

# Public Private Partnership Legislation: North Carolina

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A Q&A guide to North Carolina public private partnership (P3 or PPP) legislation. This Q&A discusses key provisions of P3 legislation, including bid submission, review and approval procedures, and the project delivery structures that may be used. This Q&A also discusses the rights and obligations of the government entity and the private sector party, including finance and compensation structures. Answers to questions can be compared across a number of jurisdictions (see [Public Private Partnership Legislation: State Q&A Tool \(8-579-1870\)](#)).

## BID SUBMISSION AND REVIEW

### 1. What legislation governs public private partnerships (PPPs or P3s) in your state?

North Carolina has two primary statutes governing public private partnerships (P3s) in the state:

- Section 143-128.1C of the North Carolina General Statutes (General P3 Statute), which authorizes governmental entities to enter into P3s to acquire, construct, own, lease as a lessor or lessee, and operate or participate in the acquisition, construction, ownership, leasing, and operation of a public-private project or of specific facilities within a public-private project. The General P3 Statute is primarily a procurement statute.
- Sections 136-18(39) and (39a) and 136-89.180 to 136-89.220 of the North Carolina General Statutes (DOT and TA P3 Statutes), which authorize the North Carolina Department of Transportation and the North Carolina Turnpike Authority to develop transportation infrastructure using P3s.

### 2. Are there any limitations on the types of projects that can be developed or monetized under the public private partnership (PPP or P3) legislation?

#### GENERAL P3 STATUTE

A governmental entity may enter into a P3 for any public-private project for which the governmental entity determines, in writing, it has a critical need (N.C. Gen. Stat. Ann. § 143-128.1C(b)).

The General P3 Statute defines public-private project as a capital improvement project undertaken for the benefit of a governmental entity and a private developer under a development contract that includes construction of a public facility or other improvements, including paving, grading, utilities, infrastructure, reconstruction, or repair, and may include both public and private facilities (N.C. Gen. Stat. Ann. § 143-128.1C(a)(8)).

Governmental entities include every officer, board, department, or commission responsible for preparing specifications or awarding or entering into contracts for the erection, construction, alteration, or repair of any buildings for the state of North Carolina or for any county, municipality, or other public body in the state (N.C. Gen. Stat. Ann. §§ 143-128.1B(a)(6) and 143-128.1C(a)(5)).

The General P3 Statute does not apply to the University of North Carolina and any of its constituent institutions, nonprofit supporting corporations, or any other private foundation, private association, or private club created for the primary purpose of financial support to the University of North Carolina or one of its constituent institutions (N.C. Gen. Stat. Ann. § 143-128.1C(m)).

#### DOT AND TA P3 STATUTES

The North Carolina Department of Transportation (NCDOT) may enter into partnership agreements with private entities and authorized political subdivisions to finance, by tolls, contracts, and other financing methods authorized by law, the cost of acquiring, constructing, equipping, maintaining, and operating transportation infrastructure in North Carolina, and to plan, design, develop, acquire, construct, equip, maintain, and operate transportation infrastructure in North Carolina (N.C. Gen. Stat. Ann. § 136-18(39)).

The NCDOT may consider procuring a project as a P3 if it falls in one of the following categories:

- Projects where design and construction need to be expedited for the public good and innovative delivery and finance/partnership can facilitate acceleration.
- Projects affording opportunities for innovation in design, construction, operation, maintenance, or financing of the transportation infrastructure.
- Unusual projects that do not lend themselves to normal design-bid-build procedures, or design-build procedures with traditional funding readily available.
- Projects where significant Department resources, which may include rights-of-way or air rights, are available to leverage with private investment.
- Projects conducive to significant private investment.
- Projects for which private investment would fulfill a critical financial need to complete the project.
- Projects that may provide access to new private capital to deliver other critical transportation projects.
- Projects that need to be on local long range transportation plans or have demonstrated local support.
- Projects for which a business case demonstrates that a P3 can deliver the best value to the traveling public.

(NCDOT: P3s Policy & Procedures, at 5).

The North Carolina Turnpike Authority (NCTA) is authorized to:

- Study, plan, develop, and undertake preliminary design work on up to nine Turnpike Projects. A Turnpike Project is either:
  - a road, bridge, or tunnel project planned, or planned and constructed, in accordance with the statute; or
  - a segment of the State highway system the governing board of the NCTA is authorized to convert to a tolled highway.
- Design, establish, purchase, construct, operate, and maintain the following projects:
  - the Triangle Expressway, including segments also known as N.C. 540;
  - the Triangle Parkway;
  - the Western Wake Freeway in Wake and Durham Counties; and
  - the Monroe Connector/Bypass.

(N.C. Gen. Stat. Ann. § 136-89.183(2).)

The NCTA may pursue other projects if they meet the following conditions:

- Two of the projects must be ranked in the top 35 based on total score on the NCDOT-produced list entitled “Mobility Fund Project Scores” dated June 6, 2012.
- The projects must be included in any applicable locally adopted comprehensive transportation plans.
- The projects must be shown in the current State Transportation Improvement Program.
- Toll projects must be approved by all affected Metropolitan Planning Organizations and Rural Transportation Planning Organizations for tolling.

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(N.C. Gen. Stat. Ann. § 136-89.183(a)(2)(e); Question 5: DOT and TA P3 Statutes: Project Authorization).

### 3. Please give a brief overview of the bidding process. In particular:

- Must the bidder be pre-qualified or meet any other submission requirements?
- What are the permitted bidding procedures, including does the legislation provide for a negotiated or fixed bidding process?
- Is a government entity permitted or required to submit a competing bid? If so, how is this bid treated and what is the standard of review?
- Are unsolicited bids permitted? If so, are there any restrictions on these bids?
- Are there any other or unique bidding procedures?

## GENERAL P3 STATUTE

### Qualification of Bidders

A governmental entity contemplating entering into a public private partnership (P3) must determine the form in which private developers may submit their qualifications (N.C. Gen. Stat. Ann. § 143-128.1C(h)).

