector also assumes risk, creating an opportunity for a market-based return on investment. As the degree of responsibility increases, so does the risk but also the opportunity for a higher return.

The public sector benefits by gaining access, through the private sector, to financing sources and arrangements not traditionally available to the state, and to innovative methods that can shorten the time required for project design and construction.

When they are properly conceived and implemented and have the support of the community and local jurisdictions, public-private partnerships can offer significant advantages to both sectors, such as:

- delivering critically needed transportation projects quickly, thereby reducing the costs of traffic delays and improving safety problems caused by congestion
- providing access to innovative project development and financing sources and arrangements
- supplementing the state's transportation revenues by allowing the use of tolls, user fees, and development rights, thereby allowing Oregon to allocate its limited resources to other needed projects
- providing cost certainty earlier in the procurement process
- encouraging and promoting business and employment opportunities
- providing a sound investment opportunity for the private sector

Public-private partnerships are not a new concept

Innovative public-private partnerships, in which private entities move beyond their traditional role in transportation projects, are not new in the United States. Nationwide over the past ten years, more than 350 transportation public-private partnerships with a constructed value in excess of \$23 billion have been initiated and are currently in various stages of completion. The committee reviewed a number of the projects and found that the most common types were highway, bridge, rail transit, heavy rail, and port projects. The committee also found that many of the projects would likely have suffered long delays, or may not have been built at all, without private sector involvement.

The public sector benefits from partnerships by gaining access to financing mechanisms not traditionally available to the state

In the last ten years, more than 350 transportation public-private partnerships have been initiated in the U.S.

Partnership arrangements varied widely because they were structured to fit individual projects. The committee found the partnership arrangements could be differentiated by:

- who designed the project
- who maintained it
- who built it
- who financed it
- who operated it
- who owned it

Ownership arrangements in the projects considered by the committee ran the gamut from completely public to completely private. Appendix A provides details on a number of transportation public-private partnerships, chosen from across the nation to illustrate a variety of project types and partnership arrangements.

Most transportation projects will continue to be handled in a traditional manner

Not all transportation projects are appropriate for public-private partnerships

Only a small percentage of transportation projects are appropriate for and would benefit from a public-private partnership arrangement. Most transportation projects will continue to be handled in a traditional manner. Projects that could benefit from public-private partnerships are those that have:

- a clearly recognized need
- realistic cost estimates
- political support that is greater than political resistance
- a local commitment
- opportunities for innovative finance techniques
- a timetable that can be materially reduced
- complex jurisdictional issues

In public-private partnerships, the public sector must function as both a fiduciary and partner

Public-private partnerships require the public sector to modify its traditional way of conducting business

The public sector's traditional role in transportation projects is as a fiduciary—it is the guardian of public funds and protector of, and decision-maker for, statutory public policy requirements and project oversight. In public-private partnerships, public and private interests must both be protected, which requires the public sector to function as both a fiduciary and a partner. As a partner, the public sector must work with the private entity to complete the project successfully.

In traditional transportation project arrangements, risk is fairly low because financing is provided from public sources, overruns in costs are typically covered by the public, and design and construction are strictly governed by standards and policies.

Private entities will not enter into public-private partnerships unless there is a reasonable expectation for a return on investment (profit). Profit is tied directly to the degree of risk, which depends largely on method of delivery (how design and construction are contracted), amount of control, financial arrangement, and how predictable it is that the project will proceed.

A high degree of predictability that a partnership, once agreed to, will proceed to implementation is critical to management of risk. Loss of time and uncertain delays inhibit the private sector's ability to obtain anticipated returns, jeopardizing not only the project, but the public-private partnership program as well.

The private sector must be able to manage risk in order to make a profit and still provide the best value to the public. Project delivery efficiency reduces risk and can be improved by implementing a system that rewards imagination, innovation and problem solving. The greater the risk, the greater the benefit may be of moving away from the traditional public agency delivery methods for achieving established performance standards.

The public sector, including the legislature, governor, the Oregon Transportation Commission (OTC), and the Oregon Department of Transportation (ODOT), must understand and accept that for public-private partnerships to succeed:

- the public sector must function as both partner and fiduciary
- the public sector must view private sector entities as partners, not adversaries
- a unique approach to risk allocation is required
- the private sector can realize a return on investment commensurate with returns obtainable elsewhere in the marketplace for comparable risk
- there must be a shared sense of urgency in meeting ambitious schedules and an awareness that every day lost can be critical
- new methods of developing projects must be adopted
- the public sector must be committed to an entrepreneurial approach that emphasizes a streamlined process and places a premium on innovation and expediting project delivery; an equal burden is placed on the private sector to bring innovative concepts to the process

Some agency policies and procedures need to be changed

The committee found that although ODOT currently has the capacity to engage the private sector in transportation public-private partnerships, there are a number of factors that significantly complicate ODOT's ability to do so.

Predictability that a partnership, once agreed to, will proceed to implementation is critical to management of risk

Project delivery efficiency can be improved by rewarding imagination and innovative problem-solving

ODOT currently has the capacity to implement public-private partnerships, but there are restrictions and other complications that need to be addressed

ODOT must accept the legitimacy of the private sector's objectives of profit and speed

Addressing these issues will greatly improve ODOT's ability to implement the partnerships. Recommended changes in policies and procedures are discussed here, and recommended statutory changes are discussed on page 7.

Identifying projects that are appropriate for public-private partnerships.

ODOT needs to develop a process for project identification and screening.

Accepting unsolicited proposals. ODOT must revise its existing rules or develop new rules for accepting and evaluating unsolicited proposals. There is currently an administrative rule governing unsolicited proposals for toll roads, but the rule needs to be revised to better accommodate large, complex, toll and related projects, and broadened to include the myriad of ways public-private partnerships can participate in transportation projects. In addition, without rules, proprietary information cannot be assured protection, thus inhibiting participation by the private sector.

Participation in project development. For maximum use of the talents the private sector offers, the private sector partner needs to have the opportunity to be involved from the beginning of a project to help shape its size, scope and major elements. Currently, the earliest the private sector can easily enter a project is at the design-build phase.

Organizational flexibility and creativity. Current rules place severe limits on flexibility and creativity in project development, requiring strict adherence to proscriptive specifications, rather than to performance standards. Incentives need to be identified to encourage an entrepreneurial approach to private-sector flexibility and creativity in planning, engineering, and financing.

Risk management philosophy. ODOT must help define and agree to the creative allocation of project risks. The party that can most effectively manage, control, reduce, or eliminate risks should be given responsibility for mitigating the factors that generate the risks. Allocation of economic consequences of risks, when and if they materialize, must also take into account project performance, long-term financial benefit from the project, and compensation for accepting and/or managing the risk.

Return on investment. ODOT must understand the connection between allocation of risk and return on investment and be willing to agree to returns on investment at market rates.

Control of costs and overruns. ODOT must accept creative methods for cost control and reduction, and public-private sharing of not only legitimate,

unanticipated cost overruns but also underruns that result from superior performance or innovative change.

Political risk. Elected officials must understand and support the way risk is allocated and market-based returns are generated for the partnership agreements. Public-private partnerships can collapse when there is a perception that the return to the private partners is too high or when the public sector's political behavior is inconsistent with the expectations of the parties.

Innovative funding. ODOT must set aside funds for public-private partnership opportunities, outside of normal project programming, to ensure that public-private arrangements can be achieved with speed and flexibility.

Some statutory changes need to be made

SB 966 required the committee to determine what, if any, legal impediments to transportation public-private partnerships exist and to recommend statutory changes that would remove the impediments. Three key types of legal impediments were found.

Public contracting laws. Oregon statutes on public contracting require that contracts be awarded to the lowest bidder unless an exception can be applied. The statutory requirements inhibit ODOT's ability to negotiate and implement creative and entrepreneurial public-private partnerships based on best value. Transportation partnerships should be exempted from the requirements of the Oregon statutes on public contracting (e.g., ORS Chapter 279).

Project selection constraints. State of Oregon transportation projects are subject to several process constraints. Transportation projects must be consistent with Oregon land use plans, local transportation system plans, the State Air Quality Improvement Plan, the State Highway Plan, and the Statewide Transportation Improvement Program, among others. Compliance with these laws is essential from the standpoint of good public policy, but they constrain the flexible and speedy selection of projects for innovative partnerships. For certain projects, ODOT may need to seek legislative authority for expedited project review and approval.

Innovative finance mechanisms. Transportation projects are traditionally funded on a "pay-as-you-go" basis, requiring projects to be constructed in phases as funds become available. The pay-as-you-go method can cause delays, which result in extra costs. Oregon needs to minimize the delays, and using innovative financing techniques would be one way to do it. The tech-

ODOT must set aside funds for partnerships to ensure they are implemented quickly

For certain projects, ODOT may need to seek legislative authority for expedited project review and approval

The Innovative Finance Advisory Committee believes it is important for the State of Oregon to use public-private partnerships as a critical element of a strategy to address the growing backlog of transportation needs throughout the state

niques have been designed to enhance the effectiveness of grant and private financing methods, and to bridge investment gaps between available resources and infrastructure needs. As transportation finance needs evolve, new tools and programs are likely to be added to the field of innovative finance.

Appendix B provides additional information on specific actions needed to improve access to project funds. Specific actions include:

- allowing ODOT credit backstop of local revenue streams
- enhancing Oregon Transportation Infrastructure Bank (OTIB) options
- expanding ODOT's eminent domain authority to facilitate private partner land purchase
- facilitating transfer of assets outside the right-of-way acquisition process
- revising reversion rights for acquiring toll bridges
- enabling use of federal financing programs
- allowing joint powers authority for project development

What is the next step?

Section II of this report outlines a vision for a new Oregon Innovative Partnerships Program (OIPP) for ODOT. The program would encourage the private sector to submit unsolicited transportation proposals to ODOT, and facilitate ODOT's ability to engage the private sector in transportation public-private partnerships. The basis of the OIPP is that it would establish a philosophy among the Oregon leadership that private sector entities should be recognized as partners and that business should be conducted differently.

Key to the OIPP is the creation of an Innovative Partnership Unit (IPU) in the Office of the Director at ODOT. The IPU would develop OIPP processes and policies and manage partnership projects with entrepreneurial flexibility, imagination and speed. The purpose of the IPU is to work effectively with the private sector and other governmental agencies on eligible transportation projects to accelerate project delivery and improve cost effectiveness.

Also in Section II, the committee recommends specific innovative finance mechanisms ODOT should have access to, some of which will require legislative action. Finally, the committee recommends several ways to encourage the private sector to participate in public-private transportation projects.

Oregon Innovative Partnerships Program

Vision

The Oregon Innovative Partnerships Program (OIPP) will accelerate the completion of transportation projects in a cost-effective manner by using an entrepreneurial approach. The approach will focus on encouraging the private sector to work in partnership with the public sector to procure, design, finance, and manage projects.

Requirements for success

Partnership perspectives

The basis of the OIPP is that ODOT and its leadership, staff, and organizational allies, such as the governor's office, the Oregon Transportation Commission (OTC) and area commissions, must recognize private sector entities and other governmental agencies as partners, and that business will be conducted in a new way, as described below.

For OIPP to succeed, characteristics of good partnerships must be observed, including:

- partners respect each other and recognize the mutual need to achieve success
- partners communicate effectively with each other, especially about difficulties
- partners operate in good faith
- partners are responsive to each other's needs
- partners focus on the objective that has been mutually agreed to

True partnerships are essential to the OIPP. The project should not proceed if mutually beneficial partnership arrangements cannot be reached.

Organizational support for the OIPP

ODOT's leadership and staff must support the OIPP and accept it as an important project delivery tool. ODOT must be clearly committed to innovation, and

the private sector must be clearly committed to adhering to necessary governmental actions.

Institutional capacity to manage the OIPP

ODOT must have the capacity to define the program's organizational structure and must have the expertise and authority to effectively implement the program. As the public partner, ODOT needs to be able to analyze a project's cost, risk, and economic and social benefits as well as impacts. Because ODOT may function as both a regulating and a contracting or concession-granting authority, the agency will require the legal and financial framework adequate for these roles.

Risk management philosophy

Critical components of the OIPP are the identification of risk and the allocation of risk to the partners who are able to manage the risks most effectively and at the lowest cost. Management of the risks identified should be allocated to the parties most able to effectively control and reduce the likelihood that the risk materializes. ODOT must adopt a risk management philosophy that recognizes that both the level and management of risk are directly related to the private sector's expectation of a reasonable rate of return and its financial ability to reasonably bear the risk.

Adequate information for decision-making

A successfully negotiated partnership requires each party to have accurate and complete knowledge of direct and indirect costs. ODOT must be able to demonstrate the value added from private sector participation. ODOT must obtain accurate information on project costs, schedules, risks, financing options and public benefit streams. The information must be gathered and assessed in a timely manner.

Full tool box of innovative finance mechanisms

Legislation and administrative rules must be adopted to allow ODOT to access state-of-the-art finance mechanisms.

Flexibility

The range of project types under the OIPP may be diverse. The incentive for participation by private partners may hinge on the ability to innovate and act quickly. Both of these factors will require ODOT to demonstrate an openness to new ideas and a quick turnaround capability.

Innovative selection of partners

Selection of private sector partners must be swift, efficient, and performance-based. This will require a shift away from lowest bid procurement, a due diligence review of track records at the front end, and selection of pre-qualified private sector partners. Proprietary information must be protected in this process.

Positive political climate

The legislature, the governor, and OTC must support the overall approach of OIPP and must understand and actively support three of its essential underpinnings:

Management of risk. There will be a different approach to management of risk in every OIPP arrangement, which will involve the sharing of risk elements between public and private sector parties. The party best able to manage an element of risk will bear that risk.

Predictability. The most important element in the partnership arrangement is for the legislature, the governor and OTC to accept responsibility to provide predictability, allowing the negotiated projects under this program to be implemented. It must also be understood and accepted that not all OIPP projects, being fairly high-risk ventures, will be successful. The failure of any one project should not negatively affect the OIPP.

Communication. ODOT should keep the legislature up-to-date on the status of OIPP projects to provide sufficient transparency to allow rapid implementation of negotiated agreements and adequate authority for execution of innovative partnerships. ODOT may require specific authority from the legislature to create an oversight process that defines appropriate political, administrative and judicial supervision. Clarity about how the program is to be administered will be key to the smooth execution of negotiated agreements.

Transparency

With few exceptions, every stage of the ODOT process for selecting and implementing an OIPP project should be open to the public. Exceptions include evaluation of unsolicited proposals and partnership negotiations.

Structure and process

Aligning ODOT's approach with OIPP's

To be effective, the OIPP must have certain characteristics, including:

Grant of authority. OTC should direct the creation of an Innovative Partnerships Unit (IPU) at the highest level within ODOT. To adequately support the IPU, OTC should grant the director the authority necessary to allow OIPP's mission to be achieved expeditiously and thoroughly. ODOT's director should be charged with leading the effort to successfully design and implement the OIPP.

Purpose. The purpose of the IPU should be to work effectively with the private sector and other governmental agencies on eligible transportation projects to accelerate project delivery and to encourage cost-effective solutions.

Structure for decisionmaking. The IPU should be established in ODOT's Office of the Director so that projects will be managed with entrepreneurial flexibility, imagination and speed.

Implementation and operations. The IPU should be granted authority to:

- screen and recommend projects for inclusion as OIPP projects
- review and recommend projects submitted as unsolicited proposals for inclusion as OIPP projects
- enter into intergovernmental agreements with local governments to leverage expertise and resources to participate in the structure and financing of innovative partnership projects
- solicit, procure and negotiate OIPP agreements
- perform contract management and oversight
- seek an appropriate State Transportation Improvement Program allocation or other funds for a project

Management of project components. The ODOT director should grant authority to the IPU to advance projects that are (a) financed without a mandate for a direct fee from the user, (b) financed involving various combinations of user fees, value capture, development rights, debt, traditional funding sources or any other innovative source, or (c) financed without state funding. Most innovative projects are likely to include a variety of private or public financial contributions beyond traditional highway trust fund sources. In managing an OIPP arrangement, the IPU should have defined roles and authority relative to the ODOT Highway Finance Office, Financial Services, Technical Services, the Director's Office, the ODOT regions and the rest of ODOT.

Development of the OIPP process. The IPU, or current ODOT staff, should develop a description of the process ODOT intends to use in evaluating and negotiating public/private initiatives. The description should include (a) program objectives, (b) project assessment methodologies (e.g., socioeconomic benefits, risk analysis, costing and schedules), (c) regulatory authority and procedures, and (d) reporting procedures. The IPU should describe IPU roles and authority relative to the ODOT Highway Finance Office, Financial Services, Technical Services, the Director's Office, ODOT regions and the rest of ODOT. The IPU should identify changes necessary in ODOT policies, procedures, rules and regulations to enable effective delivery of OIPP projects.

Acquisition of capability and expertise. IPU personnel must be required to have a firm understanding of project management and finance, and a commitment to OIPP project delivery. The manager of the IPU should report to the ODOT director. IPU personnel should identify easily with the entrepreneurial profile of the IPU. To acquire appropriate human resources, the director should consider entering into a personnel exchange agreement with private sector firms and governmental partners or contracting for services to acquire necessary expertise.

Budget. OTC should allocate a percentage of the available ODOT budget to accomplish OIPP projects. The funds should be available for use as up-front costs, project funds or ancillary work related to OIPP projects.

Communication with private sector firms. The IPU should have the principal responsibility of communicating with the private sector on matters relating to the OIPP.

Legislative involvement. The IPU, in conjunction with its partners and ODOT Governmental Affairs Division, should establish regular contact with key legis-

lators, in bipartisan manner, for the duration of each OIPP project, to keep them informed of the project's status.

Local and citizen involvement. The selection and development of an OIPP project by the IPU should be transparent to the public, notwithstanding contract negotiations and proprietary information that need to be held in confidentiality. The IPU, in conjunction with its partners and the ODOT Governmental Affairs Division, should reach out to community leaders and citizens and to local and statewide interest groups to solicit input and ensure an adequate flow of information about the OIPP project.