A private developer submitting its qualifications for the proposed project must include the following information:

- Evidence of financial stability.
- Experience with similar projects.
- Explanation of project team selection by either:
  - listing licensed contractors, licensed subcontractors, and licensed design professionals whom the private developer proposes to use for the project’s design and construction; or
  - a statement outlining a strategy for open contractor and subcontractor selection based on the provisions of the General P3 Statute.
- A statement of availability to undertake the public private project and projected time line for project completion.
- Any other information required by the governmental entity.

(N.C. Gen. Stat. Ann. § 143-128.1C(h).)

A private developer submitting its qualifications for a design-build or design-build bridging contract must include additional information (see N.C. Gen. Stat. Ann. §§ 143-128.1A(c) and 143-128.1B(d)).

### Bidding Procedures

Once the governmental entity determines its programming requirements and the form in which developers are to submit their qualifications, it must:

- Publish a notice for interested private developers to submit their qualifications for the project. The notice must be published in a newspaper having general circulation within the county in which the governmental entity is located.
- Make available the programming requirements for facilities included in the public private project.

(N.C. Gen. Stat. Ann. § 143-128.1C(h).)

Generally, based on the qualification packages submitted by private developers and other information the governmental entity requires, the governmental entity may select one or more private developers with whom to negotiate the terms and conditions of a contract to perform the public private project. The governmental entity must advertise the terms of the proposed contract in a newspaper having general circulation within the county in which the governmental entity is located at least 30 days before entering into the development contract. (N.C. Gen. Stat. Ann. § 143-128.1C(i).)

For design-build and design-build bridging contracts, the governmental entity must rank the three most qualified developers. If fewer than three responses are received, the governmental entity must solicit developers a second time before the governmental entity may begin negotiations with the highest ranked bidder. (N.C. Gen. Stat. Ann. §§ 143-128.1A(d) and 143-128.1B(e).)

### Competing Government Bids

The General P3 Statute does not provide guidance on competing government bids.

### Unsolicited Bids

The General P3 Statute does not provide for unsolicited bids.

## DOT AND NCTA P3 STATUTES

### Qualification of Bidders

The DOT and TA P3 Statutes requires the North Carolina Department of Transportation (NCDOT) and the North Carolina Turnpike Authority (NCTA) to solicit proposals for agreements (N.C. Gen. Stat. Ann. §§ 136-18(39a)(f)(1) and 136-89.194(b)).

The NCDOT has developed and adopted standards for entering into P3 agreements with private entities (NCDOT Procedures) (NCDOT: P3s Policy & Procedures). The NCTA must solicit Turnpike Projects in accordance with the NCDOT Procedures (N.C. Gen. Stat. Ann. § 136-89.194(b) and NCTA Policy on PPP's).

Any private entity responding to a Request for Qualifications (RFQ) from the NCDOT or the NCTA must prequalify with the NCDOT before it can bid. A private entity bidding on a Turnpike Project must also be on the NCDOT Register of Qualified Firms.

The NCTA advertises all requests for private engineering or consulting services in the North Carolina Purchase Directory and posts the advertisements on Connect NCDOT. Additional information and forms for NCTA projects can be found on the Connect NCDOT Turnpike website.

### Bidding Procedures

Under the NCDOT Procedures, the NCDOT may evaluate proposals and select a proposer using a:

- One-step process, which includes the distribution of a Request for Proposals (RFP) or RFQ. Generally, the one-step process is reserved for projects that are specialized in nature or do not require substantial investment to generate a proposal.
- Two-step process, which includes:
  - the issuance of a RFQ;
  - the development of a short list of proposers;

- the issuance of a RFP; and
- the determination of the successful proposer. (NCDOT: P3s Policy & Procedures, at 6.)

The RFQ must:

- Provide a general description of the work and the proposer's responsibilities.
- Set out prequalification requirements.
- Include any pre-proposal conferences.
- Include a NCDOT point of contact.
- Set out any additional technical or financial qualifications desired.
- Include key proposer firms, contractors, and personnel to be identified.
- Set out the timeframe for statements of qualification or letters of interest to be submitted to the NCDOT.
- Set out basic evaluation criteria, for example:
  - professional experience;
  - technical competence;
  - resources;
  - staffing;
  - management stability;
  - legal contracting entity;
  - organizational structure; and
  - financial capability and stability necessary to complete a project.
- Include all weighted evaluation criteria to be used in assessing the letters of interest or statements of qualifications.

(NCDOT: P3s Policy & Procedures, at 6-7.)

The RFP contains the directives and scope description for a project and designates the required contents of responsive proposals, which may include the following:

- Additional information regarding the proposer's qualifications and demonstrated technical and financial competence.
- A discussion on the feasibility of developing the project as proposed.
- Environmental documentation responsibilities.
- Detailed engineering or architectural designs.
- Project schedule and the proposer's ability to maintain progress.
- A detailed financial plan, including costing methodology, cost proposals, and project financing approach.
- Ongoing or long term operation and maintenance issues related to the infrastructure.
- Any other information the NCDOT deems relevant or necessary.

(NCDOT: P3s Policy & Procedures, at 8.)

The Evaluation Committee (a committee comprised of five DOT employees) reviews the responses to the RFQ and identifies those proposers that are best suited for further consideration. The shortlist of proposers receives an RFP and is invited to submit a conceptual or details proposal in response. (NCDOT: P3s Policy & Procedures, at 7-8.)

The RFQ or RFP outlines the type of procurement the NCDOT will use to determine the successful proposer. The NCDOT may use:

- A negotiated procurement process. Under this procedure, the NCDOT attempts to negotiate an interim agreement, comprehensive agreement, or other agreement with the highest ranked proposal. Negotiations may include modifications to the proposal. NCDOT may formally end negotiations if an agreement cannot be successfully negotiated or the NCDOT deems that the proposal will not provide the NCDOT with the anticipated benefit. The NCDOT may then:
  - reject all proposals;
  - modify the RFP and request a new submission of proposals;
  - attempt to negotiate an agreement to the proposer with the next-highest ranked proposal; or
  - discontinue the project indefinitely.
- A competitive procurement process. Under this procedure, no negotiations regarding construction costs occur before the contract is awarded. However, details may be finalized following the determination of the successful proposer and before the execution of a contract, comprehensive agreement, lenders' agreements, or other instruments.
- A competitively negotiated procurement process. This is typically used when:
  - multiple proposers have provided proposals that are deemed comparable in value by the evaluation committee; or
  - the NCDOT deems that it is in the best interest of the NCDOT or the public to enter into competitive negotiations.
 (NCDOT: P3s Policy & Procedures, at 10-11.)

The NCTA must solicit competitive proposals for the construction of Turnpike Projects under Article 2 of Chapter 136 of the North Carolina General Statutes. Contracts for professional engineering services and other kinds of professional or specialized services necessary in connection with construction of Turnpike Projects must be solicited in accordance with procedures used by the NCDOT. Cost estimates prepared for the purpose of comparing bids for a Turnpike Project are confidential and may not be disclosed until after the opening of bids for the project. (N.C. Gen. Stat. Ann. § 136-89.194(b).)

However, the NCTA may authorize the use of an alternative contracting method if:

- The authorization applies to an individual project.
- The NCTA has concluded, and documents in writing, that the alternative contracting method is necessary because the project cannot be completed using the procedures of Article 2 of Chapter 136 of the North Carolina General Statutes within the necessary time frame or available funding or for other reasons the NCTA deems in the public interest.
- The NCTA has provided, to the extent possible, for the solicitation of competitive proposals before awarding a contract.
- The approved alternative contracting method provides for reasonable compliance with the disadvantaged business participation goals.

(N.C. Gen. Stat. Ann. § 136-89.194(c).)

Further, under Session Law 2008-164, any contracts for construction of highways, roads, streets, and bridges which are awarded under a P3 agreement must comply with the competitive bidding requirements of Article 2 of this Chapter 136 of the North Carolina General Statutes.

### Competing Government Bids

The DOT and NCTA P3 Statutes does not contemplate competing government bids.

### Unsolicited Bids

The NCDOT is not required to respond to unsolicited proposals and reserves the right to reject any unsolicited proposals. However, if the NCDOT elects to pursue a project, the NCDOT must issue a formal advertisement or RFP the same way as it would for a solicited proposal. (NCDOT: P3s Policy & Procedures, at 5.)

An individual or firm may request a meeting with the NCDOT Oversight Committee, through the NCDOT's P3 Coordinator, to determine whether a concept is of merit and relevant to the NCDOT's goals. The NCDOT is not obligated to meet with potential proposers.

A conceptual unsolicited proposal must address the following items:

- Economic viability of the project, including the market outlook for private finance for the project.
- Requirements and expectations of the NCDOT.
- Project delivery constraints.
- Risks to schedule, finance, and other elements.
- Environmental impacts including National Environmental Policy Act and North Carolina State Environmental Policy Act considerations, mitigation, permitting, and any other related issues.
- Any other information deemed appropriate by the NCDOT based on preliminary conversations, previous submissions, or other project-specific requests.

(NCDOT: P3s Policy & Procedures, at 11-12.)

The proposer will be advised of the Oversight Committee's determination as to whether the conceptual unsolicited proposal is viable and sufficiently related to the goals of the NCDOT.

The NCDOT may gauge industry interest in the proposal concept through the issuance of a request for letters of interest. The NCDOT may use the response to the request for letters of interest to inform the decision as to whether the NCDOT pursues procurement and implementation of the unsolicited proposal.

If the NCDOT pursues the unsolicited proposal, the proposer will be included on the shortlist of proposers if the proposer:

- Maintains its team as to the extent originally proposed unless exceptions to the team have been approved by the NCDOT.
- Is prequalified by the NCDOT to perform the work that is anticipated to be performed by the proposer. In this regard, an entity that proposes an unsolicited proposal may include other team members on the shortlisted team if the new entities are not replacing an entity previously included in the original submission without the NCDOT's written consent.

If more than one unsolicited proposal is submitted to the NCDOT for any given concept, only the first proposer, as evidenced by the submission date, will be afforded the automatic inclusion on the list of shortlisted proposers. Procurement of a P3 resulting from an unsolicited proposal proceeds the same way as procurement for a solicited proposal. (NCDOT: P3s Policy & Procedures, at 12-13.)

## Other Procedures

A private entity or its contractors must provide performance and payment security in the form and in the amount determined by the NCDOT. The form of the performance and payment security may consist of bonds, letters of credit, parent guaranties, or other instruments acceptable to the NCDOT. (N.C. Gen. Stat. Ann. § 136-18(39a)(b).)

### 4. Please give a brief overview of the bid review process for a public private partnership (PPP or P3). In particular:

- Does the legislation set out criteria for evaluating a successful bid?
- Must the bidder post a deposit or security, or pay an application fee?
- Is there a dedicated office or PPP unit that must review the bids? If so, what is the scope of its authority?
- Does the legislation provide a schedule for reviewing bids?
- Is any government entity required or permitted to reimburse unsuccessful bidders for costs they incur in preparing and submitting the bid?

## GENERAL P3 STATUTE

### Criteria for Evaluating Bids

The General P3 Statute does not specify the criteria for evaluating P3 bids. The governmental entity is responsible for determining the programming needs of the project and selects the winning bid based on the qualification packages submitted by private developers (N.C. Gen. Stat. Ann. § 143-128.1C(h), (i); see Question 3: General P3 Statute: Bidding Procedures).

### Deposits and Other Fees

A developer submitting its qualifications for a project is not required to post a deposit or security to secure its bid or to pay an application fee.

### Dedicated P3 Unit

The General P3 Statute does not create an office or P3 unit to review bids or manage P3 projects once awarded.

### Bid Review Schedule

The General P3 Statute does not provide a specific schedule for reviewing bids.

### Reimbursement of Losing Bidders' Costs

The General P3 Statute does not provide for the reimbursement of losing bidders' costs.

## DOT AND NCTA P3 STATUTES

### Criteria for Evaluating Bids

The North Carolina Department of Transportation (NCDOT) uses an Evaluation Committee consisting of at least five NCDOT employees to select a proposer. Other evaluation committees, such as a Financial Review Committee, may be used to review specific portions of a proposal, if the intent to use additional committees is outlined in the RFP. (NCDOT: P3s Policy & Procedures, at 6.)