Advisory committee. It would serve the ODOT director well to create an informal advisory committee to advise and inform the director and the IPU with regard to the OIPP.

Entry of projects into the OIPP

There should be two ways for a project to enter the OIPP: (1) through a screening process to determine appropriateness and readiness, and (2) through an unsolicited proposal.

Screening. A project screening process should be developed to determine which unfunded projects meet minimum OIPP project criteria and are ready for private sector involvement.

Eligibility as an OIPP project. For an unfunded project to successfully pass the screening process, sufficient project development must have occurred. To determine the sufficiency of project development, these parameters should be considered:

- **Need for and scope of the project.** The project would provide significant benefits to the state transportation system and/or local area and would be of sufficient scope, complexity, and risk to warrant innovative private sector development.
- **Cost of the project.** Project costs have been reviewed and are considered to include all material components and be a reasonable estimate.
- **Short time-to-completion.** The project can be completed in a time frame that is materially shorter than could be achieved through a traditional process.

- **Political support vis-a-vis political resistance.** The project has political support that is sufficient to overcome barriers and enable the project to be implemented in a timely manner.
- **Application of innovative finance and project delivery techniques.** The project is structured in such a way that it is amenable to the application of innovative finance and project delivery techniques.
- **Participation of local governments.** Beneficiaries of the project have committed resources, including expertise, a local match, and process changes, to the success of the project.
- **Legal feasibility.** The project as described is consistent with state law.

Findings. The IPU should use the above criteria to screen potential projects.

Projects failing screening process. Projects that do not adequately address the screening parameters are not considered IPU projects. These projects may be funded locally or through traditional State Transportation Improvement Program (STIP) processes.

Unsolicited proposals

ODOT should develop a process for accepting, evaluating, and awarding a contract on the basis of unsolicited proposals from the private sector. Submitters of unsolicited proposals should not be entitled to compensation from ODOT whether or not the proposal is accepted. The criteria used to develop an ODOT process should:

- encourage submission of unsolicited proposals for projects other than those that have completed the screening process or are currently under evaluation as part of the screening process
- allow the opportunity for preliminary inquiries with regard to general need and background data
- provide a descriptive list of all the information required for ODOT action on an unsolicited proposal
- ensure adequate confidentiality for the submitter
- outline a timely review process
- consider the fees, if any, that should be charged
- provide an opportunity for other interested parties to propose on the project in competition if the unsolicited proposal has merit, but provide

protection for the propriety information submitted. Competing proposers should have adequate time for submitting proposals.

Process for creation of OIPP arrangements

Defining the project. The IPU should define any project included in the OIPP, including description, goals and objectives, parameters, timing, cost, risk, public benefits and justification.

Approval for inclusion within the IPU. The IPU should apply authority granted by the OTC to approve or deny inclusion of the project as an OIPP project.

Pre-qualification of partners. Private sector partners in an OIPP project must be selected carefully. For projects under solicitation by ODOT, the partners should go through a pre-qualification process to determine eligibility for selection as a partner. ODOT should develop criteria for selection of private sector partners, including qualifications and capacity of the firm and the firm's record on safety and claims experience.

Partner selection. For a screened project, the nature of the project and the expertise and experience of the private sector partner should determine how the qualified private sector partner will be chosen. In keeping with the OIPP's vision, the selection process should be a public competition for a short list of candidates.

Negotiation of contract. Once a private sector partner is chosen, a project contract should be negotiated. Among the considerations to be made in any contractual arrangement are:

- **Assignment of roles and responsibilities.** The parties must determine when the private sector partner will enter the project (e.g., pre-EIS, EIS, PE, design, construction, operation). The parties must also determine which parties will assume responsibilities for specific elements of the project.
- **Alignment of incentives.** In every OIPP project, the incentives of the public and private sector must be aligned at the outset. The public sector entities and the private sector firms must agree, in negotiating the contract, how risk will be managed and allocated. In developing incentive mechanisms for managing and allocating risk, the private sector entities must agree to the importance of public policy considerations in a project, and the public sector must recognize the importance of reasonable profitability for the private sector.

- **Cost sharing in development phase.** For the private sector to put capital at risk in the development phase of a project, there must either be a reasonable predictability of project completion or, if there are considerable uncontrollable risks, the public sector must be willing to either share the cost or reimburse the cost.
- **Return on investment.** Negotiations for the project agreement must include a consideration of market rates of return for the activity under negotiation. The returns must be reasonable, related to the risk taken, and clear to all public and private sector parties. To be most effective, the returns should be tied to the performance of the private sector parties against benchmarks.
- **Public-private cost sharing of overruns.** The public sector must be willing to bear some of the responsibility for certain legitimate and unanticipated cost changes that are outside the control of the private partner and not otherwise insurable. If taking on ownership or a normal public sector role, the private sector must be willing to take on the associated risks typically carried by the public sector and provide fixed price contracts, guarantees and/or warranties to ODOT. Innovative contracting methods typically involve significant additional responsibility on the part of the private sector for project insurance and must be addressed at the beginning of an arrangement.
- **ODOT oversight: Performance standards vs. proscriptive specifications.** The public sector entity must accept that oversight for design-build projects must focus on adherence to performance criteria/standards as a measure of performance rather than compliance with strict, conventional specifications. In return, the private sector must take responsibility for delivering a project that meets all performance criteria and work cooperatively with the project oversight process.
- **Risk transfer/risk management.** Public and private partners should seek the best ways to manage risk and find the most cost-effective alternatives for a project. A risk matrix analysis can identify risks that can be eliminated or reduced. An accurate appraisal of the risks of each partner will optimize risk sharing.
- **Incentives for performance/penalties for nonperformance.** Penalties for non-performance should be assigned in a way that protects the public but also retains an incentive for the private sector partner to meet contract obligations.

Review by director. Once an OIPP arrangement is reached, the director should review the arrangement and make a recommendation to OTC, which should have approval authority for the arrangement. The director should be the contractor signatory.

Publicizing the contract. After director approval, the OIPP arrangement must be communicated in a way that allows for public scrutiny by citizens and institutions with an interest in the project or contractual arrangement.

Accounting and auditing. An accounting and auditing procedure appropriate for OIPP projects should be applied.

Management and development of OIPP projects

From a project development perspective, it is most advantageous to engage a private sector partner as early as possible in the process. It is often more likely that a private sector firm will commit significant investment dollars to a project when the firm can evaluate and help shape the course of the project. The timing of the private sector partner's entry into the process will determine the degree of the partner's involvement in project assessment, design and management.

Innovative finance mechanisms

ODOT credit backstop

ODOT should have authority to use ODOT Highway User Tax Revenue Bond credit to backstop local system development charges or other local revenue charges in support of an OIPP project.

Infrastructure bank

Private sector participation. The Oregon Transportation Infrastructure Bank (OTIB) should facilitate loans and provide infrastructure assistance to the private sector in support of OIPP projects.

Acquisition of developable property. OTIB should have authority to finance non-right-of-way acquisition of developable property that would benefit by a project (or combined projects) in an OIPP project.

OTIB capitalization. OTIB should obtain additional capital to provide loans and infrastructure assistance for more and larger projects. This may include federal or state sources of capital or use of OTIB's existing bonding authority.

Acquisition of land and development rights

ODOT acquisition of land. ODOT should have the authority to acquire land for non-right-of-way purposes to facilitate financing of OIPP projects. ODOT should also have the authority to acquire land in conjunction with private or local government partners.

Facilitating private sector purchases of land or development rights. As part of an OIPP arrangement, ODOT and local government partners should provide private sector partners the opportunity to purchase land or development rights that would benefit by a project in exchange for private dollar investments into the project.

Land trading. Opportunity for land trading not related to right-of-way should be explored as a way to support OIPP projects.

Land donations. Opportunity for land donations not related to right-of-way should be explored as a way to support OIPP projects.

Tolling

ORS 383.330 should be repealed to eliminate the state's right to acquire a toll bridge after three years following construction and operation.

Federal financing programs

TIFIA. ODOT should have the authority to enter into agreements under the Transportation Infrastructure Finance and Innovation Act of 1998 (TIFIA) as part of an OIPP project.

Enacted as part of the Transportation Equity Act for the 21st Century (TEA-21), TIFIA established a new federal program under which the U.S. Department of Transportation (USDOT) provides loans and credit assistance to major surface transportation projects of national or regional significance. The TIFIA

credit program offers three distinct types of financial assistance, designed to address the varying requirements of projects throughout their life cycles:

- Direct loans to project sponsors that offer flexible repayment terms and provide combined construction and permanent financing of capital costs, often sooner and at a lower cost than could otherwise be obtained.
- Loan guarantees that provide full-faith-and-credit guarantees by the federal government to institutional investors, such as pension funds, which make loans for projects.
- Standby lines of credit that represent secondary sources of funding in the form of contingent federal loans. The loans may be drawn upon to supplement project revenues, if needed, during the first ten years of project operations.

GARVEEs. ODOT should have the authority to issue Grant Anticipation Revenue Vehicle Bonds (GARVEE Bonds).

GARVEE Bonds pledge future federal aid or other sources of funds for debt service. This financing mechanism generates up-front capital for transportation projects, which the state may be unable to construct in the near term using traditional pay-as-you-go funding approaches.

Joint powers authority

Oregon's statute for intergovernmental agreements (ORS 190.003 et seq.) should be amended to allow ODOT participation in a "joint powers authority" (a.k.a. intergovernmental agreement). The statutory change should also allow governmental entities in other states to participate in bi-state compacts with multi-state transportation projects.

Other innovative finance mechanisms

The Innovative Finance Advisory Committee considered several other financial mechanisms of interest but does not give these mechanisms priority for further legislative action or ODOT implementation. Among the other financial mechanisms considered were ODOT authority to impose systems development charges, ODOT authority to impose traffic impact fees for value capture, and ODOT or local government authority to charge fees for the "up zoning" of properties into an Urban Growth Boundary.

How to encourage private entities to participate in the OIPP

Pre-qualification workshop

ODOT should unveil its OIPP at a national conference. The conference should include details of private sector access to the Oregon program, including pre-qualification.

Engaging area commissions on transportation

ODOT should engage area commissions on transportation and metropolitan planning organizations in workshops to educate local leaders and interests about the OIPP.

Engaging local governments

All ODOT projects will require the meaningful involvement of affected local governments. ODOT should also leverage the experience, expertise, and resources of governmental agencies, particularly those that may become partners with ODOT in an innovative partnership.

Engaging major transportation associations

ODOT should engage the major transportation associations locally and nationally, including ACEC, Associated General Contractors and AASHTO.

Web site

ODOT should establish a highly informative and interactive Web site for the OIPP.

Timeline for adoption, formation and implementation of the OIPP

Owing to the urgency of opening Oregon to public-private transportation projects, the Innovative Finance Advisory Committee recommends the following timeline for program development.

Legislative approval

The legislature should pass legislation to implement the program, as described above, no later than June 30, 2003.

Formation of the IPU

ODOT should form the IPU no later than September 30, 2003.

First IPU project award

The IPU should award the first innovative partnership project no later than December 31, 2003.

**Examples of Transportation
Public-Private Partnerships in the U.S.**

Examples of transportation public-private partnerships in the U.S.*

Project	Description	Date of completion	Cost	Financing	Revenue	Partnership arrangement
ARIZONA						
U.S. 60 Upgrade, Phoenix, Arizona	Improvements in 13-mile stretch from I-10 Val Vista Dr. with addition of new HOV lanes, auxiliary lanes, and some new traffic lanes.	2003	\$184 million			Design-build
CALIFORNIA						
Foothills/Eastern Corridor, Orange County, California	New toll facility being constructed by the Transportation Corridor Agency in two segments— Eastern Transportation Corridor (24 miles) and Foothill Transportation Corridor (27.7 miles)— provides direct access between Riverside County residential areas, Orange County SE suburbs, and northern San Diego County.	Eastern corridor and northern section of the Foothill Corridor are open to traffic and performing above expectations. Southern Foothill Corridor is in the environmental document development phase.	\$1.5 billion (\$750 million in construction)	<ul style="list-style-type: none"> • \$25 million standby construction contingency line of credit via TE-045 • \$120 million standby federal line of credit • \$1.263 billion from fixed-rate revenue bonds • \$246 million from variable-rate revenue bonds • \$67 million CA state and local transportation partnership program funds • Interest earnings on bond proceeds • Development impact fees • Subordinated vendor financing available 	<ul style="list-style-type: none"> • Tolls • Development impact fees • Interest earnings 	<ul style="list-style-type: none"> • Design-build • Guaranteed maximum price • Guaranteed completion date
San Joaquin Hills Corridor, Orange County, California	15-mile, six-lane, limited-access highway designed to relieve congestion on I-405, I-5, Pacific Coast Highway, and other major arterials. First new public toll facility developed by the Transportation Corridor Agency.	Opened in November 1996. Currently operating at 82.5% of projections.	\$1.4 billion (\$790 million in design/construction)	<ul style="list-style-type: none"> • \$120 million standby federal line of credit through direct appropriation • \$1.079 billion senior-lien revenue bonds • \$91 million junior-lien bonds • \$38 million project revenue certificates • \$31 million advance-funded development impact fees • \$40 million California Transportation Commission grant 	<ul style="list-style-type: none"> • Tolls • Development impact fees • Interest earnings 	<ul style="list-style-type: none"> • Design-build • Guaranteed maximum price • Guaranteed completion date

*Based on best available information

Examples of transportation public-private partnerships in the U.S. (cont.)*

Project	Description	Date of completion	Cost	Financing	Revenue	Partnership arrangement
CALIFORNIA (cont.)						
SR 91 express lanes, Orange County, California	Four-lane toll facility in the median of 16-kilometer section of the Riverside Freeway. Requires electronic transponder for toll collection.	December 1995	\$130 million	<ul style="list-style-type: none"> • \$65 million 14-year variable-rate bank loan • \$35 million longer term loans • \$20 million private equity • \$9 million subordinated debt 	Variable-rate tolls (\$0.75 to \$4.25 reflecting level of congestion delay avoided in adjacent non-toll lanes)	Design-build-toll-operate-private ownership. In 2003 sold to Orange County Transportation Authority
SR 125 S/San Miguel Mountain Parkway, San Diego County, California	New 11-mile highway alignment from SR 905 near the border to SR 54, completing the missing link in north-south corridor. Southern 9.5 miles to be constructed and privately financed and operated toll road. Northern 1.5 miles publicly financed.	2006	\$426 million	<ul style="list-style-type: none"> • Private equity bank financing • USDOT TIFIA loan 	Tolls	35-year BTO franchise with State of California allows developer to set market rate tolls. Franchise allows a maximum 18.5% return on total investment with additional allowed incentive return for action to increase average vehicle occupancy in the toll road.
COLORADO						
E-470 Highway Authority, Denver, Colorado	46-mile beltway along the eastern edge of the Denver metro area linking arterials with Denver International Airport. Built in four phases.	Phase 1 opened 1991, Phase II 1998, Phase III 1999, Phase IV 2002	\$12 billion	Tax-exempt revenue bonds.	<ul style="list-style-type: none"> • Tolls • Vehicle registration fees • Highway expansion impact fee • Other private (office space, ROW, property assessments, monetary donations) 	Publicly owned and publicly operated project. Design-build turnkey contract to guarantee maximum price and completion date. Public-private development agreement for Phases II-III.
Northwest Parkway, Denver Area, Colorado	11-mile connection between E-470 / I-25 and Boulder Turnpike. Last 2 miles untolled connector.	2003	\$180 million	Tax-exempt revenue bonds.	Tolls	Public-private development agreement plus design-build

*Based on best available information

Examples of transportation public-private partnerships in the U.S. (cont.)*

Project	Description	Date of completion	Cost	Financing	Revenue	Partnership arrangement
COLORADO (cont.)						
T-Rex (Transportation Expansion Project) (formerly the Southeast Corridor Project), Denver, Colorado	Widening 14 miles of I-25 and 4 miles of I-225. New 19 mile grade separated, double-tracked light rail with 13 stations and park-and-rides. Links the two largest employment centers in the region (the Southeast Business District and the Denver Central Business District).	June 2008	\$1.67 billion (\$788 million for highway; \$879 million for rail)	CDOT: <ul style="list-style-type: none"> • GARVEE Bonds: \$671 million • Sales and use tax revenue: \$117 million RTD: <ul style="list-style-type: none"> • FTA full funding grant agreement: \$525 million • Bond proceeds: \$320 million • Local funds: \$34 million 	<ul style="list-style-type: none"> • Future federal and state matching funds will be used for debt service. • RTD will use sales and use tax revenues to repay its debt. 	Single design-build contract for highway and transit improvements
MASSACHUSETTS						
Mass Route 3, Boston, Massachusetts, to the New Hampshire border	Improvements to existing 21-mile limited-access highway.	Under construction	\$385 million	63-20 corporation issue tax-exempt lease revenue bonds		Design-build-operate
NEW JERSEY						
Atlantic City/Brigantine Connector, Atlantic City, New Jersey	2.2-mile highway with 2,200-foot tunnel connecting Atlantic City Expressway to the north end of Atlantic City and improved access to resort city of Brigantine where there is new resort casino expansion		\$330 million	<ul style="list-style-type: none"> • \$125 million bond sales with \$65 million reimbursement from new casino parking fees • \$95 million from New Jersey Transportation Trust Fund • \$110 million from Mirage Resorts, Inc. (\$55 million bond purchase in lieu of tax credits) 	<ul style="list-style-type: none"> • Casino parking fees • Atlantic City Expressway toll fees 	Design-build
NEW MEXICO						
New Mexico I-44, San Ysidro to Bloomfield (Four Corners), New Mexico	120-mile stretch to be expanded from two to four lanes. Project passes through three counties, four tribe and Pueblo lands, BLM, USFS, and private owners.	November 2001	\$314 million	<ul style="list-style-type: none"> • \$100 million sole source GARVEE Bonds (long term), insured and tax exempt • \$214 million state highway revenue bonds (tax-exempt) 	Future federal highway grants and state road fund revenues	Public-private partnership and four separate contracts used to deal with state design-build prohibition.

*Based on best available information

Examples of transportation public-private partnerships in the U.S. (cont.)*

Project	Description	Date of completion	Cost	Financing	Revenue	Partnership arrangement
OHIO						
Butler Regional Highway, Butler County, Ohio	New 10.7-mile, four-lane, limited-access toll road in southwest Ohio to connect an intersection in Hamilton to I-75.	Fall 2000	\$150 million	<ul style="list-style-type: none"> • \$158.5 million revenue bond sale • \$35 million Ohio SIB loans (ODOT lease payments made through GARVEE Bonds) 	Lease payments	ODOT will lease toll road from TID through 2017
OREGON						
Airport MAX LRT Extension, Portland, Oregon	Extends the light rail system in Portland 5.5 miles to serve the Portland International Airport. Includes four new stations.	2002	\$135 million	<ul style="list-style-type: none"> • Port of Portland (airport passenger facility charges), \$28.3 million • TriMet (General Fund), \$45.5 million • City of Portland (urban renewal district, tax increment financing), \$23 million • Cascade Station Development Co. (private partner that included Bechtel), \$28.2 million 	Private development rights. Funding provides for transit-oriented development of 120 acres near the airport.	Design-build with public-private partnership for development
I-84 Quarry Bridges, La Grande, Oregon	Replace four deficient bridges on the interstate	November 2005. Could be completed up to one year early.	\$19 million	<ul style="list-style-type: none"> • Federal funding • OTIA 		Design-build
SOUTH CAROLINA						
Carolina Bays Parkway, Grand Strand area, South Carolina	Alternative north-south controlled-access highway on the mainland side of the Atlantic Intercoastal Waterway with connector routes to US 17.	Late 2001	\$226 million	<ul style="list-style-type: none"> • SIB – 45% • Horry County – 45% • SCDOT – 10% 	<ul style="list-style-type: none"> • Federal decapitalization monies • State general funds as one-time source of capitalization • Share of state gas tax • Truck registration fees • Horry County hospitality fees 	Design-build

*Based on best available information

Examples of transportation public-private partnerships in the U.S. (cont.)*

Project	Description	Date of completion	Cost	Financing	Revenue	Partnership arrangement
SOUTH CAROLINA (cont.)						
Conway Bypass, Myrtle Beach area, South Carolina	New 28.5-mile controlled access highway linking US 501 (main access to Myrtle Beach) between Conway and Aynor to US 17 near Myrtle Beach.	May 2001	\$386 million	State infrastructure bank		Design-build
Cooper River Bridge, Charleston/Mt. Pleasant, South Carolina	2.5-mile bridge replacement for two structurally deficient bridges. Incorporation of PSRC gives the project the ability to raise money from the private sector and recruit retail business for the station		\$650 million	\$215 million TIFIA direct loan	South Carolina Transportation Improvement Board, including registration fees and loan repayments	Design-build
Cross Island Parkway, Hilton Head, South Carolina	7.5-mile parkway with one toll plaza and 12 lanes	February 1998	\$83 million	<ul style="list-style-type: none"> • State highway bonds • State and federal funds 	Tolls	Competitive bid. Lockheed Martin IMS selected for private operation and maintenance.
Southern Connector, Greenville, South Carolina	16-mile toll road bypass of Greenville between I-185 and I-385	February 2001	\$191 million	<ul style="list-style-type: none"> • \$200 million tax-exempt bonds sold by 63-20 corporation • \$5 million TIFIA support • \$18 million state funding 	Tolls	Joint development agreement. When bonds are retired, operation and ownership will be transferred to the state
TEXAS						
Camino Colombia Truck Bypass, Laredo, Texas	21-mile controlled-access truck bypass from International Bridge to I-35, the primary artery for truck traffic between Texas and Monterrey, Mexico. Includes truck transfer station for freight handling.	October 2000	\$85 million	<ul style="list-style-type: none"> • Equity contributions • Bank loans • Secured debt 	Tolls	Finance-design-build-operate-maintain under private ownership
Central Texas Regional Mobility Authority	US 183A (12.1 mi; \$190 million)	Estimated 2007-2008	\$190 million plus financing costs	<ul style="list-style-type: none"> • Bonds sold by RMA • Texas DOT grant • USDOT TIFIA loan 	Tolls	Exclusive development agreement

*Based on best available information

Examples of transportation public-private partnerships in the U.S. (cont.)*

Project	Description	Date of completion	Cost	Financing	Revenue	Partnership arrangement
TEXAS (cont.)						
Central Texas Turnpike, Austin – San Antonio, Texas	A new 122-mile turnpike facility in four elements: <ul style="list-style-type: none"> • SH 45 (16.1 mi; \$480 million) • Loop 1 (4.1 mi; \$125 million) • SH 130 (90 mi; \$916 million) 	Late 2007	\$3.2 billion (includes O&M and financing)	<ul style="list-style-type: none"> • \$800 million USDOT TIFIA direct loan • \$700 million sought from Texas Transportation Commission • Bonds sold by Texas Turnpike Authority 	Tolls	Traditional design-bid-build for Loop 1 and SH 45. Exclusive development agreement for SH 130 and US 183A.
George Bush Turnpike, Dallas area, Texas	New 26-mile highway connecting Dallas to northern suburbs.	Portions completed; remainder under construction.	\$531 million	<ul style="list-style-type: none"> • ISTEA and TEA-045 program tools • NTTA revenue bonds 	Tolls	Design-bid-build. Joint development by NTTA and TxDOT
UTAH						
I-15 reconstruction, Salt Lake City area, Utah	17-mile stretch of I-15.	Spring 2001	\$1.4 billion	Federal highway funds		Design-build
Legacy Parkway, Davis County, Utah	14-mile alternative to I-15 from Salt Lake City to I-15 / US 89 in Farmington to alleviate congestion in Davis County and north Salt Lake County.	2004	\$330 million	Federal highway funds		Design-build
VIRGINIA						
Dulles Greenway, northern Virginia	14-mile privately owned toll road connecting Leesburg to Dulles Toll Road and Dulles Airport area. Extension of the Dulles Toll Road.	Opened September 1996. Plans announced in 1999 to expand the four-lane facility.	\$350 million	1999 refinancing following default in 1996: <ul style="list-style-type: none"> • Bonds issued to satisfy all previous note agreements and all other outstanding agreements • AAA Bonds insured by MBIA's \$332 million in total bonds issued: • \$35 million of current pay interest-only bonds • \$297 million zero coupon bonds maturing in 2003, 2005, with blended interest rate of approximately 7% 	Tolls	Finance-design-build-operate-maintain private ownership

*Based on best available information

Examples of transportation public-private partnerships in the U.S. (cont.)*

Project	Description	Date of completion	Cost	Financing	Revenue	Partnership arrangement
VIRGINIA (cont.)						
I-895 connector/ Pocahontas Parkway, Richmond, Virginia	New 8.8-mile toll facility connecting I-95 and I-29 near Richmond International Airport. Includes high-level bridge over the James River.	Under construction	\$324 million	<ul style="list-style-type: none"> • \$297 million in tax-exempt toll revenue bonds • \$9 million in federal funds for design costs • \$18 million in SIB loans 	Tolls	Design-build-finance
Route 288, Richmond area, Virginia	17.5-mile western loop around Richmond between Route 76 and I-64	<ul style="list-style-type: none"> • Rte 76 to Charter Colony Pkwy completed 2001 • Charter Colony Pkwy to Chesterfield / Powhatan County line to be completed July 2003 • Remainder to I-64 to be completed late 2003 	\$236 million	<ul style="list-style-type: none"> • \$20.7 million FHWA TEA-21 • \$283 million VDOT • \$236 million APAC-Virginia 		Design-build with long-term warranty
WASHINGTON						
Tacoma Narrows Bridge, Pierce County, Washington	New suspension bridge and roadway improvements along a 3.4-mile segment of SR 16.	Spring 2005	\$835 million	<ul style="list-style-type: none"> • TIFIA assistance <ul style="list-style-type: none"> – \$240 million secured loan – \$30 million line of credit • \$500 million tax exempt bonds 		Design-build

*Based on best available information

Innovative Finance Mechanisms

Transportation projects are traditionally funded on a “pay-as-you-go” basis, requiring projects to be constructed in phases as funds become available. The ability to use innovative financing reduces project delays and their associated costs. The Federal Highway Administration (FHWA) and states throughout the U.S. have advanced a broad range of innovative techniques that can be used in combination with traditional funding programs.

Most highway projects will continue to rely primarily upon grant-based funding because they do not generate revenues needed to repay debt financing. These projects can still benefit from innovative finance tools that enhance flexibility and maximize resources. For example, sometimes it makes sense to use debt service to advance projects, borrowing against future grant receipts to pay back the loan.

Some projects can be partially financed with project-related revenues, such as tolls, but may also require some form of public credit assistance to be financially viable. State infrastructure banks can offer assistance in the form of low-interest loans, loan guarantees, and other credit enhancements.

A small number of projects may be able to secure private capital financing without governmental assistance. These relatively few projects may be developed on high-volume corridors where the revenues from user fees are sufficient to cover capital and operating costs.

Following are innovative finance mechanisms along with specific actions needed to improve access to project funds.

ODOT credit backstop of local revenue streams

Local revenue sources currently have limited usefulness for financing transportation projects. Higher borrowing rates for local debt issues can make local financing methods too expensive in a practical sense. Allowing ODOT to use ODOT Highway User Tax Revenue Bond credit to backstop local revenue sources, such as system development charges, would greatly improve the bonding capability for local sources of revenue.

State infrastructure bank

The Oregon Transportation Infrastructure Bank (OTIB) has statutory authority to sell bonds up to \$200 million to make loans and provide infrastructure assistance to private entities. The Bond Bill authorizes up to \$50 million in the 2003–2005 biennium. Bonds, if sold, would require a repayment source such as loan repayments or the Highway Fund. OTIB lacks authority to finance acquisition of developable property or development rights. OTIB is also restricted by federal regulation of state infrastructure banks, and by unavailability of additional capital.

ODOT eminent domain authority

The Oregon Department of Justice advises that ODOT's existing eminent domain authority under Oregon statutory law does not extend to the purchase of land or development rights for conveyance to private sector partners as part of a public-private project arrangement. In addition, the Oregon Constitution prohibits the use of the State Highway Fund revenue for purposes other than the construction, reconstruction, improvement, repair, maintenance, operation and use of public highways, roads, streets and roadside areas. Expansion of ODOT's eminent domain authority to allow the use of funds other than State Highway Fund revenues to facilitate private sector partner purchases of land and development rights would greatly improve the likelihood of private sector funding of public-private transportation projects.

Transfer and disposition of ODOT assets

While ODOT has current statutory authority to exchange parcels of land (ORS 366.337) and to dispose of property that is no longer needed for highway purposes (ORS 366.395), a new process may be needed to facilitate transfer of assets outside the right-of-way acquisition process.

Toll bridge reversion

Oregon's current toll bridge statute (ORS 383.330) contains a state right to acquire toll bridges after three years following construction and operation. This provision effectively eliminates private sector motivation to finance toll bridge projects in Oregon.

Federal financing programs

Two federal programs allow for creative financing of transportation projects. The Transportation Infrastructure Finance and Innovation Act (TIFIA) provides loans and credit assistance to major surface transportation projects of national or regional significance. Grant Anticipation Revenue Vehicle Bonds (GARVEE Bonds) allow the pledge of future federal aid for debt service. ODOT currently does not have the authority to enter into TIFIA agreements as part of public-private partnerships nor does ODOT have the authority to issue GARVEE Bonds. Both federal programs would aid the development of public-private projects in Oregon.

Joint powers authority

Working with multiple governmental jurisdictions in a non-coordinating fashion can hamper the ability of a public-private project to progress expeditiously. While Oregon has statutory authority for intergovernmental agreements (ORS 190.003 et seq.), ODOT is not currently authorized to participate as a member in joint governmental arrangements for transportation projects and it must have the ability to leverage the expertise and resources of other governmental entities.

Himes, Dale

From: Himes, Dale
Sent: Monday, April 05, 2004 9:45 AM
To: Arnis, Amy; Ellis, Jerry; Cummings, Michael; Legry, Mary
Cc: Conrad, John; Hammond, Paula; Wagner, Don
Subject: FW: Final Proposed Rules for OIPP

All,
 Below are Jim Whitty's, ODOT, response to our concerns. Any further comments?
 Dale

-----Original Message-----

From: Jim.WHITTY@odot.state.or.us [mailto:Jim.WHITTY@odot.state.or.us]
Sent: Monday, April 05, 2004 9:25 AM
To: HimesD@wsdot.wa.gov
Cc: Joe.Mcnaught@state.or.us; Steven.Wolf@state.or.us; William.Nessly@state.or.us;
 David.G.WILLIAMS@odot.state.or.us; Art.JAMES@odot.state.or.us
Subject: RE: Final Proposed Rules for OIPP

Dale,

a) The intent of requiring an "agreement" is for two (or more) states to reach an understanding about how they would jointly deal with unsolicited proposals. This paragraph simply closes off Oregon's ability to receive an unsolicited proposal until Washington agrees with the approach to be taken, which means that both states would have to agree that submission of an unsolicited proposal is acceptable. Until such an agreement, Oregon would not be able to accept an unsolicited proposal. Thus, both states would be protected from being forced to deal with an unsolicited proposal until they are prepared to do so.

b) It is our intention that paragraph (5) does not apply to solicited proposals.

c) I see your point. You are wondering if through -0270, paragraph (5) or -0050 applies to solicited proposals. Again, this is not our intent but the drafting must reflect our intent.

d) and e) The EIS process does not relate to the proposals. A proposal can be submitted before, during or after the EIS process.

Jim

-----Original Message-----

From: Himes, Dale [mailto:HimesD@wsdot.wa.gov]
Sent: Wednesday, March 31, 2004 3:57 PM
To: WHITTY Jim
Subject: RE: Final Proposed Rules for OIPP

Jim,

Thank you for the opportunity to respond.

Today, March 30, 2004, I met with Amy Arnis, Jerry Ellis, Mike Cummings, Mary Legry and Don Wagner to discuss the proposed rules for OIPP. Several concerns were voiced:

In regards to section 731-070-0050, page 7, paragraph 5:

a) Could you summarize the overall intent of the Agreement and define it more? b) Would the Agreement cover both solicited and unsolicited proposals? c) How does paragraph 5 relate to section 731-070-0270, page 31? d) When would the EIS review begin? e) Would the EIS review start after the detailed plans are submitted?

As you know, we may have to seek legal authority to enter into such an Agreement. It also seems that the overall

4/6/2004

approval/disapproval process needs to be as simple and straight forward as possible so that WSDOT could mirror the same process as well. The process would have to be modified to follow our permitting requirements and other Washington State laws and procedures.

We would like to hear your response to the above and then discuss internally again. We may also then send paragraph 5 to our AG office for further wordsmithing.

Thanks,
Dale

-----Original Message-----

From: Jim.WHITTY@odot.state.or.us [mailto:Jim.WHITTY@odot.state.or.us]

Sent: Monday, February 23, 2004 1:32 PM

To: himesd@wsdot.wa.gov

Subject: Final Proposed Rules for OIPP

Dale,

I attach the formal rules proposal for the Innovative Partnerships Program that was filed with the Secretary of State on February 13th. I welcome WSDOT's comments and suggestions on this formal proposal. If you like, I would be pleased to have the opportunity to meet with whomever you suggest about these rules.

A public hearing is scheduled for March 25 in Salem. The public comment period closes April 9th at 5 pm.

Jim

<<731-070.doc>> <<731-070.doc>>

*** eSafe scanned this email for malicious content ***

*** IMPORTANT: Do not open attachments from unrecognized senders ***

Himes, Dale

From: Himes, Dale
Sent: Wednesday, March 31, 2004 3:57 PM
To: 'Jim.WHITTY@odot.state.or.us'
Subject: RE: Final Proposed Rules for OIPP

Jim,

Thank you for the opportunity to respond.

Today, March 30, 2004, I met with Amy Arnis, Jerry Ellis, Mike Cummings, Mary Legry and Don Wagner to discuss the proposed rules for OIPP. Several concerns were voiced:

In regards to section 731-070-0050, page 7, paragraph 5:

a) Could you summarize the overall intent of the Agreement and define it more? b) Would the Agreement cover both solicited and unsolicited proposals? c) How does paragraph 5 relate to section 731-070-0270, page 31? d) When would the EIS review begin? e) Would the EIS review start after the detailed plans are submitted?

As you know, we may have to seek legal authority to enter into such an Agreement. It also seems that the overall approval/disapproval process needs to be as simple and straight forward as possible so that WSDOT could mirror the same process as well. The process would have to be modified to follow our permitting requirements and other Washington State laws and procedures.

We would like to hear your response to the above and then discuss internally again. We may also then send paragraph 5 to our AG office for further wordsmithing.

Thanks,
Dale

-----Original Message-----

From: Jim.WHITTY@odot.state.or.us [mailto:Jim.WHITTY@odot.state.or.us]
Sent: Monday, February 23, 2004 1:32 PM
To: himesd@wsdot.wa.gov
Subject: Final Proposed Rules for OIPP

Dale,

I attach the formal rules proposal for the Innovative Partnerships Program that was filed with the Secretary of State on February 13th. I welcome WSDOT's comments and suggestions on this formal proposal. If you like, I would be pleased to have the opportunity to meet with whomever you suggest about these rules.

A public hearing is scheduled for March 25 in Salem. The public comment period closes April 9th at 5 pm.