The criteria to be used in selecting a proposer are set out in the RFP or RFQ. The NCDOT's criteria used for evaluating bids may include, but are not limited to:

- Financial plan feasibility/credibility.
  - Project schedule, milestones, and credibility.
  - Reasonableness of assumptions, including those related to ownership, legal liability, law enforcements, and operation and maintenance of the project.
  - Financial exposure and benefit to NCDOT and the public.
  - Forecasts.
  - Compatibility with other existing or planned facilities.
  - Compliance with DBE or MB/WB goals or good faith efforts.
  - Proposer's demonstrated capabilities and past performance.
  - Design features and approach.
  - Construction approach.
  - Operations and maintenance approach.
  - Financing approach.
  - Likelihood of obtaining necessary third party approvals or support.
  - Cost and pricing, including user fees and projected usage.
  - Innovation in planning, development, design, construction, maintenance, or financing.
  - Liability insurance provisions.
  - Staffing and project coordination capabilities, including governmental liaison.
  - Long term operations and maintenance considerations and life cycle costs.
  - Traffic control.
  - Safety records and plan.
  - Quality control methods and project guarantees.
  - Natural environmental responsibility.
  - Oral presentation, if applicable.
- (NCDOT: P3s Policy & Procedures, at 9.)

### Deposits and Other Fees

Neither the DOT and NCTA P3 Statutes nor the NCDOT Procedures require the submission of a deposit or other fees for proposals, but the NCDOT may include the requirement of a security deposit in either the RFP or RFQ.

### Dedicated P3 Unit

The NCDOT maintains an Oversight Committee to:

- Evaluate and select P3 projects.
  - Oversee the P3 program, procedures, and performance measures.
  - Vet unsolicited proposals.
- (NCDOT: P3s Policy & Procedures, at 4.)

Once a project has been selected to be built through a P3 process, an Evaluation Committee:

- Evaluates the proposals.
- Chooses the winning proposer.

An NCDOT employee serves as a facilitator to assist in the evaluation process. The role of the facilitator is to ensure that:

- The evaluation process occurs in a systematic and consistent manner.
- False or irrelevant data is not used in the evaluation process.
- To the greatest extent possible, the overall evaluations relating to the size and complexity of the project are properly valued.
- The Evaluation Committee understands the confidential nature and outcome of its work.

(NCDOT: P3s Policy & Procedures, at 9-10.)

### Bid Review Schedule

The DOT and NCTA P3 Statutes does not provide a specific schedule for reviewing bids.

### Reimbursement of Losing Bidders' Costs

The RFP or RFQ may provide for a stipend to provide partial compensation for each unsuccessful shortlisted proposer that submits a responsive proposal or as otherwise outlined in the RFP. The stipend is determined on a project specific basis and is based on both the project size and complexity. (NCDOT: P3s Policy & Procedures, at 14.)

#### 5. Is executive or legislative authorization or approval required before either:

- A request for proposals may be issued or the bidding process may be initiated?
- A bid can be approved?

## GENERAL P3 STATUTE

### Project Authorization

Generally, no executive or legislative approval is required before a governmental entity can authorize a project. However, the statute provides that if the public private partnership (P3) project will be leased to a unit of local governmental on completion, any capital lease or operating lease entered into by the unit must be approved by the North Carolina Local Government Commission (LGC) if the lease:

- Has a term of five or more years.
- Obligates the governmental entity to pay sums of money to another.
- Either:
  - obligates the governmental unit over the term of the agreement to extend at least \$500,000;
  - obligates the unit to exercise its power to levy taxes; or
  - involves the governmental entity incurring indebtedness or entering into a similar financing arrangement.

(N.C. Gen. Stat. Ann. § 143-128.1C(k)(1).)

In addition, if a state entity enters into a capital lease that is a state-supported financing arrangement that requires payments that are payable from North Carolina's General Fund or other funds and accounts that are funded from the general revenues and other taxes and fees of North Carolina or its entities, that capital lease is subject to approval by the North Carolina General Assembly and the Council of State (N.C. Gen. Stat. Ann. § 143-128.1C(k)(2)). This limitation

appears not to apply to P3 projects in which the state entity's interest is through an operating lease rather than a capital lease

### Bid Approval

No executive or legislative approval is required to approve a bid.

## DOT AND NCTA P3 STATUTES

### Project Authorization

Any project proposed by:

- The North Carolina Department of Transportation (NCDOT) must be approved by the Board of Transportation. In addition, simultaneously with the NCDOT's notification of the Board of a P3 agreement, it must submit a report on proposed agreements to the Chairs of the Joint Legislative Transportation Oversight Committee, the Chairs of the House of Representatives Appropriations Subcommittee on Transportation, and the Chairs of the Senate Appropriations Subcommittee on Department of Transportation. In addition, any executed agreement must be approved by the Secretary of Transportation and the Board of Transportation (N.C. Gen. Stat. Ann. § 136-18(39) and NCDOT: P3s Policy & Procedures, at 14).
- The North Carolina Turnpike Authority (NCTA) other than those already approved in the governing statute (see Question 2: DOT and TA P3 Statutes) requires:
  - consultation with the Joint Legislative Commission on Governmental Operations under Section 120-76.1 of the North Carolina General Statutes no less than 180 days before initiating the process for the issuance of debt to finance the project under Article 7 of Chapter 159 of the North Carolina General Statutes; and
  - approval by the General Assembly before construction. (N.C. Gen. Stat. Ann. § 136-89.183(a)(2)(e).)

### Bid Approval

The North Carolina Department of Transportation (NCDOT) must get approval from the North Carolina Local Government Commission before entering into a contract that commits the NCDOT to make non-retainage payments for undisputed capital costs of a completed transportation infrastructure to be made later than 18 months after final acceptance by the NCDOT of the transportation infrastructure (N.C. Gen. Stat. Ann. § 136-18(39)).

The NCTA must consult with and report to the Joint Legislative Oversight Committee and the Joint Legislative Commission on Governmental Operations before letting any contract for construction of a Turnpike Project (N.C. Gen. Stat. Ann. § 136-89.193(d)).