Jim

<<731-070.doc>> <<731-070.doc>>

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*** IMPORTANT: Do not open attachments from unrecognized senders ***

3/31/2004

Himes, Dale

From: Himes, Dale
Sent: Tuesday, March 30, 2004 9:20 AM
To: Cummings, Michael
Cc: Ellis, Jerry; Arnis, Amy; ~~Wagner, Don; Legry, Mary; Conrad, John; Hammond, Paula~~, *Mike*, *Cummings*
Subject: FW: ODOT PP Rules

Mike,

FYI, on Wednesday, March 31, 2004 at 10:00 a.m., Amy Arnis, Jerry Ellis and myself will be reviewing (via conference call) the "formal draft" of ODOT's PP rules. (ODOT's public comment period closes on April 9, 2004 at 5:00 p.m.) The draft rules are attached along with a flowchart that I constructed that summarizes the overall decision process. When reviewing the rules and the flowchart, you will notice that the "Director" is the "gatekeeper" for most of the critical decisions.

Before April 9th, I need to prepare a response back to Jim Whitty, ODOT. Should you (or others) wish to participate in the aforementioned conference call and/or review our response to ODOT, please let me know. Your ongoing participation would benefit this bi-state review process.

Dale Himes, AICP
Project Director Columbia River Crossing
WSDOT-Southwest Region
360-905-2006 - office
360-601-3932 - cell
himesd@wsdot.wa.gov



731-070.doc



OIPPPflowchart.xls

-----Original Message-----

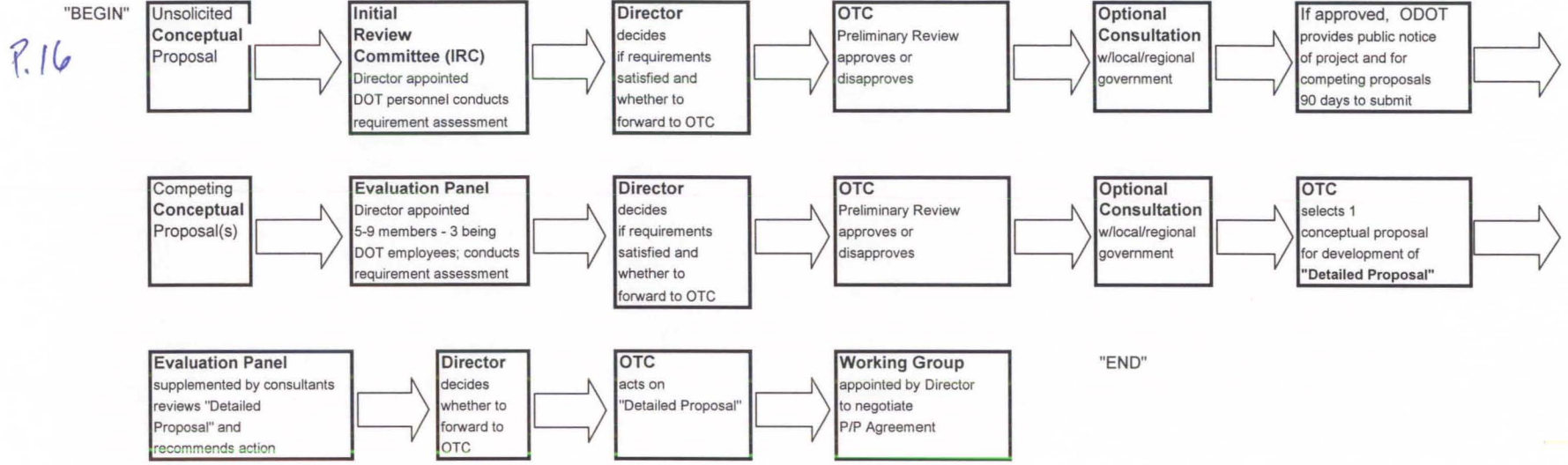
From: Conrad, John
Sent: Monday, March 29, 2004 4:10 PM
To: Himes, Dale; Wagner, Don
Cc: Hammond, Paula; Cummings, Michael
Subject: ODOT PP Rules

Dale
Pls invite Mike Cummings to participate in contacts with ODOT rulemaking as an FYI to him.

John

John F Conrad
Assistant Secretary for Engineering & Regional Operations
Washington State Department of Transportation
P.O. Box 47315
Olympia, WA 98504-7315
Phone: (360) 705-7032
FAX: (360) 705-6803
Cell: (360) 790-7099

Oregon Innovative Partnership Program (OIPP) Flowchart



Himes, Dale

From: Jim.WHITTY@odot.state.or.us
Sent: Monday, February 23, 2004 1:32 PM
To: himesd@wsdot.wa.gov
Subject: Final Proposed Rules for OIPP

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Jim

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DIVISION 70
OREGON INNOVATIVE PARTNERSHIPS PROGRAM

731-070-0010

Definitions for the Oregon Innovative Partnerships Program

As used in OAR 731-070-0010 to 731-070-0330:

- (1) "Agency" means a public agency, as defined in ORS 279.011(7).
- (2) "Commission" or "OTC" means the Oregon Transportation Commission created by ORS 184.612 and any person or persons authorized or directed by the Commission to take any action or make any decision authorized by these rules on the Commission's behalf.
- (3) "Conceptual Proposal" means a written submission to the Department satisfying the requirements set forth in OAR 730-070-0060.
- (4) "Department" or "ODOT" means the Oregon Department of Transportation created by ORS 184.615.
- (5) "Detailed Proposal" means a written submission to the Department satisfying the requirements set forth in OAR 730-070-0070.
- (6) "Director" means the Director of Transportation appointed under ORS 185.620 and any person or persons authorized or directed by the Director to take any action or make any decision authorized by these rules on the Director's behalf.
- (7) "Major partner" means, with respect to a limited liability company or joint venture, each firm that has an ownership interest therein in excess of 5%.
- (8) "Major subcontractor" is any subcontractor designated in the proposal to perform 10% or more of the scope of work for a proposed Project.
- (9) "Program" or "OIPP" means the Oregon Innovative Partnerships Program established under Oregon Laws 2003, chapter 790.
- (10) "Public-private partnership" or "PPP" means a nontraditional arrangement between the Department and one or more private or public entities that provides for the implementation of a Transportation Project that may include:
 - (a) Acceptance of a private contribution to a transportation system project or service in exchange for a public benefit concerning that project or service;
 - (b) Sharing of resources and the means of providing transportation system projects or services; or
 - (c) Cooperation in researching, developing, and implementing transportation system projects or services.
 - (d) The use of the word "partnership" to describe such an arrangement does not confer on the relationship formed any of the attributes or incidents of a partnership under common law or under ORS chapters 68 and 70.
- (11) "Private contribution" means resources supplied by a private entity to accomplish all or any part of the work on a transportation system project, including funds, financing, income, revenue, cost sharing, technology, staff, materials, equipment, expertise, data, or engineering, construction, or maintenance services, or other items of value.
- (12) "Transportation Project" or "Project" has the meaning given that term in section 2 of Oregon Laws 2003, chapter 790.

(13) Terms not otherwise defined herein shall have the meaning given them in Oregon Laws 2003, chapter 790.

Stat. Auth.: ORS 184.616, 184.619 & Ch. 790, OL 2003
Stats. Implemented: Sec. 1-13, Ch. 790, OL 2003

731-070-0020

General Selection Policies

(1) The Department may exercise broad discretion, subject to the ultimate approval of the Commission, in evaluating and selecting proposals in accordance with the criteria stated in this rule. To conduct a meaningful evaluation of a proposal, ODOT may refine its examination of the proposal so that the concrete features offered by a particular proposal are translated into, or examined in light of, the general criteria identified in section (2) of this rule. In light of the exemption from the public contracting requirements of ORS chapter 279 contained in subsection 4(5) of Oregon Laws 2003, chapter 790, the selection of proposals must be based on broader considerations of public need, feasibility, transportation efficiency and cost effectiveness; the selection process must appreciate economy and potential savings to the public, but proposal selection will not be determined by a lowest responsible bidder determination.

(2) In evaluating and selecting proposals, ODOT will give precedence to:

(a) Projects that will address an urgent or state-identified transportation need that otherwise would not be addressed in the foreseeable future under current or anticipated levels of funding and in the execution of existing transportation plans.

(b) Projects that use primarily rights-of-way and publicly-owned real property that already are owned or under the long-term control of ODOT or other public entities that have authority to put the real property to the use proposed.

(c) Projects for which planning, reliable feasibility determinations, or precedential parallel examples or case studies demonstrate a strong potential to generate adequate revenues to pay the costs of capital, operation and maintenance, and provide a reasonable return on that investment in terms of:

(A) The private partner's investment; and

(B) Transportation benefits to the public.

(d) Projects for which planning, reliable feasibility determinations, or precedential analogue examples demonstrate a low risk of failure (in terms of the completion of infrastructure improvements and the generation of sufficient revenue), practicable means of mitigating the risk of failure, or a high reward-to-risk ratio (in terms both of the benefits to the public and the private partner's investment incentive).

(e) Proposals for Projects in which open competition for contracts or subcontracts, such as the solicitation of competitive quotes, bids or proposals, is emphasized or encouraged.

(f) Proposals that identify specific, reliable, confirmable sources of non-public capital that is available to supplement or replace public funding for the project.

(g) Projects for which there is a demonstration of clear and substantial public support.

(h) Proposals that identify innovative construction approaches that will result in shorter build time, reduced construction cost or improved function in comparison to conventional approaches.

Stat. Auth.: ORS 184.616, 184.619 & Ch. 790, OL 2003
Stats. Implemented: Sec. 1-13, Ch. 790, OL 2003

Prequalification of Proposers

731-070-0030

Prequalification of Proposers - Unsolicited Proposals

(1) The Department may, at any time, issue a written order that requires any entity that wishes to submit an Unsolicited Proposal to apply for prequalification to submit a proposal. The order must describe the character or class of the Project or Projects, and the size of the Projects in terms of estimated implementation or construction cost, that are subject to the prequalification requirement. The order also must provide that each proposer must be prequalified by the Department in order to submit a proposal for the kind or kinds of Project described in the order, and that the Department will reject proposals received for the kind or kinds of Projects described in the order from proposers who are not prequalified.

(2) The prequalification order also shall contain:

(a) The location at which interested entities may obtain prequalification applications, information about prequalification criteria and other related documents, if any; and

(b) The name, title, and address of the person designated to receive the prequalification applications.

(3) Each prequalification application shall be in writing and must substantially comply with the instructions given by the Department in a prequalification application questionnaire or prequalification form issued by the Department.

(4) The Department may establish the criteria used to evaluate prequalification applications in light of the features and demands of the kind or kinds of Project for which prequalification is required as a condition of an entity's ability to submit an Unsolicited Proposal. The criteria may include, but shall not be limited to:

(a) The applicant's financial resources, including:

(A) Bonding capacity;

(B) Solvency; and

(C) Past payment history with employees, suppliers and subcontractors;

(b) The applicant's equipment and technology available to perform the Project, including whether the applicant has or reasonably can obtain, either itself, through subcontractors, or otherwise, all licenses and registrations necessary for use and operation of any technology or equipment involved in the Project, and all licenses and permits necessary to the lawful completion of the Project;

(c) The applicant's key personnel available to work on the Project, including:

(A) The specific capabilities of the applicant and its key personnel, as demonstrated by work on past projects which are comparable in size, nature, and technical and

managerial complexity to the Project and to the scope of any construction services that may be required by the Project; and

(B) The identity and experience of the key personnel to be assigned to the Project;

(d) The applicant's performance history on other projects or contracts, including the applicant's approach to comparable projects, including planning, phasing and scheduling techniques, in general, and, to the extent possible, particularly as applicable to the Project for which prequalification is required;

(e) The applicant's safety programs and safety record including, where applicable, evidence of the applicant's experience modifier issued by the Department of Consumer and Business Services, Workers' Compensation Division;

(f) The applicant's experience or ability to provide the services of key persons with experience in design-build projects and similar innovative approaches to project completion;

(g) References from owners, architects and engineers with whom the applicant has worked in the past;

(h) The histories of the applicant, its key persons and major participants concerning their involvement in claims, disputes and litigation in past projects or under contracts to which they were parties;

(i) Information concerning whether the applicant, any key person or major participant of the applicant has been:

(A) Convicted of any criminal offense as an incident in obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract;

(B) Convicted under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty that currently, seriously and directly affects the person's responsibility as a contractor;

(C) Convicted or determined to be liable under state or federal antitrust statutes.

(5) The Department will, after receiving a prequalification application submitted in accordance with sections (3) and (4) of this rule, notify the applicant whether the applicant is qualified to submit an Unsolicited Proposal for a Project of the kind or kinds described in the Department's order issued under section (1) of this rule.

(6) If the Department determines that the applicant is not qualified, the Department shall provide the applicant written notice of that determination that contains a statement of the reason or reasons for that determination.

(7) An entity whom the Department determines not to be qualified may, within five (5) business days after its receipt of the Department's written notice of that determination, submit to the Department a written protest of the decision. The protest must state facts and argument to demonstrate that the Department's decision was incorrect or constituted an abuse of the Department's discretion.

(8) If an entity timely submits a protest that complies with section (7) of this rule, the Department will issue a written decision that resolves the issues raised in the protest. The Department's written decision under this section shall constitute a final order under ORS 183.484

Stat. Auth.: ORS 184.616, 184.619 & Ch. 790, OL 2003

731-070-0040

Prequalification of Proposers - Competing Proposals

(1) Prior to furnishing public notice of a request for competing proposals, the Department may issue written notice that any entity that wishes to submit a competing proposal in response to that request must be prequalified by the Department. The notice must provide that each proposer must be prequalified by the Department in order to submit a proposal in response to the particular request for competing proposals, and that the Department will reject proposals received from proposers who are not prequalified.

(2) The Department must publish each notice that prequalification is required in the same manner that it issues public notice of a solicitation under OAR 731-070-0260(2). Additionally, each notice shall contain:

(a) The location at which interested entities may obtain prequalification applications, information about prequalification criteria and other related documents, if any;

(b) The date and time by which entities must submit their prequalification applications to the Department, which generally will be a reasonable time prior to the Department's issuance of the request for competing proposals, and the location at which they must be filed; and

(c) The name, title, and address of the person designated to receive the prequalification applications.

(3) Each prequalification application shall be in writing and must substantially comply with the instructions given by the Department in a prequalification application questionnaire or prequalification form issued by the Department.

(4) The Department shall establish the criteria used to evaluate prequalification applications prior to the advertised notice of required prequalification. The criteria may include, but need not be limited to:

(a) The applicant's financial resources, including:

(A) Bonding capacity;

(B) Solvency; and

(C) Past payment history with employees, suppliers and subcontractors;

(b) The applicant's equipment and technology available to perform the Project, including whether the applicant has or can reasonably obtain, either itself, through subcontractors, or otherwise, all licenses and registrations necessary for use and operation of any technology or equipment involved in the Project, and all licenses and permits necessary to the lawful completion of the Project;

(c) The applicant's key personnel available to work on the Project, including:

(A) The specific capabilities of the applicant and its key personnel, as demonstrated by work on past projects which are comparable in size, nature, and technical and managerial complexity to the Project and the scope of any construction services that may be required by the Project; and

(B) The identity and experience of the key personnel to be assigned to the Project;

(d) The applicant's performance history on other projects or contracts, including the applicant's approach to comparable projects, including planning, phasing and scheduling

techniques, in general, and, to the extent possible, particularly as applicable to the Project for which prequalification is required;

(e) The applicant's safety programs and safety record including, where applicable, evidence of the applicant's experience modifier issued by the Department of Consumer and Business Services, Workers' Compensation Division;

(f) The applicant's experience or ability to provide the services of key persons with experience in design-build projects and similar innovative approaches to project completion;

(g) References from owners, architects and engineers with whom the applicant has worked in the past;

(h) The histories of the applicant, its keys persons and major participants concerning their involvement in claims, disputes and litigation in past projects or under contracts to which they were parties;

(i) Information concerning whether the applicant, any key person or major participant of the applicant has been:

(A) Convicted of any criminal offense as an incident in obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract;

(B) Convicted under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty that currently, seriously and directly affects the person's responsibility as a contractor;

(C) Convicted or determined to be liable under state or federal antitrust statutes.

(5) The Department will, after receiving a prequalification application submitted in accordance with sections (2) and (3) of this rule, notify the applicant whether the applicant is qualified to submit a proposal in response to the Department's request for competing proposals.

(6) If the Department determines that the applicant is not qualified, the Department shall provide the applicant written notice of that determination that contains a statement of the reason or reasons for that determination.

(7) An entity whom the Department determines not to be qualified may, within five (5) business days after its receipt of the Department's written notice of that determination, submit to the Department a written protest of the decision. The protest must state facts and argument to demonstrate that the Department's decision was incorrect or constituted an abuse of the Department's discretion.

(8) If an entity timely submits a protest that complies with section (7) of this rule, the Department will issue a written decision that resolves the issues raised in the protest. The Department's written decision under this section shall constitute a final order under ORS 183.484.

Stat. Auth.: ORS 184.616, 184.619 & Ch. 790, OL 2003

Stats. Implemented: Sec. 1-13, Ch. 790, OL 2003

Unsolicited Proposals for OIPP Projects

3-31-04

⑨ Reserve - to reject. p. 34 - Whitley, Conrad
FP5 then have AB's
w/Smith Agreement.

731-070-0050

Submission of Unsolicited Conceptual Proposal

(1) Any private entity or unit of government may submit an unsolicited Conceptual Proposal for a transportation project to the Department for consideration under the OIPP.

(2) (a) A proposal review fee in an amount to be determined by the Department must accompany any unsolicited Conceptual Proposal submitted by a private entity.

(b) A proposal review fee in an amount to be determined by the Department must accompany any Detailed Proposal submitted by a private entity.

(3) The proposer shall submit 20 copies of any unsolicited Conceptual Proposal in addition to the proposal bearing the signature of the authorized representative. The original proposal, required copies and processing fee shall be delivered to the Director or his designee.

(4) The Department will consider an unsolicited proposal only if the proposal:

(a) Is unique and innovative in comparison with and is not substantially similar to other transportation system projects already in the state transportation improvement program within the Department or, if it is similar to a project in the state transportation improvement program, that such project has not been fully funded by the Department or any other entity as of the date the proposal is submitted. Unique or innovative features which may be considered by the Department in evaluating such a proposal may include but are not limited to unique or innovative financing, construction, design, schedule or other project components as compared with other projects or as otherwise defined by Department rules or regulations;

(b) Is independently originated and developed by the proposer; and

(c) Includes all information required by and is presented in the format set out in OAR 731-070-0070. Such information shall include a list of any proprietary information included in the proposal which the proposer considers protected trade secrets or other information exempted from disclosure under Oregon Laws 2003, chapter 790, § 3(5) and (6) and OAR 731-070-0280 and 0290.

(5) The Department will not consider an unsolicited proposal for a project involving another state or local government unit of another state unless the Department and the appropriate representative of the other state or of the local government unit of the other state have entered into an agreement that permits the acceptance of unsolicited proposals for such a project.

Stat. Auth.: ORS 184.616, 184.619 & Ch. 790, OL 2003
Stats. Implemented: Sec. 1-13, Ch. 790, OL 2003

731-070-0060

Contents and Format of Unsolicited and Competing Conceptual Proposal

(1) An unsolicited or competing Conceptual Proposal shall include the following information, separated by tabs as herein described:

(a) **TAB 1: Qualifications and Experience**

(A) Identify the legal structure of the private entity or consortium of private entities (the "Team") submitting the proposal. Identify the organizational structure of the Team for the Project, the Team's management approach and how each partner and major

② Accept but DOT to review proposals
③ Characterization of Agreement

⑥ Simple & clean process for WAs well,

⑦ When Bistate, how concerned does WAs mirror process?

⑧ How does EIS review work. Start detailed plans?

① Intent? what

② Reluctant to page 31

③ How do we cap chain

④ AG review

⑤ who could participate but review under WAs terms.

solicited as well? sep. 31

Define Agreement

① what legal authority does DOT have to enter into Agreement?

② what are they envisioning

OR taken act? T & C needs to be defined.

IF not, we have to seek legal authority.

subcontractor identified as being a part of the Team as of the date of submission of the proposal in the structure fits into the overall Team.

(B) Describe the experience of each private entity involved in the proposed Project. Describe the length of time in business, business experience, public sector transportation experience, PPP experience, development experience, design-build experience and other engagements of the private entity or private entities. The lead entity must be identified.

(C) Provide the names, addresses and phone numbers of persons within the Team who may be contacted for further information.

(D) Provide financial information regarding the private entity or consortium and each major partner demonstrating their ability to perform the proposed Project.

(E) If the Proposer is a limited liability company, all members and managers, if any (as those terms are defined in ORS 63.001), as well as any assignee of an ownership interest, regardless of whether the assignee has also acquired the voting and other rights appurtenant to membership.

(F) If the Proposer is a trust, the trustee and all persons entitled to receive income or benefit from the trust.

(G) If the Proposer is an association other than a limited liability company, all members, officers and directors of the association.

(H) If the Proposer is a partnership or joint venture, all of the general partners, limited partners or joint venturers.

(b) TAB 2: Project Characteristics:

(A) Provide a topographical map (1:2,000 or other appropriate scale) depicting the location of the proposed project.

(B) Provide a description of the Transportation Project or Projects, including all proposed interconnections with other existing transportation facilities or known publicly identified projects. Describe the Project in sufficient detail so the type and intent of the Project, the general location of the Project, and the communities that may be affected by the Project are clearly identified. Describe the assumptions used in developing the Project.

(C) List the critical factors for the Project's success.

(D) Demonstrate consistency with, or ability to achieve compliance with, state and local transportation plans and local comprehensive plans or indicate the steps required for acceptance into such plans.

(E) Provide an explanation of how the proposed transportation project would impact local transportation plans of each affected locality.

(F) Provide a list of public transportation facilities and public utility facilities that will be crossed or affected by the Transportation Project and a statement of the proposer's plans to accommodate such facilities.

(G) Describe the role the proposer anticipates the Department will have in the development, construction, operation, maintenance, financing, or any other aspect of the Transportation Project.

(c) TAB 3: Project Financing

(A) Include a list and discussion of assumptions (user fees or toll rates, and usage of the facility) underlying all major elements of the proposed financing plan for the Project.

(B) Identify the proposed risk factors relating to the proposed Project financing and methods for dealing with these factors.

(C) Identify any local, state or federal resources that the proposer contemplates requesting for the Project. Describe the total commitment (financial, services, property, etc.), if any, expected from governmental sources; and the timing of any anticipated commitment.

(D) Identify any aspect of the financial model for the Transportation Project that implicates or potentially implicates restrictions on use of highway-related revenues under Article IX, section 3a of the Oregon Constitution, and explain how the financial model avoids conflicting with those restrictions.

(E) Explain the possible use of federal funding and its impact on Project delivery.

(F) Provide an estimate of the total cost of the Transportation Project.

(d) TAB 4: Public Support/Project Benefit/Compatibility

(A) Describe the significant benefits of the Project to the community, region or state and identify who will benefit from the Project and how they will benefit. Identify any state benefits resulting from the Project including the achievement of state transportation policies or other state goals.

(B) Describe significant benefits of the Project to the state's economic condition. Discuss whether the Project is critical to attracting or maintaining competitive industries and businesses to the state or region.

(C) Identify any known or anticipated government support or opposition, or general public support or opposition, for the Project.

(D) Identify all major environmental, social and land use issues that the proposer knows or anticipates must be addressed.

(2) All pages of a Conceptual Proposal shall be numbered. Each copy of the proposal will be bound or otherwise contained in a single volume where practicable. All documentation submitted with the proposal will be contained in that single volume.

(3) A Conceptual Proposal submitted by a Private Entity must be signed by an authorized representative of the Private Entity submitting the unsolicited Conceptual Proposal.

(4) The Proposer shall include a list of any proprietary information included in the proposal which the proposer considers protected trade secrets or other information exempted from disclosure under Oregon Laws chapter 790, § 3 and OAR 731-070-0280 and 0290.

Stat. Auth.: ORS 184.616, 184.619 & Ch. 790, OL 2003

Stats. Implemented: Sec. 1-13, Ch. 790, OL 2003

731-070-0070

Contents and Format of Detailed Proposal

(1) A Detailed Proposal shall include the following information, unless waived by the Department, separated by tabs as herein described:

(a) TAB 1: Qualifications and Experience

(A) Identify the legal structure of the private entity or consortium of private entities (the "Team") submitting the proposal. Identify the organizational structure of the Team for the Project, the Team's management approach and how each partner and major

subcontractor identified as being a part of the Team as of the date of submission of the proposal in the structure fits into the overall Team.

(B) Describe the experience of each private entity involved in the proposed Project. Describe the length of time in business, business experience, public sector transportation experience, public-private partnership experience, development experience, design-build experience and other engagements of the private entity or private entities. The lead entity must be identified.

(C) Provide the names, addresses and telephone numbers of persons within the Team who may be contacted for further information.

(D) Include the address, telephone number, and the name of a specific contact person at a public entity for which the private entity or the Team or the primary members of the Team have completed a development project, public-private partnership project or design-build project.

(E) Include the resumes for those managerial persons within the Team that will likely be associated in a significant way with the Project development and implementation.

(F) Provide financial information regarding the private entity or Team and each Major Partner demonstrating their ability to perform the work and Project as set forth in the Detailed Proposal including ability to obtain appropriate payment and performance bonds.

(G) Submit executed disclosure forms, prescribed by the Department, for the Team, each Major Partner and any Major Subcontractor.

(b) TAB 2: Project Characteristics:

(A) Provide a detailed description of the Transportation Project or Projects, including all proposed interconnections with other existing transportation facilities or known publicly identified projects. Describe the Project in sufficient detail so the type and intent of the Project, the general location of the Project, and the communities that may be affected by the Project are clearly identified. Describe the assumptions used in developing the Project.

(B) Identify any significant local, state or federal services or practical assistance that the proposer contemplates requesting for the Project. In particular, identify and describe any significant services that will need to be performed by the Department such as right-of-way acquisition or operation and maintenance of the completed Project.

(C) Include a preliminary list of all significant federal and state permits and approvals required for the Project. Identify which, if any, permits or approvals are planned to be obtained by the Department.

(D) Identify the projected significant positive and negative social, economic and environmental impacts of the Project.

(E) List the critical factors for the Project's success.

(F) Identify the proposed preliminary schedule for implementation of the Project.

(G) Describe the assumptions related to ownership, law enforcement and operation of the Project and any facility that is part of the Project.

(H) Describe the payment and performance bonds and guarantees that the Team will provide for the Project.

(I) Identify any public improvements that will be part of the proposed Transportation Project that will constitute "public works" under ORS 279.348, the workers on which must be paid in accordance with Oregon's Prevailing Rate of Wage Law, ORS 279.348 to

279.375, and any public improvements the workers on which must be paid in accordance with the federal Davis-Bacon Act, 40 USC §276a.

(c) TAB 3: Project Financing

(A) Provide a conceptual estimate of the cost of the work based on proposer's prior experience on other projects or other cost projection factors and information.

(B) Include a list and discussion of assumptions (user fees or toll rates, and usage of the facility) underlying all major elements of the plan for the Project.

(C) Identify the proposed risk factors relating to the proposed Project financing and methods for dealing with these factors.

(D) Submit a plan for the financing, development and operation of the Project, showing: the anticipated schedule on which funds will be required; and proposed sources and uses of the funds. The plan must include a projected allocation of the respective contributions of the proposed funding to be contributed by the private and public sectors.

(E) Identify any significant local, state or federal resources that the proposer contemplates requesting for the Project. Describe the total commitment (financial, services, property, etc.), if any, expected from governmental sources; and the timing of any anticipated commitment.

(F) Identify any aspect of the financial model for the Transportation Project that implicates or potentially implicates restrictions on use of highway-related revenues under Article IX, section 3a of the Oregon Constitution, and explain how the financial model avoids conflicting with those restrictions.

(G) Explain the possible use of federal funding and its impact on Project delivery.

(H) Identify the form of the Private Contribution and the members of the Team that will make the Private Contribution and the proposed compensation for such Private Contribution.

(I) Provide an explanation of how funds for the Transportation Project will be segregated, accounted for and expended in a manner that ensures that any moneys from the state highway fund will be expended exclusively for the construction, reconstruction, improvement, repair, maintenance, operation and use of public highways, roads, streets and roadside rest areas in Oregon, as required by Article IX, §3a(1), of the Oregon Constitution.

(J) Identify proposed financing team members, including banks, investment banks, equity investors, credit enhancement providers, bond trustees and legal counsel to the same.

(K) Identify the structure of any bonds anticipated to be issued in connection with the financing of the Project, the projected maturities of the bonds and the terms of the financing, including estimates of interest rates and amortization.

(d) TAB 4: Public Support/Project Benefit/Compatibility

(A) Identify who will benefit from the Project, how they will benefit and how the Project will benefit the overall transportation system.

(B) Identify any anticipated government support or opposition, or general public support or opposition, for the Project.

(C) Explain the strategy and plans that will be carried out to involve and inform the agencies and the public in areas affected by the Project.

(e) TAB 5: Project Benefit/Compatibility

(A) Describe the significant benefits of the Project to the community, region or state and identify who will benefit from the Project and how they will benefit. Identify any state benefits resulting from the Project including the achievement of state transportation policies or other state goals.

(B) Describe significant benefits of the Project to the state's economic condition. Discuss whether the Project is critical to attracting or maintaining competitive industries and businesses to the state or region.

(f) **TAB 6: Special Deliverables**

(A) Provide a statement setting out the plan for securing all necessary real property, including proposed timeline for any necessary acquisitions.

(B) Provide proposed design, construction and completion guarantees and warranties.

(C) Include a detailed discussion of assumptions about user fees or toll rates, anticipated or proposed use of user fees and toll receipts and usage of the facility such as traffic forecasts and assumptions.

(D) Provide such additional material and information as the department may reasonably request.

(2) All pages of a proposal shall be numbered. Each copy of the proposal will be bound or otherwise contained in a single volume where practicable. All documentation submitted with the proposal will be contained in that single volume.

(3) A proposal submitted by a Private Entity must be signed by an authorized representative of the Private Entity submitting the unsolicited proposal.

(4) The Proposer shall include a list of any proprietary information included in the proposal which the proposer considers protected trade secrets or other information exempted from disclosure under Oregon Laws chapter 790, § 3 and OAR 731-070-0280 and 0290.

Stat. Auth.: ORS 184.616, 184.619 & Ch. 790, OL 2003

Stats. Implemented: Sec. 1-13, Ch. 790, OL 2003

731-070-0080

Additional Proposer Organizational Disclosure Requirements

(1) In addition to the disclosure requirements of OAR 731-070-0060(1)(a) and 0070(1)(a), the Director or the Director's designee may impose, after the submission of a proposal, any other special disclosure requirements the Director determines to be reasonably necessary to evaluate the expertise, experience, financial backing, integrity, ownership and control of any proposer.

(2) All proposers must provide all the information required by this rule and the Director. All proposers and Key Persons must complete and submit the required disclosure form within the deadlines set by the director or the director's designee. All proposers and Key Persons must provide any documents required in the disclosure process, or other documents as determined by the Director, or their proposals may be rejected by the Department.

(3) The Department may reject, or require the supplementation of, a proposal if the proposer has not provided all information required in the disclosure form or if any

information provided is not accurate, current or truthful. The failure or refusal of any proposer to properly execute, fully complete, or accurately report any information required by the required disclosure shall be sufficient grounds for rejection of the proposal.

(4) Any change in the status of the proposer or of any of the Key Persons, or the addition of any Key Persons must be reported to the Department within thirty (30) days of the known change, and those whose status has changed or who have been added as Key Persons will be required to submit the required disclosure information.

(5) The burden of satisfying ODOT's disclosure requirements, both in terms of producing the disclosures and assuring their accuracy and completeness, resides with each proposer.

(6) Each proposer, by submitting a proposal, thereby accepts all risk of adverse public notice, damages, financial loss, criticism or embarrassment that may result from any disclosure or publication of any material or information required or requested by the department in connection with the proposer's submission of a proposal. In submitting a proposal, the proposer expressly waives, on behalf of itself, its partners, joint venturers, officers, employees and agents, any claim against the director, the State of Oregon, the Oregon Transportation Commission, ODOT, and their officers and employees, for any damages that may arise therefrom.

(7) An Agency that submits a proposal may, prior to submission, request ODOT to waive the disclosure requirements of this rule with respect to the corporate public entity and its officers. However, if the Agency proposes to enter into or establish a partnership or joint venture with a private party to perform any substantial portion of the proposed Project (as opposed to the engagement of only a prime contractor or subcontractors), then disclosure of the private party must be made as if the private party is a proposer, in accordance with this rule.

Stat. Auth.: ORS 184.616, 184.619 & Ch. 790, OL 2003

Stats. Implemented: Sec. 1-13, Ch. 790, OL 2003

735-070-0090

Conflict of Interest and Improper Proposer Conduct

(1) By submitting a proposal, the proposer certifies that that the proposer, to the best of its knowledge, is not aware of any information bearing on the existence of any potential Organizational Conflict of Interest. If the proposer is aware of information bearing on whether a potential conflict may exist, the proposer shall provide a disclosure statement describing this information, in a form suitable to the Department, as part of its proposal. For purposes of this section, "Organizational Conflict of Interest" means that because of other activities or relationships with other persons, a proposer, a principal officer of a proposer, or a prime contractor who is proposed to perform construction or design work on a proposed Transportation Project, is unable or potentially unable to render impartial assistance or advice to the Department, or the person's objectivity in performing the proposed contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.

(2) **Warranty Against Contingent Fees.** By submitting a proposal, the proposer warrants that that the proposer, except for a bona fide employee or agency working solely for the proposer:

(a) Has not employed or retained any person or agency to solicit or obtain the contract that might result from submission of the proposal; and

(b) Has not paid upon agreement or understanding to any person or agency employed or retained to solicit or obtain a Transportation Project agreement any contingent fee. For breach or violation of this warranty, the Department shall have the right to annul this contract without liability or, in its discretion, to deduct from the contract price or consideration, or otherwise recover, the full amount of the contingent fee.

(c) As used in this section:

(A) "Bona fide agency" means an established commercial or selling agency, maintained by a proposer for the purpose of securing business, that neither exerts nor proposes to exert improper influence to solicit or obtain federal or state contracts nor holds itself out as being able to obtain any federal or state contract or contracts through improper influence.

(B) "Bona fide employee" means a person or firm employed by a proposer and subject to the proposer's supervision and control as to time, place, and manner of performance, who neither exerts nor proposes to exert improper influence to solicit or obtain federal or state contracts nor holds itself out as being able to obtain any federal or state contract or contracts through improper influence.

(C) "Contingent fee" means any commission, percentage, brokerage, or other fee that is contingent upon the success that a person or concern has in securing a federal or state contract.

(D) "Improper influence" means any influence that induces or intends to induce a federal or state officer or employee to give consideration or to act regarding a federal or state contract on any basis other than the merits of the matter.

(3) By submitting a proposal, the proposer certifies, to the best of its knowledge and belief, that on or after December 23, 1989:

(a) No federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress on his or her behalf in connection with the awarding of any federal contract, the making of any federal grant, the making of any federal loan, the entering into any cooperative agreement, and the extension, continuation, renewal, amendment or modification of any federal contract, grant, loan, or cooperative agreement;

(b) If any funds other than federal appropriated funds (including profit or fee received under a covered federal transaction) have been paid, or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress on his or her behalf in connection with its proposal, the proposer shall complete and submit, with its proposal, OMB standard form LLL, Disclosure of Lobbying Activities, to the Department; and

(c) The proposer shall include the language of this certification in all subcontract awards at any tier and require that all recipients of subcontract awards in excess of \$100,000 shall certify and disclose accordingly.