#### 6. Are public hearings required during the bidding and review process?

## GENERAL P3 STATUTE

Governmental entities that are public bodies must consider the development contract in an open meeting after holding a public hearing on the proposed contract (N.C. Gen. Stat. Ann. § 143-128.1C(i)).

As defined under North Carolina law, a public body is an entity and its political subdivisions that administer the following functions of North Carolina:

- Legislative.
- Policy-making.
- Quasi-judicial.
- Administrative.
- Advisory.

(N.C. Gen. Stat. Ann. § 143-318.9.)

Governmental entities must publish notice of the public hearing in an advertisement of the terms of the proposed contract in a newspaper having general circulation within the county in which the governmental entity is located at least 30 days before entering into the development contract (N.C. Gen. Stat. Ann. § 143-128.1C(i); see Question 3: General P3 Statute: Bidding Procedures).

#### DOT AND NCTA P3 STATUTES

Public hearings are not required during the bidding and review process. However, a public hearing is required before user fees are imposed (N.C. Gen. Stat. Ann. § 136-18(39a)(f)(3); see Question 12: DOT and TA P3 Statutes).

#### 7. Can an approved bidder perform preliminary work before the public private partnership (PPP or P3) agreement is executed? If so:

- What type of preliminary work can be performed?
- Will the bidder be compensated for this work if the parties cannot agree on the PPP agreement?
- Who has title to any work produced during this period?

#### GENERAL P3 STATUTE

The General P3 Statute does not expressly address whether an approved bidder may perform preliminary work before the P3 agreement is executed.

#### DOT AND NCTA P3 STATUTES

The DOT and NCTA P3 Statutes do not expressly address whether an approved bidder may perform preliminary work before the P3 agreement is executed. Most of the details of the P3 agreement are left to negotiations between the proposer and the North Carolina Department of Transportation and the North Carolina Turnpike Authority, as applicable. However, the NCDOT P3: Policies & Procedures provides that the NCDOT may enter into interim agreements covering primarily project development or preconstruction activities (NCDOT P3: Policies & Procedures, at 13).

#### PROJECT DELIVERY STRUCTURES

#### 8. What project delivery structures can be used to implement a public private partnership (PPP or P3)?

#### GENERAL P3 STATUTE

The General P3 Statute provides its own project delivery structure in which the developer may be responsible for any or all of the following:

- Construction of the entire public private project.

- Reconstruction or repair of the public private project or any part of it after construction of the project.
- Construction of any addition to the public-private project.
- Renovation of the public-private project or any part of it.
- Purchase of the following for the project:
  - apparatus;
  - supplies;
  - materials; or
  - equipment.

(N.C. Gen. Stat. Ann. § 143-128.1C(c).)

The General P3 Statute also accounts for the following project delivery structures:

- Design-build (N.C. Gen. Stat. Ann. § 143-128.1A).
- Design-build bridging. This is a procurement method in which a governmental entity contracts for design criteria services under a separate agreement from the construction phase services of the design-builder (N.C. Gen. Stat. Ann. § 143-128.1B(a)(1)).

#### DOT AND TA P3 STATUTES

The DOT and TA P3 Statutes does not provide guidance on project delivery structure. However, the NCDOT Procedures suggest that P3 projects should be considered for projects that do not lend themselves to either design-bid-build or design-build procedures with traditional funding readily available (NCDOT: P3s Policy & Procedures, at 5).

#### RIGHTS AND OBLIGATIONS OF THE GOVERNMENT ENTITY

#### 9. What rights, if any, does the government entity have to ensure proper management and maintenance of the public private partnership (PPP or P3) project? In particular:

- Are there any repairs, maintenance, or other operational issues that require the approval of a government entity?
- What inspection or auditing rights does the government entity have?
- Under what circumstances can the government take over the project?

#### GENERAL P3 STATUTE

##### Required Maintenance and Repair

The General P3 Statute does not specify that a governmental entity must approve any repairs, maintenance, or other operational issues. There is no guidance beyond the requirement that the development contract specify the following:

- The property interest of the governmental entity and all other participants in the development of the project.
- The responsibilities of the governmental entity and all other participants in the development of the project.
- The responsibilities of the governmental entity and all other participants with respect to financing of the project.

(N.C. Gen. Stat. Ann. § 143-128.1C(b).)

### Auditing and Inspection Rights

The General P3 Statute does not include any provisions regarding inspection rights.

### Step-in Rights

The General P3 Statute does not include any provisions regarding step-in rights for a governmental entity. However, a private developer may perform a portion of the construction or design work itself only if both of the following criteria apply:

- A previously engaged contractor defaults and a qualified replacement cannot be obtained after a good-faith effort has been made in a timely manner.
- The governmental entity approves the private developer to perform the work.

(N.C. Gen. Stat. Ann. § 143-128.1C(f).)

### DOT AND NCTA P3 STATUTES

The DOT and TA P3 Statutes does not address any of these issues. In practice, matters involving approval, auditing, and inspection rights or step-in rights are addressed in the P3 agreement.

## PRIVATE SECTOR PARTY COMPENSATION

### 10. How is the private sector party compensated for performing its obligations under the public private partnership (PPP or P3) agreement?

#### GENERAL P3 STATUTE

The General P3 Statute does include any provisions regarding private sector compensation. There is no guidance beyond the requirement that the development contract specify the following:

- The property interest of the governmental entity and all other participants in the development of the project.
- The responsibilities of the governmental entity and all other participants in the development of the project.
- The responsibilities of the governmental entity and all other participants with respect to financing of the project.

(N.C. Gen. Stat. Ann. § 143-128.1C(b).)

#### DOT AND TA P3 STATUTES

The DOT and TA P3 Statutes does not include any provisions regarding private sector compensation.

### 11. If availability payments or shadow tolls are permitted, how will the government entity's obligations be met?

#### GENERAL P3 STATUTE

This statute does not provide for availability payments or shadow tolls.

#### DOT AND NCTA P3 STATUTES

This statute:

- Allows for availability payments but does not specify how these payments will be made (N.C. Gen. Stat. Ann. § 136-18(39a)(f)(5)(VII)).
- Does not provide for shadow tolls.