(4) Certification - Debarment, Suspension, Proposed Debarment and Responsibility Factors. By submitting a proposal, the proposer certifies, to the best of its knowledge and belief, that neither the proposer, any principal officer of a proposer, nor a prime contractor who is proposed to perform construction or design work on a proposed Transportation Project:

(a) Are presently debarred, suspended, proposed for debarment, or declared ineligible for the award of contracts by any federal agency or agency of the State of Oregon;

(b) Have, within a three-year period preceding the submission of its proposal, been convicted of or had a civil judgment rendered against them for: commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, state, or local) contract or subcontract; violation of federal or state antitrust statutes relating to the submission of bids or proposals; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property; and

(c) Are presently indicted for, or otherwise criminally or civilly charged by a governmental entity with, the commission of any of the offenses enumerated in subsection (b) of this section;

(d) Have had, within a three-year period preceding the submission of its proposal, one or more contracts terminated for default by any federal, state or local government agency.

(5) For the purposes of this rule, a “principal officer of a proposer” means an officer, director, owner, and partner and any person having primary management or supervisory responsibilities within a business entity (*e.g.*, general manager; plant manager; head of a subsidiary, division, or business segment, and similar positions).

(6) In addition to requiring the certification of compliance with the foregoing provisions of this section, in any Transportation Project that involves funding provided by or through the federal government, the Department shall be entitled to require, as a requirement of any contract for a Transportation Project with a proposer, that proposer make such additional certifications, warranties or commitments as may be required by the laws, rules, regulations or policies that govern the funding source or which are conditions of the receipt of such funding.

Stat. Auth.: ORS 184.616, 184.619 & Ch. 790, OL 2003

Stats. Implemented: Sec. 1-13, Ch. 790, OL 2003

731-070-0100

Protection of ODOT from Proposer “Monopolization” of Site Claims

(1) By submitting a proposal, a proposer thereby waives and relinquishes any claim, right in or expectation that the proposer may assert against the State of Oregon, the Commission, the Department, or their members, officers and employees, that the proposer may occupy, use, profit from, or otherwise exercise any prerogative with respect to any route, corridor, right of way or public property identified in the proposal as being involved in or related to the proposed Transportation Project. A proposer may obtain no right to claim exclusivity or the right of use with respect to any such route, corridor, right

of way or public property by virtue of having submitted a proposal that proposes to use or otherwise involve or affect it.

(2) By submitting a proposal, a proposer thereby waives and relinquishes as against the State of Oregon, the Commission, the Department, or their members, officers or employees, any right, claim, copyright, proprietary interest or other right in any proposed location, site, route, corridor, right of way or alignment or transportation mode or configuration identified in the proposal as being involved in or related to the proposed Transportation Project. This waiver does not apply, however, to a proposer's rights in any documents, designs and other information and records that constitute "sensitive business, commercial or financial information that is not customarily provided to business competitors" as defined in OAR 731-070-0280 and 731-070-0290.

Stat. Auth.: ORS 184.616, 184.619 & Ch. 790, OL 2003

Stats. Implemented: Sec. 1-13, Ch. 790, OL 2003

731-070-0110

Initial Review of Unsolicited Conceptual Proposals

(1) An unsolicited Conceptual Proposal submitted under OAR 731-070-0050 will be reviewed by an Initial Review Committee (IRC), which shall be appointed by the Director from Department personnel, at appropriate staff levels.

(2) The IRC will assess:

(a) Whether the proposal is complete;

(b) Whether the proposer is qualified;

(c) Whether the proposal appears to satisfy the requirements of OAR 731-070-0060;

(d) Whether the project as proposed appears to be technically and financially feasible;

(e) Whether the project as proposed appears to have the potential of enhancing the state transportation system; and

(f) Whether the project as proposed appears to be in the public interest.

(3) The IRC will report the results of its assessment to the Director. Based on this assessment and his own review of the proposal, the Director will determine whether the proposal satisfies the requirements of section (2) of this rule. If the Director determines that the proposal satisfies the requirements set out in section (2) of this rule, the Director will forward the proposal to the Commission for preliminary review and approval.

Stat. Auth.: ORS 184.616, 184.619 & Ch. 790, OL 2003

Stats. Implemented: Sec. 1-13, Ch. 790, OL 2003

731-070-0120

Commission Preliminary Review of Unsolicited Conceptual Proposals

At the first regular meeting of the Oregon Transportation Commission following a determination by the Director under OAR 731-070-0110 that an unsolicited Conceptual Proposal merits further review, the Commission will review the proposal and approve or

disapprove it for further evaluation and action by the Department under Oregon Laws 2003, chapter 790 and these rules.

Stat. Auth.: ORS 184.616, 184.619 & Ch. 790, OL 2003
Stats. Implemented: Sec. 1-13, Ch. 790, OL 2003

731-070-0130

Competing Proposals

(1) Within 30 days of the Commission's preliminary approval of an unsolicited Conceptual Proposal under OAR 731-070-0120, the department shall provide public notice of the proposed project. This notice shall:

(a) Be published in a newspaper of general circulation and upon such electronic website providing for general public access as the department may develop for such purpose;

(b) Be provided to any county, city, metropolitan service district, or transportation district in which the project will be located;

(c) Be provided to any person or entity that expresses in writing to the department an interest in the subject matter of the unsolicited Conceptual Proposal and to any member of the Legislature whose House or Senate district would be affected by such proposal;

(d) Outline the general nature and scope of the unsolicited Conceptual Proposal, including the location of the transportation project and the work to be performed on the project; and

(e) Specify the address to which any competing Conceptual Proposal must be submitted.

(2) Any private entity that elects to submit a competing proposal for the proposed project shall submit a written letter of intent to do so not later than 30 days after the department's initial publication of notice. Any letter of intent received by the department after the expiration of the 30 day period shall not be valid and any competing proposal submitted thereafter by a private entity that has not submitted a timely letter of intent shall not be considered by the department.

(3) A private entity that has submitted a timely letter of intent must submit its competing proposal to the department not later than 90 days after the department's initial publication of notice under paragraph (1) of this rule, or such shorter time as the department states in the notice. The competing proposal must:

(a) Be signed by an authorized representative of the proposer;

(b) Be accompanied by the processing fee for unsolicited Conceptual Proposals required under OAR 731-070-0050(2); and

(c) Include the information and be organized in the manner required of an unsolicited Conceptual Proposal under OAR 731-070-0060.

Stat. Auth.: ORS 184.616, 184.619 & Ch. 790, OL 2003
Stats. Implemented: Sec. 1-13, Ch. 790, OL 2003

731-070-0140

Evaluation of Unsolicited and Competing Conceptual Proposals

(1) An Evaluation Panel shall be appointed by the Director and shall consist of not fewer than five nor more than nine members, at least three of whom shall be employees of the Department.

(2) After expiration of the time to submit competing Conceptual Proposals to an unsolicited Conceptual Proposal, the Evaluation Panel will review the competing proposals to determine whether they satisfy the requirements of OAR 731-070-0050 and qualify for full evaluation.

(3) As part of its initial review of competing proposals under section (2) of this rule, the Evaluation Panel shall make a preliminary assessment whether any of the proposals differ from the unsolicited proposal in such a significant and meaningful manner that they should be treated as an original unsolicited Conceptual Proposal. If the Evaluation Panel believes that a proposal submitted as a competing proposal should be treated as an original unsolicited Conceptual Proposal and that it satisfies the requirements of OAR 731-070-0050, the Evaluation Panel shall forward the proposal to the Director, who shall determine whether the proposal should be submitted to the Commission for preliminary review and approval under OAR 731-070-0120, and the proposal shall thereafter be processed under these rules in the same manner as an unsolicited Conceptual Proposal.

(4) At any time during this evaluation process, the Evaluation Panel may request proposers to make presentations to the Panel. The format of these presentations will include a formal presentation by the proposer, followed by any questions the Evaluation Panel may have pertaining to the project proposal or the presentation. The Evaluation Panel may also ask the proposer to address concerns expressed through the public comment process, if applicable. These meetings will allow the Evaluation Panel to seek clarification of project elements and complete deliverable requirements, and provide proposers with the opportunity to further explain their proposed projects. If there is an issue to which the proposer is unable to respond during the formal presentation, the Evaluation Panel may, at its discretion, grant the proposer a reasonable period of time in which to submit a written response.

(5) The Evaluation Panel shall assess the unsolicited proposal and qualifying competing proposals based on the following factors:

(a) **Qualifications and Experience.** Does the proposer propose a team which is qualified, led, and structured in a manner which will clearly enable the team to complete the proposed project?

(A) **Experience with Similar Infrastructure Projects.** Have members of this team previously worked together constructing, improving or managing transportation infrastructure? Has the lead firm managed, or any of the member firms worked on, a similar privatization project?

(B) **Demonstration of Ability to Perform Work.** What commitments has the team made to carry out the project? Does the team possess the necessary financial, staffing, equipment, and technical resources to successfully complete the project? Do the team and/or member firms have competing financial or workforce commitments that may inhibit success and follow-through on this project?

(C) **Leadership Structure.** Is one firm designated as lead on the project? Does the organization of the team indicate a well thought out approach to managing the project? Is there an agreement/document in place between members?

(D) **Project Manager's Experience.** Is a Project Manager identified, and does this person work for the principal firm? If not, is there a clear definition of the role and responsibility of the Project Manager relative to the member firms? Does the Project Manager have experience leading this type and magnitude of project?

(E) **Management Approach.** Have the primary functions and responsibilities of the management team been identified? Have the members of the team developed an approach to facilitate communication among the project participants? Has the firm adequately described its approach to communicating with and meeting the expectations of the state?

(F) **Financial Condition.** Is the financial information submitted on the firms sufficient to determine the firms' capability to fulfill its obligations described in the project proposal, and is that capability demonstrated by the submitted information?

(G) **Project Ownership.** Does the proposal identify the proposed ownership arrangements for each phase of the project and clearly state assumptions on legal liabilities and responsibilities during each phase of the project?

(H) **Participation of Small Businesses and Businesses Owned by Women and Minorities.** What is the level of commitment by the proposers to use small, minority-, and women-owned business enterprises in developing and implementing the project?

(I) **Competitive Bidding** To what extent have adequate and transparent procurement policies been adopted by the proposer to maximize competitive bidding opportunities for potential subcontractors and suppliers?

(b) **Project Characteristics.** Is the proposed transportation facility technically feasible?

(A) **Project Definition.** Is the project described in sufficient detail to determine the type and size of the project, the location, all proposed interconnections with other transportation facilities, the communities that may be affected, and alternatives (e.g. alignments) that may need to be evaluated?

(B) **Proposed Project Schedule.** Is the time frame for project completion clearly outlined? Is the proposed schedule reasonable given the scope and complexity of the project? Does the proposal contain adequate assurances that the project will be completed and will be completed on time?

(C) **Operation.** Does the proposer present a reasonable statement setting forth plans for operation of the project or facilities that are included in the project?

(D) **Technology.** Is the proposal based on proven technology? What is the degree of technical innovation associated with the proposal? Will the knowledge or technology gained from the project benefit other areas of the state or nation? Does the technology proposed maximize interoperability with relevant local and statewide transportation technology? Can the proposed project upgrade relevant local technology?

(E) **Conforms to Laws, Regulations, and Standards.** Is the proposed project consistent with applicable state and federal statutes and regulations, or reasonably anticipated modifications of state or federal statutes, regulations or standards? Does the proposed design meet applicable state and federal standards?

(F) **Federal Permits.** Is the project outside the purview of federal oversight, or will it require some level of federal involvement due to its location on the National Highway System or Federal Interstate System or because federal permits are required? Does the Proposal identify the primary federal permits and agencies that will be involved in review and oversight of the project?

(G) **Meets/Exceeds Environmental Standards.** Is the proposed project consistent with applicable state and federal environmental statutes and regulations? Does the proposed design meet applicable state environmental standards? Does the proposal adequately address air quality issues?

(H) **State and Local Permits.** Does the proposal list the required permits and provide a schedule for obtaining them? Are there known or foreseeable negative impacts arising from the project? If so, is there a mitigation plan identified? Are alternatives to standards or regulations needed to avoid those impacts that cannot be mitigated?

(I) **Right of Way.** Does the proposal set forth a method or plan to secure all property interests required for the transportation project? Does the proposal set forth: the names and addresses, if known, of the current owners of the property needed for the project, the nature of the property to be acquired, and a listing of any property that the state or another public entity is expected to be requested to condemn?

(J) **Maintenance.** Does the proposer have a plan to maintain any facilities that are part of the proposed transportation project in conformance with department standards? Does the proposal clearly define assumptions or responsibilities during the operational phase including law enforcement, toll collection and maintenance? Under the proposal, will maintenance and operation of any new facilities be consistent with standards applied throughout the highway system and use the same work-forces and methods?

(c) **Project Financing.** Has the proposer provided a financial plan and financial guarantees which will allow for access to the necessary capital to finance the facility?

(A) **Financing.** Did the proposer demonstrate evidence of its ability and commitment to provide sufficient equity in the project as well as the ability to obtain the other necessary financing?

(B) **Financial Plan.** Does the financial plan demonstrate a reasonable basis for funding project development and operations? Are the assumptions on which the plan is based well defined and reasonable in nature? Are the plan's risk factors identified and dealt with sufficiently? Are the planned sources of funding and financing realistic? Does the proposer make a financial contribution to the project? Does the proposer adequately identify sources of non-public funding that it anticipates including in the project financing, and does the proposer provide adequate assurance of the availability of those funds and the reliability of the funding sources?

(C) **Estimated Cost.** Is the estimated cost of the project reasonable in relation to the cost of similar projects?

(D) **Life Cycle Cost Analysis.** Does the proposal include an appropriately conducted analysis of projected rate of return and life-cycle cost estimate of the proposed project and/or facility?

(E) **Business Objective.** Does the proposer clearly articulate its reasons for pursuing this project? Do its assumptions appear reasonable?

(d) **Public Support.** Has the proposer garnered sufficient public support for the proposed project or proposed a reasonable plan for garnering that support?

(A) **Community Benefits.** Will this project bring a significant transportation and economic benefit to the community, the region, and/or the state? Are there ancillary benefits to the communities because of the project?

(B) **Community Support.** What is the extent of known support or opposition for the project? Does the project proposal demonstrate an understanding of the national and

regional transportation issues and needs, as well as the impacts this project may have on those needs? Is there a demonstrated ability to work with the community? Have affected local jurisdictions expressed support for the project?

(C) Public Involvement Strategy. What strategies are proposed to involve local and state elected officials in developing this project? What level of community involvement is contemplated for the project? Is there a clear strategy for informing and educating the public and for obtaining community input throughout the development and life of the project?

(e) Project Compatibility. Is the proposed project compatible with state and local comprehensive transportation plans?

(A) Compatibility with the Existing Transportation System. Does this project propose improvements that are compatible with the present and planned transportation system? Does the project provide continuity with existing and planned state and local facilities?

(B) Fulfills Policies and Goals. Does the proposed project help achieve performance, safety, mobility or transportation demand management goals? Does the project improve connections among the transportation modes?

(C) Enhance Community-Wide Transportation System. Has the proposer identified specific way in which the project benefits affected community transportation systems? Does this project enhance adjacent transportation facilities?

(D) Consistency with Local, Regional and State Transportation Plans. Is the project consistent with city and county comprehensive plans and regional transportation plans? Is the project consistent with plans developed by the Oregon Transportation Commission under ORS 184.618 and any applicable regional transportation plans or local transportation programs? If not, are steps proposed that will achieve consistency with such plans?

(E) Economic Development. Will the proposed project enhance the state's economic development efforts? Is the project critical to attracting or maintaining competitive industries and businesses to the region, consistent with stated objectives?

(6) If the project financing component of a proposal includes a plan to impose tolls, the Evaluation Panel shall specifically consider:

(a) The opinions and interests of units of government encompassing or adjacent to the path of the proposed tollway project in having the tollway installed;

(b) The probable impact of the proposed tollway project on local environmental, aesthetic and economic conditions and on the economy of the state in general;

(c) The extent to which funding other than state funding is available for the proposed tollway project;

(d) The likelihood that the estimated use of the tollway project will provide sufficient revenues to independently finance the costs related to the construction and future maintenance, repair and reconstruction of the tollway project, including the repayment of any loans to be made from moneys in the State Tollway Account or other accounts;

(e) With respect to tollway projects, any portion of which will be financed with state funds or department loans or grants:

(A) The relative importance of the proposed tollway project compared to other proposed tollways; and

(B) Traffic congestion and economic conditions in the communities that will be affected by competing tollway projects; and

(f) The effects of tollway implementation on other major highways in the state system and on community and local street traffic.

(7) For any Conceptual Proposal that receives a favorable evaluation, the Evaluation Panel will prepare a written determination, based on facts and circumstances presented in the proposal or known to the Department, that the proposal merits development into a Detailed Proposal. The Evaluation Panel will report its assessments and recommendations to the Director. The Director will review the Evaluation Panel's assessments and recommendations and determine whether to forward any of the proposals to the Commission.

Stat. Auth.: ORS 184.616, 184.619 & Ch. 790, OL 2003

Stats. Implemented: Sec. 1-13, Ch. 790, OL 2003

731-070-0150

Consultation with Local Government, Transportation District, Metropolitan Planning Organization or Area Commission on Transportation.

As part of its evaluation of a proposal submitted under these rules, ODOT will consult with appropriate local governments, metropolitan planning organizations and area commissions on transportation. Consultation under this rule will occur in such manner and at such time as ODOT considers appropriate in the particular circumstance, and may include:

- (1) Solicitation of written comments from the local government, transportation district, metropolitan planning organization or area commission on transportation;
- (2) Public meetings;
- (3) Informal information-sharing sessions;
- (4) Any other method of consultation appropriate under the circumstances.

Stat. Auth.: ORS 184.616, 184.619 & Ch. 790, OL 2003

Stats. Implemented: Sec. 1-13, Ch. 790, OL 2003

731-070-0160

Use of an Iterative Process that Permits ODOT Feedback and Ability of Proponents to Supplement/Refine Proposals after Initial Submission.

(1) **For "Non-Competitive" Proposals.** The Department reserves the right, to be exercised in its sole and absolute discretion, to require or to permit proposers to submit, at any time, revisions, clarifications to, or supplements of their previously submitted proposals. The Department may, in the exercise of this authority, require proposers to add features, concepts, elements, information or explanations that were not included in their initial proposals, and may require them to delete features, concepts, elements, information or explanations that were included in their initial proposals. A proposer will not be legally bound to accept a request to add to or delete from a proposal any feature, concept, element or information, but its refusal to do so in response to a request by the

Department shall constitute sufficient grounds for the Department to terminate consideration of its proposal.

(2) For Competitive Proposals.

(a) After the Department's opening and review of competitive proposals, the Department may issue or electronically post an addendum to the request for competitive proposals that:

(A) Modifies the criteria, rating process or procedure, for the Department's evaluation or ranking of competitive proposals;

(B) Requires proposers to address or add features, concepts, elements, information or explanations that were not included in their initial proposals;

(C) Requires proposers to delete features, concepts, elements, information or explanations that were included in their initial proposals; or

(D) Otherwise requires proposers to modify their proposals.

(b) The Department will send any such addendum that it issues by a method other than electronic posting to all proposers who are eligible to compete under the particular competitive proposal process. However, the addendum need not require a proposer whose proposal is regarded by the Department as sufficiently complete and detailed, to respond to the Addendum (although the proposer shall have the right, even if not required, to supplement or subtract proposal items in response to information contained in the addendum).

(c) The Department will issue or electronically post an addendum issued under this section. The addendum will contain a deadline by which the proposers must submit to the Department any additions to, modifications of or deletions from their proposals.

(d) A proposer will not be legally bound to accept a request to add to or delete from a proposal any feature, concept, element or information, but its refusal to do so in response to an addendum issued by the Department shall constitute sufficient grounds for the Department to terminate consideration of the proposer's competitive proposal and also may be considered by the Department in determining the proposer to be selected as the result of the competitive proposal process.

Stat. Auth.: ORS 184.616, 184.619 & Ch. 790, OL 2003

Stats. Implemented: Sec. 1-13, Ch. 790, OL 2003

731-070-0170

Protests of Rejection of Proposal/Award of Contract to Competitor in Competitive Proposals Context

(1) At least fourteen (14) calendar days prior to the final selection of the successful proposer in any competitive proposal selection process, the Department will give, electronically or otherwise, written notice to all participating proposers of the Department's apparent selection of the successful proposer. A proposer who would be adversely affected by the selection announced in the Department's notice may, within the 14-day period, submit to the Department a written protest of the selection of the apparent successful proposer.

(2) A proposer's written protest must state facts and argument that demonstrate how the selection process was flawed or that the Department's selection of the apparent

successful proposer was incorrect or constituted an abuse of the Department's discretion. If the Department receives no written protest concerning the proposed selection listing within the 14-day period, then the selection of the successful proposer shall automatically become effective on the fifteenth (15th) calendar day after the Department first transmitted or otherwise delivered its written notice of the apparent successful proposer.

(3) In response to a proposer's timely filed protest that complies with section (2) of this rule, the Department will issue a written decision that resolves the issues raised in the protest. In considering a timely protest, the Department may request further information from the protesting proposer and from the apparent successful proposer identified in the Department's notice issued under section (1) of this rule. The Department will make its written determination available, by mail or by electronic means, to the protesting proposer and to the apparent successful proposer identified in the Department's notice issued under section (1) of this rule. The Department's written decision under this section shall constitute a final order under ORS 183.484.

Stat. Auth.: ORS 184.616, 184.619 & Ch. 790, OL 2003

Stats. Implemented: Sec. 1-13, Ch. 790, OL 2003

731-070-0180

Commission Review and Selection of Proposals

The Commission shall review the evaluations of Conceptual Proposals forwarded by the Director under OAR 731-070-0140(7). Based on that review the Commission shall:

- (1) Select one Conceptual Proposal for development of a Detailed Proposal; or
- (2) Reject all Conceptual Proposals.

Stat. Auth.: ORS 184.616, 184.619 & Ch. 790, OL 2003

Stats. Implemented: Sec. 1-13, Ch. 790, OL 2003

731-070-0190

Detailed Proposal and Interim Services Agreement

(1) Upon the Commission's selection of a Conceptual Proposal for further evaluation and completion of the protest period, the Department shall notify the proposer to submit a Detailed Proposal complying with the requirements of OAR 731-070-0070.

(2) The Evaluation Panel, as supplemented by consultants retained by the Department, shall review the Detailed Proposal to ensure compliance with the requirements of ORS 731-070-0070. The Evaluation Panel shall evaluate the Detailed Proposal based on the factors set forth in ORS 731-070-0140(5) and any additional factors consistent with the intent and goals of the OPPI legislation, but the weighting and final decision is subject to the sole discretion of the Evaluation Panel.

(3) Upon completion of its review of the Detailed Proposal, the Evaluation Panel will recommend to the Director whether the Detailed Proposal should be advanced to a final agreement.

(4) After receipt of the Evaluation Panel's recommendation, the Director shall either accept or reject the Evaluation Panel's recommendation, and if accepted, the Director

shall submit to the Oregon Transportation Commission the Detailed Proposal, as modified, if applicable, with a recommendation that the Detailed Proposal constitutes an acceptable basis for an agreement to enter into a public-private partnership with the proposer.

(5) After receipt of the selection from the Director, the Oregon Transportation Commission shall either approve or disapprove the Detailed Proposal selected by the Director for negotiation of a final agreement.

Stat. Auth.: ORS 184.616, 184.619 & Ch. 790, OL 2003

Stats. Implemented: Sec. 1-13, Ch. 790, OL 2003

731-070-0200

Negotiation of Agreement

(1) A Detailed Proposal selected by the Commission for negotiation of a final agreement shall be referred to a working group appointed by the Director. The working group shall be responsible for negotiating the final agreement with the proposer. Each final agreement will define the rights and obligations of the Department and the respective proposer with regard to the transportation project. The final agreement must include provisions specifying at least the following:

(a) At what point in the transportation project public and private sector partners will enter the project and which partners will assume responsibility for specific project elements;

(b) How the partners will share management of the risks of the project;

(c) How the partners will share the costs of development of the project;

(d) How the partners will allocate financial responsibility for cost overruns;

(e) The penalties for nonperformance;

(f) The incentives for performance;

(g) The invoicing and payment procedures and schedules to be followed, and the accounting and auditing standards to be used to evaluate work on the project; and

(h) Whether the project is consistent with the plan developed by the Oregon Transportation Commission under ORS 184.618 and any applicable regional transportation plans or local transportation programs and, if not consistent, how and when the project will become consistent with applicable plans and programs.

(2) If public moneys are used to pay any costs of construction of public works that is part of a transportation project, the construction contract shall contain provisions that require payment of workers under the contract in accordance with ORS 279.334 and 279.348 to 279.380.

(3) An agreement for the construction of a public improvement as part of a transportation project shall provide for bonding, financial guarantees, deposits or the posting of other security to secure the payment of laborers, subcontractors and suppliers who perform work or provide materials as part of the project.

(4) The working group shall consider whether to implement procedures to promote competition among subcontractors for any subcontracts to be let in connection with the transportation project. As part of its request for approval of the agreement by the Commission under OAR 731-070-0230, the working group shall report in writing to the

Commission its conclusions regarding the appropriateness of implementing such procedures.

Stat. Auth.: ORS 184.616, 184.619 & Ch. 790, OL 2003
Stats. Implemented: Sec. 1-13, Ch. 790, OL 2003

731-070-0210

ODOT Objection to Subcontractors

(1) Prior to the execution of any contract with a proposer, the proposer must provide ODOT a list of all subcontractors who will perform work in the construction, operation or maintenance of the Project. All subcontractors must be legally eligible to perform or work on public contracts under federal and Oregon law and regulations. No subcontractor will be accepted who is on the list of contractors ineligible to receive public works contracts under ORS 279.361.

(2) If ODOT has reasonable objection to any proposed subcontractor, ODOT is authorized to require, before the execution of a contract, an apparently successful proposer to submit an acceptable substitute. In such case, the proposer must submit an acceptable substitute, and the contract may, at ODOT's discretion, be modified to equitably account for any difference in cost necessitated by the substitution. ODOT will permit a maximum of fourteen (14) calendar days from the date of ODOT's written demand for substitution which to make an acceptable substitution. A proposer's failure to make an acceptable substitution at the end of the 14-day period will constitute sufficient grounds for ODOT to refuse to execute a contract without incurring any liability for the refusal.

(3) ODOT will not require any proposer to engage any subcontractor, supplier other person or organization against whom the proposer has reasonable objection.

Stat. Auth.: ORS 184.616, 184.619 & Ch. 790, OL 2003
Stats. Implemented: Sec. 1-13, Ch. 790, OL 2003

731-070-0220

Legal Sufficiency Review of Final Agreement

On completion of a final agreement, the Attorney General will review it for legal sufficiency under ORS 291.047 and OAR Chapter 137, Division 045. When conducting that review, the Attorney General shall:

- (1) Recognize that the agreement is the product of a partnership; and
- (2) Defer to the business judgment of the department and the Oregon Transportation Commission concerning the assignment of risks and the incentives provided within the agreement.

Stat. Auth.: ORS 184.616, 184.619 & Ch. 790, OL 2003
Stats. Implemented: Sec. 1-13, Ch. 790, OL 2003

731-070-0230

Commission Review of Final Agreement

On completion of the Attorney General's legal sufficiency review of the final agreement, the Commission shall

- (1) Approve the final agreement;
- (2) Reject the final agreement; or
- (3) Return the final agreement to the working group for further negotiation on issues the Commission specifies.

Stat. Auth.: ORS 184.616, 184.619 & Ch. 790, OL 2003
Stats. Implemented: Sec. 1-13, Ch. 790, OL 2003

Solicitation of Proposals for OIPP Projects

731-070-0240

Commission Selection of Projects for Solicitation of Conceptual Proposals

The Department may solicit Conceptual Proposals for a public-private partnership approach to planning, acquiring, financing, developing, designing, managing, constructing, reconstructing, replacing, improving, maintaining, repairing, leasing, operating and/or financing a transportation project if the Commission has determined that such an approach has the potential to accelerate cost-effective delivery of the project or promote innovative approaches to carrying out the project.

Stat. Auth.: ORS 184.616, 184.619 & Ch. 790, OL 2003
Stats. Implemented: Sec. 1-13, Ch. 790, OL 2003

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731-070-0250

Solicitation Documents

The Request for Conceptual Proposals for a public-private transportation project approved for solicitation under OAR 731-070-0240 shall include the following:

- (1) General Information.
 - (a) Notice of any pre-proposal conference as follows:
 - (A) The time, date and location of any pre-proposal conference;
 - (B) Whether attendance at the conference will be mandatory or voluntary; and
 - (C) That statements made by the Department's representatives at the conference are not binding upon the Department unless confirmed by written addendum.
 - (b) The deadline for submitting mandatory prequalification applications and the class or classes of work for which proposers must be prequalified if prequalification is a requirement;
 - (c) The name and title of the authorized agency person designated for receipt of proposals and contact person (if different);
 - (d) Instructions and information concerning submission requirements including the address of the office to which proposals must be delivered and any other special

information, e.g., whether proposals may be submitted by Facsimile or Electronic Data Interchange;

(e) The time, date and place of opening of proposals;

(f) The time and date of closing after which the Department will not accept proposals, which time shall be not less than five days after the date of the last publication of the advertisement. The interval between the date of issuance of the Solicitation Document and a closing should not be less than 30 days unless the Department finds a shorter interval is in the public's interest;

(g) The form and submission of proposals and any information required therein, including the requirement that proposals contain all the information and be presented in the format required of unsolicited and competing proposals under OAR 731-070-0060;

(h) If the agreement resulting from a solicitation will be a contract for a public work subject to ORS 279.348 to 279.380 or the Davis-Bacon Act (40 U.S.C. 276a), a statement that no proposal will be received or considered by the Department unless the proposal contains a statement by the proposer as a part of its proposal that "proposer agrees to be bound by and will comply with the provisions of ORS 279.350 or 40 U.S.C. 276a;"

(i) If the project so requires, a statement that the Department will not receive or consider a proposal from an entity when the entity is not registered with the Construction Contractors Board or is not licensed by the State Landscape Contractors Board as required by ORS 671.530;

(j) Whether a contractor or a subcontractor under the contract must be licensed under ORS 468A.720;

(k) Contractor's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279.111. (See OAR 731-005-0245(3)); and

(l) How the Department will notify proposers of Addenda and how the Department will make Addenda available.

(2) Agency Need. A description of the transportation project for which the Department is requesting proposals for a public-private partnership in such detail as the Department considers appropriate or feasible under the circumstance.

(3) Evaluation process:

(a) A statement that the Department may reject any proposal not in compliance with all prescribed procedures and requirements and other applicable laws, and that the rights reserved to the Department in the consideration of unsolicited and competing proposals under OAR 731-070-0300 to 731-070-0330 apply equally to proposals submitted in response to the Request for Proposal;

(b) The anticipated solicitation schedule, deadlines, protest process, and evaluation process, if any; and

(c) Evaluation criteria that the Department will use to select a proposal from among those submitted in response to the Request for Proposals.

(4) All contract terms and conditions, including warranties and bonding requirements, the Department considers necessary, and including contractor's certification that all subcontractors performing work described in ORS 701.005(2) (i.e., construction work) will be registered with the Construction Contractors Board or licensed by the State Landscape Contractors Board in accordance with ORS 701.035 to 701.055 before the subcontractors commence work under the contract.

(5) If federal funds are involved, the federal laws, rules and regulations applicable to the fund requirements shall govern in the event they conflict with a provision required by state law.

(6) Unless otherwise provided in the contract, the contractor shall not assign, sell, dispose of, or transfer rights, nor delegate duties under the contract, either in whole or in part, without the Department's prior written consent. Unless otherwise agreed by the Department in writing, such consent shall not relieve the contractor of any obligations under the Contract. Any assignee or transferee shall be considered the agent of the contractor and be bound to abide by all provisions of the contract. If the Department consents in writing to an assignment, sale, disposal or transfer of the contractor's rights or delegation of contractor's duties, the contractor and its surety, if any, shall remain liable to the Department for complete performance of the contract as if no such assignment, sale, disposal, transfer or delegation had occurred unless the Department otherwise agrees in writing.

Stat. Auth.: ORS 184.616, 184.619 & Ch. 790, OL 2003
Stats. Implemented: Sec. 1-13, Ch. 790, OL 2003

731-070-0260

Public Notice of Solicitation

(1) **Notice and Distribution Fee.** The Department shall furnish notice to a sufficient number of entities for the purpose of fostering and promoting competition. The notice shall indicate where, when, how, and for how long the Solicitation Document may be obtained and generally describe the work. The notice may contain any other appropriate information. The Department may charge a fee or require a deposit for the Solicitation Document. The Department may furnish notice using any method determined to foster and promote competition, including:

(a) Mail notice of the availability of Solicitation Documents ("notice") to Entities that have expressed an interest in the Department's procurements;

(b) Place notice on the Oregon the Department of Administrative Services' electronic procurement system known as the Vendor Information Program ("VIP"); or

(c) Place notice on the Department's internet web site.

(2) **Advertising.** The Department shall advertise every solicitation for proposals, unless the Contract Review Authority has exempted the solicitation from the advertisement requirement.

(a) Unless the Department publishes by Electronic Advertisement as permitted under subsection (b) of this section, the Department shall publish the advertisement for proposals at least once in at least one newspaper of general circulation in the area where the Contract is to be performed and in as many additional issues and publications as the Department may determine to be necessary or desirable to foster and promote competition.

(b) The Department may publish by Electronic Advertisement if:

(A) The Department has published a notice that it may publish future advertisements for proposals by Electronic Advertisement. The Department shall publish such notice weekly, for no less than four consecutive weeks, in at least one newspaper of general

circulation in the area where the business office of the Department is located and in as many additional issues and publications as the Department may determine to be necessary or desirable to provide notice to potential proposers. The Department notice shall include the World Wide Web location (i.e. Uniform Resource Locator or URL) where the Department will publish future Electronic Advertisements or alternatively, to the Web location where the Department will publish information on accessing the Electronic Advertisement via a telnet application;

(B) The Department posts in its business office a notice that the Department will publish advertisements for proposals by Electronic Advertisement. The notice shall include the World Wide Web location (i.e. Uniform Resource Locator or URL) where the Department publishes Electronic Advertisements or alternatively, to the Web location where the Department publishes information on accessing the Electronic Advertisement via telnet; and

(C) DAS determines Electronic Advertisement is less expensive than publishing by newspaper under subsection (a) of this section.

(c) In addition to the Department's publication required under subsection (a) or (b) of this section, the Department shall also publish advertisement for proposals in at least one trade newspaper of general statewide circulation if the transportation project includes or contemplates a Public Improvement with an estimated cost in excess of \$125,000.

(d) All advertisements for proposals shall set forth:

(A) The scheduled closing, that shall not be less than five days after the date of the last publication of the advertisement;

(B) The date that entities must file applications for prequalification if prequalification is a requirement and the class or classes of work for which entities must be prequalified;

(C) The nature of the work to be performed or the goods to be purchased;

(D) The office where the Solicitation Documents may be reviewed;

(E) The name, title and address of the Department person authorized to receive proposals;

(F) The scheduled opening; and

(G) If applicable, that the contract is for a public work subject to ORS 279.348 to 279.380 or the Davis-Bacon Act (40 U.S.C. 276(a)).