### 12. If user fees are permitted:

- Can the private sector party increase the fees?
- Must the executive or legislative branch approve the fees?
- Are price increases subject to public hearings?

#### GENERAL P3 STATUTE

The General P3 Statute does not address user fees.

#### DOT AND TA P3 STATUTES

##### User Fee Increases

The North Carolina Department of Transportation (NCDOT) and the North Carolina Turnpike Authority (NCTA) may impose user fees. The NCDOT and NCTA are authorized to assign their authority to fix, revise, charge, retain, enforce, and collect tolls to a private entity (N.C. Gen. Stat. Ann. §§ 136-18(39a)(d), 136-89.183(a)(5), and 136-89.213).

The NCTA may contract with one or more providers to perform part or all of its collection functions with one or more of the following entities:

- The Division of Motor Vehicles of the NCDOT.
- Another state.
- Another toll operator.
- A toll collection-related organization.
- A private entity that has entered into a partnership agreement with the NCTA under Section 136-89.183(a)(17) of the North Carolina General Statutes.

(N.C. Gen. Stat. Ann. § 136-89.213(a).)

##### Executive or Legislative Approval

60 days before signing a concession agreement, the NCDOT must report to the Joint Legislative Transportation Oversight Committee on the following for the presumptive concessionaire:

- Project description.
- Number of years that tolls will be in place.
- Name and location of firms and parent companies, if applicable, including firm responsibility and stake, and assessment of audited financial statements.
- Analysis of firm selection criteria.
- Name of any firm or individual under contract to provide counsel of financial analysis to the NCDOT or the NCTA. The NCDOT must disclose payments to these contractors related to completing the agreement under this subdivision.
- Demonstrated ability of the project team to deliver the project, by evidence of the project team's previous experience in delivering a project on schedule and budget, and disclosure of any unfavorable outcomes on prior projects.
- Detailed description of method of finance, including sources of funds, state contribution amounts, including schedule of availability payments, and terms of debt payments.
- Information on assignment of risk shared or assigned to state and private partner.
- Information on the feasibility of finance as obtained in traffic and revenue studies.

(N.C. Gen. Stat. Ann. § 136-18(39a)(f)(5).)

All initial tolls or fees to be charged by a private entity must be reviewed by the Turnpike Authority Board. After tolls go into effect, the private entity must report to the Turnpike Authority Board 30 days before any increase in toll rates or change in the toll setting methodology by the private entity from the previous toll rates or toll setting methodology last reported to the Turnpike Authority Board (N.C. Gen. Stat. Ann. § 136-18(39a)(f)(3)).

#### Public Hearings Requirement

If the private entity is setting the tolls, the private entity must hold a public hearing on the toll rates before setting them. The public hearing must include an explanation of the toll setting methodology, in accordance with guidelines for the hearing developed by the NCDOT. (N.C. Gen. Stat. Ann. § 136-18(39a)(f)(3).)

### GOVERNMENT ENTITY COMPENSATION AND USE OF FUNDS

**13. Please describe the government entity's compensation structure including any lump sum and profit sharing agreements.**

#### GENERAL P3 STATUTE

The General P3 Statute does not provide for a pre-determined compensation structure. Any compensation structure would be determined by the development contract.

#### DOT AND TA P3 STATUTES

Generally, the compensation arrangement is determined in the P3 agreement. However, any contract by the North Carolina Department of Transportation (NCDOT) or the North Carolina Turnpike Authority must provide for revenue sharing, if applicable, between the private party and the NCDOT (N.C. Gen. Stat. Ann. § 136-18(39a)(e)).

**14. Are there any limitations or restrictions on the government entity's use of any funds it receives under the public private partnership (PPP or P3) agreement?**

#### GENERAL P3 STATUTE

The General P3 Statute does not impose any limitations on the governmental entity's use of funds.

#### DOT AND TA P3 STATUTES

Any contract by the North Carolina Department of Transportation (NCDOT) or the North Carolina Turnpike Authority (NCTA) for the development, construction, maintenance, or operation of a project must provide for revenue sharing, if applicable, between the private party and the NCDOT. Excess toll revenues from a Turnpike Project must be used for the funding or financing of transportation projects within the corridor where the Turnpike Project is located. (N.C. Gen. Stat. Ann. § 136-18(39a)(e).)

A corridor is defined as:

- The right-of-way limits of the Turnpike Project and any facilities related to the Turnpike Project or any facility or improvement necessary for the use, design, construction, operation,

maintenance, repair, rehabilitation, reconstruction, or financing of a Turnpike Project.

- The right-of-way limits of any subsequent improvements, additions, or extension to the Turnpike Project and facilities related to the Turnpike Projects, including any improvements necessary for the use, design, construction, operation, maintenance, repair, rehabilitation, reconstruction, or financing of those subsequent improvements, additions, or extensions to the Turnpike Project.
- Roads used for ingress or egress to the toll facility or roads that intersect with the toll facility, whether by ramps or separated grade facility, and located within one mile in any direction.

(N.C. Gen. Stat. Ann. § 136-18(39a)(e).)

The NCTA may use revenues derived from Turnpike Projects only for the following:

- NCTA administration costs. No more than 5% of total revenue derived from all Turnpike Projects may be used for NCTA administrative costs (N.C. Gen. Stat. Ann. § 136-89.188(c)).
- Turnpike Project development, right-of-way acquisition, design, construction, operation, maintenance, reconstruction, rehabilitation, and replacement.
- Debt service on the NCTA's revenue bonds or related purposes such as the establishment of debt service reserve funds.
- Debt service, debt service reserve funds, and other financing costs related to any of the following:
  - a financing undertaken by a private entity under a partnership agreement with the entity for a Turnpike Project;
  - private activity bonds issued under law related to a Turnpike Project; or
  - any federal or state loan, line of credit, or loan guarantees relating to a Turnpike Project.
- A return on investment of any private entity under a partnership agreement with the entity for a Turnpike Project.
- Any other uses granted to a private entity under a partnership agreement with the entity for a Turnpike Project.

(N.C. Gen. Stat. Ann. § 136-89.188(a).)

The NCTA may use up to 100% of the revenue derived from a Turnpike Project for debt service on the NCTA's revenue bonds or for a combination of debt service and operation and maintenance expenses of the Turnpike Projects (N.C. Gen. Stat. Ann. § 136-89.188(b)).

### TERM, RENEWAL, AND EARLY TERMINATION

#### 15. Does the legislation:

- Include a maximum term for any public private partnership (PPP or P3) agreement (including any renewals)?
- Allow the PPP agreement to be renewed? If so, what are the conditions under which this renewal can occur?
- Allow the private sector party or the government entity to terminate the PPP agreement before the expiration date?

**GENERAL P3 STATUTE****Limit on Maximum Term**

There is no maximum term for a P3 agreement under the General P3 Statute.

**Renewal Provisions**

Renewal provisions are not specifically addressed in the General P3 Statute.

**Early Termination**

Early termination rights are not specifically addressed in the General P3 Statute.

**DOT AND TA P3 STATUTES****Limit on Maximum Term**

The maximum term for a P3 agreement is 50 years (N.C. Gen. Stat. Ann. § 136-18(39a)(f)(2)).

**Renewal Provisions**

Renewal provisions are not specifically addressed in the DOT and TA P3 Statutes.

**Early Termination**

Early termination rights are not specifically addressed in the DOT and TA P3 Statutes. However, the North Carolina Turnpike Authority (NCTA) must, on fulfillment of and subject to any restrictions included in the agreement in connection with the issuance of the NCTA's revenue bonds, remove tolls from a Turnpike Project (N.C. Gen. Stat. Ann. § 136-89.196).

**16. What are the parties' rights on termination of the public private partnership (PPP or P3) agreement?**

Neither the General P3 Statute nor the DOT and TA P3 Statutes specifically address the parties' rights on termination. The parties' rights on termination are specified in the applicable P3 agreement.

**FINANCING THE PROJECT**

**17. Is the government entity permitted or required to provide any portion of the financing? If so:**

- Can it issue bonds or notes to meet its financing obligations?
- Is there a cap on the amount of financing it can provide or the amount of debt it can incur?
- Can Transportation Infrastructure Finance and Innovation Act (TIFIA) loans or other federal funding be used?
- Is the debt backed by the full faith and credit of the state?

**GENERAL P3 STATUTE****Government Entity Financing**

A development contract must require that the private developer provide at least 50% of the financing for the total cost of the public-private project (N.C. Gen. Stat. Ann. § 143-128.1C(a)(4)). The statute provides no detailed guidance as to how the governmental entity

will provide the balance of any financing required. However, this may include the making loans and grants from funds available to the government entity for purposes of procuring a capital improvement project (see N.C. Gen. Stat. Ann. § 143-128.1C(b)).

A state entity that is not a unit of local government may enter into a "state-supported financing arrangement," which is any installment financing arrangement, lease-purchase arrangement, arrangement under which funds are to be paid in the future based on the availability of an asset or funds for payment, or any similar arrangement under which a state entity agrees to make payments to acquire or obtain a capital asset for the state entity or any other state entity for a term of greater than one year, including renewal options. Any arrangement that results in the identification of a portion of a lease payment, installment payment, or similar scheduled payment by a state entity as interest for the purposes of federal income taxation is automatically considered a state-supported financing arrangement. (N.C. Gen. Stat. Ann. § 143-128.1C(a)(9), (10).)

If a state entity enters into a capital lease that is a state-supported financing arrangement that requires payments that are payable from North Carolina's General Fund or other funds and accounts that are funded from the general revenues and other taxes and fees of North Carolina or its entities, that capital lease is subject to approval by the North Carolina General Assembly and the Council of State (N.C. Gen. Stat. Ann. § 143-128.1C(k)(2)). This limitation appears not to apply to P3 projects in which the state entity's interest is through an operating lease rather than a capital lease (see Question 5).

There is also no guidance as to how the developer will provide the financing required under the development contract, but this may include private bank loans, syndication of tax credits (such as new markets tax credits, historic tax credits, or renewable energy tax credits), or other innovative financing vehicles available to the private sector but not to the public sector.

**Financing Cap**

For a state-supported financial arrangement, the General Fund may become indebted only up to 25% of the total bonded indebtedness authorized under legislation passed after January 1, 2013 (N.C. Gen. Stat. Ann. § 142-83(b)). As of July 2016, no indebtedness has been authorized.

**TIFIA and Other Federal Financing**

The General P3 Statute does not discuss TIFIA or other federal financing.

**Full Faith and Credit of the State**

The full faith and credit of North Carolina or a local government unit may be pledged only if the state or local government held a referendum to approve general obligation debt (N.C. Const. art. V, § 14).

**DOT AND TA P3 STATUTES****Government Entity Financing**

The North Carolina Department of Transportation (NCDOT) and North Carolina Turnpike Authority (NCTA) may use any lawful source of funding for a P3 project (N.C. Gen. Stat. Ann. § 136-18(39)).

The State of North Carolina can issue revenue bonds on behalf of the NCDOT to finance P3 Projects for the NCDOT, which may constitute private activity bonds under Section 142(m) of the Internal Revenue Code of 1986 (N.C. Gen. Stat. Ann. § 136-18(39a), (43)).

The NCTA is permitted to issue revenue bonds to finance a Turnpike Project. The NCTA is treated as a municipality for the purposes of Article 5 of Chapter 159 of the North Carolina General Statutes and has all powers of a municipality under the State and Local Government Revenue Bond Act. (N.C. Gen. Stat. Ann. § 136-89.189.)

An agreement entered into under the DOT and TA P3 Statutes may allow the private entity to assign, transfer, sell, hypothecate, and otherwise convey some or all of its right, title, and interest in and to the agreement and any rights and remedies under it, to a lender, bondholder, or any other party. However, an assignment cannot create additional debt or debt-like obligations of the State of North Carolina, the NCDOT or any other agency, authority, commission, or similar subdivision of the State to any lender, bondholder, or entity purchasing a participation in the right to receive the payment, trustee, trust, or any other party providing financing or funding of projects. (N.C. Gen. Stat. Ann. § 136-18(39a)(c).)