(3) **Posting Advertisement for Offers.** The Department shall post a copy of each advertisement for proposals at the principal business office of the Department. A proposer may obtain a copy of the advertisement for proposals upon request from Contractor Plans Unit, Transportation Building, 355 Capitol Street NE, Salem, Oregon 97301-3871 or on the Internet at www.odot.state.or.us.

(4) **Minority, Women Emerging Small Business.** The Department shall provide timely notice of all solicitations to the Advocate for Minority, Women and Emerging Small Business if the estimated project cost exceeds \$5,000.

Stat. Auth.: ORS 184.616, 184.619 & Ch. 790, OL 2003

Stats. Implemented: Sec. 1-13, Ch. 790, OL 2003

731-070-0270

Evaluation and Selection of Solicited Proposals

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Conceptual Proposals received pursuant to a solicitation under OAR 731-070-0240 to 731-070-0260 shall be evaluated and a proposal selected for development of a Detailed Proposal in the same manner as and under the procedures established under OAR 731-070-0050 to 731-070-0180 for unsolicited proposals. The development and evaluation of a Detailed Proposal and the negotiation, execution and approval of a Final Agreement shall be governed by OAR 731-070-0200 to 731-070-0230.

Stat. Auth.: ORS 184.616, 184.619 & Ch. 790, OL 2003
Stats. Implemented: Sec. 1-13, Ch. 790, OL 2003

731-070-0280

Public Records Requests

(1) Upon written request and within a reasonable time, the Director or his designee shall provide records relating to transportation project proposals for inspection in accordance with ORS Chapter 192, Oregon Laws 2003, chapter 790, § 3 and these rules.

(2) The Department may charge fees to cover its reasonable and actual costs in responding to public records requests. Such costs may include but are not limited to costs associated with locating records, separating exempt from nonexempt records, monitoring the requester's inspection of requested records, copying records and delivering copies of requested records. The Department may establish a fee schedule calculated to reimburse it for its reasonable and actual costs in accordance with this rule and the relevant provisions of the Public Records Law.

(3) The Department may prepare an estimate of the costs of responding to any request for public records, and may require payment of all or a portion of the estimated costs before acting on the request.

(4) Records related to a proposal for a Transportation Project submitted to the Department under the Oregon Innovative Partnerships Program are exempt from disclosure under the Oregon Public Records Law until:

(a) The Department shares the records or the information contained in them with a local government, metropolitan planning organization or area commission on transportation as part of the consultation process described in OAR 731-070-0150; or

(b) The Department completes its evaluation of the proposed project and has selected the proposal for negotiation of an agreement.

(5) Notwithstanding section (4) of this rule, sensitive business, commercial or financial information that is not customarily provided to business competitors that is submitted to the department in connection with a Transportation Project is exempt from disclosure under the Oregon Public Records Law until the records or information contained in them is submitted to the Commission in connection with its review and approval of the transportation project under Oregon Laws 2003, chapter 790, §4(6) and OAR 731-070-0230.

(6) The Department may, in its discretion, elect to disclose records in response to a public records request notwithstanding the availability of an exemption to disclosure under Oregon Laws 2003, chapter 790, §3 or ORS 192.410 to 192.505.

731-070-0290

Designation of Sensitive Business, Commercial or Financial Information and Trade Secrets

(1) The following procedure shall be followed by proposers to designate information as “sensitive business, commercial or financial information” under Oregon Laws 2003, chapter 790, §3(6) and OAR 731-070-0280: each individual page of a proposal that contains sensitive business, commercial or financial information must be clearly marked “Sensitive Business, Commercial or Financial Information”

(2) A proposer may desire that certain information be considered “trade secret” information for purposes of applying the public records exemption set out in ORS 192.501(2). To qualify for that exemption, trade secret information must meet the following criteria:

- (a) Not the subject of a patent;
- (b) Only known to a limited number of individuals within an organization; and
- (c) Used in a business which the organization conducts;
- (d) Of potential or actual commercial value; and
- (e) Capable of providing the user with a business advantage over competitors not having the information.

(3) The following procedures shall be followed by the proposer to designate information as trade secret:

- (a) Each individual page of a plan or progress report that contains trade secret information must be clearly marked trade secret;
- (b) Written substantiation describing what information is considered trade secret and why must accompany the document. The written substantiation shall address the following:
 - (A) Identify which portions of information are claimed trade secret;
 - (B) Identify how long confidential treatment is desired for this information;
 - (C) Identify any pertinent patent information;
 - (D) Describe to what extent the information has been disclosed to others, who knows about the information, and what measures have been taken to guard against undesired disclosure of the information to others;
 - (E) Describe the nature of the use of the information in business;
 - (F) Describe why the information is considered to be commercially valuable;
 - (G) Describe how the information provides a business advantage over competitors;
 - (H) If any of the information has been provided to other government agencies, identify which one(s);
 - (I) Include any other information that supports a claim of trade secret.

(4) Notwithstanding a proposer’s designation of information as constituting “trade secret,” ODOT will independently assess whether the trade secret exemption applies and whether the public interest requires disclosure when responding to a public records request.

Stat. Auth.: ORS 184.616, 184.619 & Ch. 790, OL 2003
Stats. Implemented: Sec. 1-13, Ch. 790, OL 2003

731-070-0300

ODOT Rights Reserved

(1) ODOT reserves all rights available to it by law in administering these guidelines, including without limitation, the right in its sole discretion to:

- (a) Reject any and all proposals at any time.
- (b) Terminate evaluation of any and all proposals at any time.
- (c) Suspend, discontinue and/or terminate comprehensive agreement negotiations with any proposer at any time prior to the actual authorized execution of such agreement by all parties, subject to appropriate documentation.
- (d) Negotiate with a proposer without being bound by any provision in its proposal.
- (e) Request or obtain additional information about any proposals.
- (f) Issue addenda to and/or cancel any RFP.
- (g) Revise, supplement or withdraw all or any part of these guidelines.
- (h) Decline to return any and all fees required to be paid by proposers hereunder.
- (i) Request revisions to proposals.

(2) Under no circumstances shall the state, the Oregon Transportation Commission or ODOT be liable for, or reimburse, the costs incurred by proposers, whether or not selected for negotiations, in developing proposals or in negotiating agreements. Any and all information ODOT makes available to proposers shall be as a convenience to the proposer and without representation or warranty of any kind. Proposers may not rely upon any oral responses to inquiries. If a proposer has a question regarding application of these guidelines, the proposer must submit the question in writing to the Director or his designee, and ODOT will provide answers in writing.

Stat. Auth.: ORS 184.616, 184.619 & Ch. 790, OL 2003
Stats. Implemented: Sec. 1-13, Ch. 790, OL 2003

731-070-0310


Program Administration

(1) ODOT reserves the right to extend any deadline or time within which a proposer or ODOT must take any action required or permitted under this Division if the affected proposer applies in writing for relief to ODOT and demonstrates in that application that special circumstances warrant the grant of such relief. For the purpose of this section, special circumstances that warrant the grant of relief include practical exigencies that reasonably can be regarded as imposing a substantial, practical impediment to the proposer's ability to meet the deadline or achieve the correction of a violation of rules. Special circumstances are circumstances beyond the reasonable control of the proposer organization and include, but are not limited to, the illness or other incapacity of key officers of the organization seeking relief, emergency reorganizations or replacements of the corporate structure, board of directors or executive officers of the organization, acts of God, and comparable practical impediments to a person's or organization's ability to meet a deadline or achieve the correction of a violation of rules.

(2) The grant or denial of relief under this rule must be determined by the Director or his designee. ODOT also reserves the right to waive or to permit the correction of minor or technical violations of rules in this Division. ODOT will not grant relief under this section in any case that involves the submission of competitive proposals or competitive responses in which granting the relief would give the entity or person applying for relief a material competitive advantage that is not made available to its competitors.

Stat. Auth.: ORS 184.616, 184.619 & Ch. 790, OL 2003
Stats. Implemented: Sec. 1-13, Ch. 790, OL 2003

731-070-0320



ODOT's Authority to Suspend, by "Order," the Acceptance of Specified Categories of Unsolicited Proposals

(1) The Department may, at any time, suspend its receipt and consideration of unsolicited proposals to undertake any class, category or description of Transportation Project (such as, by way of example, proposals to perform the maintenance of existing ODOT transportation facilities, or proposals to repair state secondary highway surfaces) by issuing a written order that declares that ODOT has suspended the acceptance and consideration of unsolicited proposals for certain types of Projects, describes the class or character of the Projects that are subject to the suspension, and specifies either the term of the suspension or that the suspension will continue until recalled by a subsequent order of the Department.

(2) Commencing on the effective date of the suspension order, the Department will refuse to accept unsolicited proposals for Transportation Projects of the class, category or description contained in the order, and will cease further processing and consideration of any such unsolicited proposals then currently under consideration by the Department.

(3) By submitting an unsolicited proposal, each proposer thereby waives and relinquishes every claim of right, entitlement or expectation that the processing and consideration of its proposal will not be subject to suspension under this rule.

Stat. Auth.: ORS 184.616, 184.619 & Ch. 790, OL 2003
Stats. Implemented: Sec. 1-13, Ch. 790, OL 2003

731-070-0330

ODOT's Authority to Prioritize the Processing of Submitted Proposals in Accordance with ODOT's Perception of Need and Urgency.

(1) The Department may, at any time, select any class, category or description of proposal or Transportation Project for the purpose of giving priority to the processing and consideration of unsolicited proposals by issuing a written order that declares that ODOT will give priority to the processing and consideration of unsolicited proposals for certain types of Projects, and describes the class or character of the proposals or Projects that are given priority. The priority order may either specify the term of the priority order, identify the submitted proposals that are subject to the priority order, or provide that the

priority order will continue in effect until recalled by a subsequent order of the Department.

(2) Commencing on the effective date of the order giving priority, the Department may undertake expedited processing and consideration of unsolicited proposals for Transportation Projects of the class, category or description contained in the order. The limited resources of the Department, in such cases, will require either the postponement of, or delay in, the processing and consideration of unsolicited proposals for Projects that are not within a class, category or description that is subject to a priority order.

(3) By submitting an unsolicited proposal, each proposer thereby waives and relinquishes every claim of right, entitlement or expectation that:

(a) Its proposal will enjoy the benefit of a priority order; and

(b) The processing and consideration of its proposal will not be subject to postponement or delay arising out of the Department's issuance of an order that gives priority to proposals for different the classes, categories or descriptions of Projects.

Stat. Auth.: ORS 184.616, 184.619 & Ch. 790, OL 2003

Stats. Implemented: Sec. 1-13, Ch. 790, OL 2003

Secretary of State
NOTICE OF PROPOSED RULEMAKING HEARING*
A Statement of Need and Fiscal Impact accompanies this form.

Oregon Department of Transportation, Highway Division			731
Agency and Division			Administrative Rules Chapter Number
Brenda Trump		(503) 945-5278	
Rules Coordinator		Telephone	
1905 Lana Avenue NE, Salem, OR 97314		e-mail: Brenda.C.Trump@odot.state.or.us	
Address			
March 25, 2004	2:00 p.m.	ODOT Bldg, Rm. 122, 355 Capitol St. NE, Salem	TBA
Hearing Date	Time	Location	Hearings Officer
Hearing Date	Time	Location	Hearings Officer
Hearing Date	Time	Location	Hearings Officer

Are auxiliary aids for persons with disabilities available upon advance request? Yes No

RULEMAKING ACTION

ADOPT:

Secure approval of rule numbers with the Administrative Rules Unit prior to filing.
OAR 731-070-0010 through 731-070-0330

AMEND:

REPEAL:

Renumber: Secure approval of rule numbers with the Administrative Rules Unit prior to filing.

Amend and Renumber: Secure approval of rule numbers with the Administrative Rules Unit prior to filing.

ORS 184.616, 184.619 and Chapter 790, Oregon Laws 2003 (SB 772)

Stat. Auth.: ORS

Other Authority:

Sections 1 through 13, Chapter 790, Oregon Laws 2003 (SB 772)

Stats. Implemented: ORS

RULE SUMMARY

Section 3, Chapter 790, Oregon Laws 2003 gives ODOT authority to establish the "Oregon Innovative Partnerships Program," the purpose of which is to develop partnerships with private entities or units of local government to develop an expedited project delivery process and maximize innovation for transportation projects. These rules establish a process for soliciting concepts or proposals or receive and evaluate concepts or proposals for transportation projects from private entities or units of government.

Text of proposed and recently adopted ODOT rules can be found at web site <http://www.odot.state.or.us/rules/>.

ORS 183.335(2)(G) requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

April 9, 2004

Last Day for Public Comment

Signature and Date

Brenda Trump

Printed name

* The *Oregon Bulletin* is published on the 1st of each month and updates the rule text found in the Oregon Administrative Rules Compilation. Notice forms must be submitted to the Administrative Rules Unit, Oregon State Archives, 800 Summer Street NE, Salem, Oregon 97310 by 5:00 pm on the 15th day of the preceding month unless this deadline falls on a Saturday, Sunday or legal holiday when Notice forms are accepted until 5:00 pm on the preceding workday. ARC 920-1997

Secretary of State
STATEMENT OF NEED AND FISCAL IMPACT
A Notice of Proposed Rulemaking or a Notice of Proposed Rulemaking Hearing accompanies this form.

Oregon Department of Transportation, Highway Division
Agency and Division

735
Administrative Rules Chapter Number

In the Matter of the Adoption of OAR 731-070-0010 through 731-070-0330 Relating to the Oregon Innovative Partnerships Program

Statutory Authority: ORS 184.616, 184.619 and Ch. 790, Oregon Laws 2003 (SB 772)

Other Authority:

Statutes Implemented: Sections 1 through 13, Chapter 790, Oregon Laws 2003 (SB 772)

Need for the Rule(s): Section 3, Chapter 790, Oregon Laws 2003 gives ODOT authority to establish the "Oregon Innovative Partnerships Program," the purpose of which is to develop partnerships with private entities or units of local government to develop an expedited project delivery process and maximize innovation for transportation projects. These rules establish a process for soliciting concepts or proposals or receive and evaluate concepts or proposals for transportation projects from private entities or units of government.

Documents Relied Upon: "Public-Private Partnerships for Oregon Transportation Projects: The Final Report of the Innovative Finance Advisory Committee" (February 2003). The report is available online at <http://www.odot.state.or.us/oipp/> or by contacting Jim Whitty, Transportation Funding Task Forces Administrator, 355 Capitol Street NE, Room 126, Salem, OR 97301-3871.

Fiscal and Economic Impact: There is no anticipated negative fiscal impact on government agencies, businesses, including small businesses, or the general public. Costs which may be associated with submission of concepts or proposals will be voluntary. Successful proposers will realize a benefit in the form of the opportunity to negotiate an agreement with the department relating to development of a transportation project. The state may realize benefits from private investment in transportation projects and the potential for an expedited delivery process for transportation projects.

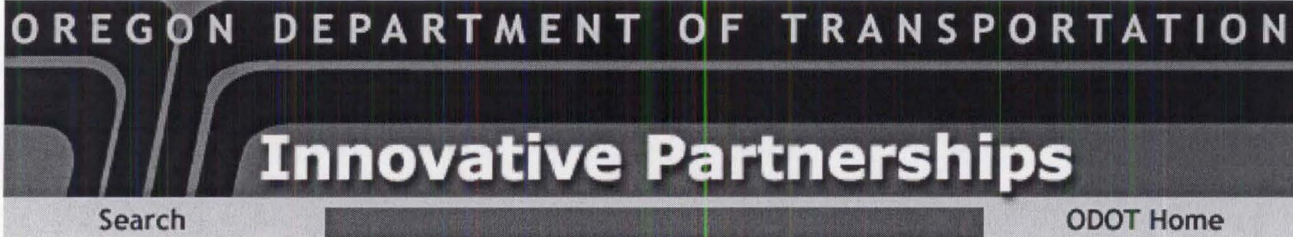
Administrative Rule Advisory Committee consulted?: No

If not, why?: As time is of the essence in the promulgation of permanent rules, a special advisory committee was not used to develop the proposed rules. The department did share informal rule drafts with the interested parties who identified themselves during the development of the legislation pertaining to the rule proposal, including 1000 Friends of Oregon, Metro, Tri-Met, Bechtel Corporation, Fluor Daniels Corporation, Parsons Brinckerhoff, League of Oregon Cities and the Association of Oregon Counties. In developing the proposed rules, the department did engage in informal dialogue with the mentioned interested parties who shared comments on the draft rules. The department also involved the Innovative Finance Advisory Committee, which developed the authorizing legislation (SB 772 (2003)) in development of the proposed rules. These contacts were made during the period beginning January 22, 2004 through February 10, 2004.

Signature and Date

Brenda Trump

Printed name



Aug. 26, 2003

For more information, contact [James Whitty](#), interim manager of the Oregon Innovative Partnerships Program, (503) 986-4282.

Legislature passes bill that encourages formation of Public-Private Partnerships for Oregon transportation projects

The 2003 Oregon Legislative Assembly passed Senate Bill 772-C to establish the Oregon Innovative Partnerships Program within the Oregon Department of Transportation. SB 772 gives ODOT broad authority to enter into contractual relationships in the form of partnerships with private sector firms and units of government. This legislation removes barriers to formation of public-private partnerships for Oregon transportation projects and provides numerous tools to encourage partnerships formation. For a copy of SB 772-C, please visit http://pub.das.state.or.us/leg_bills/pdfs/cesb772.pdf

The provisions of SB 772 are based upon the recommendations of the Innovative Finance Advisory Committee report of February 2003. A copy of this report can be found at <http://www.odot.state.or.us/ssbpublic/pcms/open/02166attb.pdf>.

Notice: ODOT has commenced a process to develop rulemaking and administrative procedures to govern the Oregon Innovative Partnerships Program and expects to complete this rulemaking process in the Spring of 2004. Unsolicited proposals for transportation projects initiated outside ODOT will be accepted only after this rulemaking is completed and administrative procedures are adopted. Nevertheless, ODOT will respond to inquiries about the nature of the new program and potential project opportunities available in Oregon.

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