#### Financing Cap

The DOT and TA P3 Statutes does not impose any caps on the amount of financing. However, financing caps may be imposed in during the legislative or other approval process for P3 projects (see Question 5: DOT and TA P3 Statutes).

#### TIFIA and Other Federal Financing

Any lawful source of funding may be used for the P3 project (N.C. Gen. Stat. Ann. § 136-18(39)).

#### Full Faith and Credit of the State

Revenue bonds issued by the NCTA are not secured by the full faith and credit of the state of North Carolina. However, the state's full faith and credit may secure general obligations bonds to finance P3 projects that are authorized by a referendum (N.C. Const. art. V, § 3).

### NON-COMPETE

#### 18. Does the public private partnership (PPP or P3) legislation allow the government entity to build or develop a competing project? If so:

- What constitutes a competing project?
- What is the term of the non-compete provision?
- What rights and remedies does the private sector party have if the government breaches the non-compete?
- Which government entities are bound by the non-compete?
- Are there any other material terms?

Neither the General P3 Statute nor the DOT and TA P3 Statutes expressly address competing projects.

#### 19. What incentives, if any, does the public private partnership (PPP or P3) legislation authorize to attract bids including:

- Tax breaks?
- Contributions in kind, including assets, property, or services?
- Labor incentives?
- Any other incentives?

#### GENERAL P3 STATUTE

The General P3 Statute does not provide guidance on any incentives to attract bids in North Carolina.

#### DOT AND TA P3 STATUTES

##### Tax Breaks

The DOT and TA P3 Statutes do not provide guidance on tax breaks.

##### Contributions in Kind

The DOT and TA P3 Statutes do not provide guidance on contributions in kind.

##### Labor Incentives

The DOT and TA P3 Statutes do not provide guidance on labor incentives.

#### OTHER INCENTIVES

The North Carolina Turnpike Authority may use incentives in any contract for development or construction of a Turnpike Project to promote expedited delivery of the project (N.C. Gen. Stat. Ann. § 136-89.183(a)(18)).

### COMPLETED OR PENDING PPP PROJECTS

#### 20. Please describe any completed or pending public private partnership (PPP or P3) projects.

#### GENERAL P3 STATUTE

There is no central reporting for projects developed or constructed using the General P3 Statute, and therefore it is difficult to track whether any governmental entity has used this method of construction.

#### DOT AND TA P3 STATUTES

The Triangle Expressway was completed by the North Carolina Turnpike Authority (NCTA) under the DOT and TA P3 Statutes and has been open to traffic since 2012.

The following projects are pending:

- The Monroe Expressway.
- The I-77 Express Lanes.
- The I-485 Express Lanes.

The North Carolina Department of Transportation provides a list of pending projects undertaken by the NCTA on its website.

For more information on P3 projects procured under this statute, see Article, Market Update: A Review of the US Public Private Partnership (P3) Sector in 2014 ([6-593-7425](#)).

## OTHER ISSUES

**21. Please identify any other material provisions of the public private partnership (PPP or P3) legislation.**

### GENERAL P3 STATUTE

#### Underused Businesses

A private developer entering into a P3 agreement under the General P3 Statute and its contractors must make a good-faith effort to meet certain goals with respect to the participation of minority and historically underused businesses in the project, and to recruit and select small business entities (N.C. Gen. Stat. Ann. §§ 143-128.1A(b)(5), 143-128.1B(b)(5), and 143-128.1C(b)).

#### Contractors

The development contract may provide that the governmental entity and private developer must use the same contractor or contractors in constructing a portion of or the entire public-private project. If the development contract provides that the governmental entity and private developer must use the same contractor, the contract must include provisions deemed appropriate by the governmental entity to assure that:

- The public facilities included in or added to the public-private project are constructed, reconstructed, repaired, or renovated at a reasonable price.
- The equipment purchased for the public facilities included in the public-private project are purchased at a reasonable price.

(N.C. Gen. Stat. Ann. § 143-128.1C(d).)

#### Payment Bond

For each development contract there must be a payment bond of 100% of the total anticipated amount of the construction contracts entered into between the private developer and the contractors to design or construct the improvements. The payment bond must be conditioned on the prompt payment for all labor or materials for which the private developer or one or more of its contractors or subcontractors are liable. (N.C. Gen. Stat. Ann. § 143-128.1C(g)(1).)

The payment bond is solely for the protection of the persons furnishing materials or performing labor or services for which the private developer or its contractors or subcontractors are liable. The development contract must state the total anticipated amount of the construction contracts and be certified by the private developer as being a good-faith projection of its total costs. The payment bond must be executed by one or more surety companies legally authorized to do business in North Carolina. The payment bond becomes effective when the development contract is awarded. (N.C. Gen. Stat. Ann. § 143-128.1C(g)(1).)

### DOT AND TA P3 STATUTES

The North Carolina Department of Transportation (NCDOT) is permitted to participate in private engineering and construction contracts for state transportation systems that are not technically P3 agreements.

To qualify for state participation, the project must be:

- The construction of a transportation project on the Transportation Improvement Plan adopted by the NCDOT.
- The construction of a transportation project on a mutually adopted transportation plan that is designated a NCDOT responsibility. (N.C. Gen. Stat. Ann. § 136-28.6(b).)

Only those projects in which the right-of-way is furnished without cost to NCDOT are eligible for state participation (N.C. Gen. Stat. Ann. § 136-28.6). The NCDOT's participation is limited to:

- 50% of the amount of any engineering contract and any construction contract let for the project.
- Costs associated with normal practices of the NCDOT. (N.C. Gen. Stat. Ann. § 136-28.6(d), (e).)

Plans for the project must meet NCDOT standards and be approved by the NCDOT (N.C. Gen. Stat. Ann. § 136-28.6(f)). Projects must be constructed in accordance with the plans and specifications approved by the NCDOT (N.C. Gen. Stat. Ann. § 136-28.6(g)).

**22. If your jurisdiction does not have public private partnership (PPP or P3) enacting legislation but still engages in PPP activity, please describe the authority, basis, and process for doing so.**

North Carolina has P3 enacting legislation (see Question 1).

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