

TITLE 2

Transportation

Transportation Department

CHAPTER 20. PUBLIC-PRIVATE INITIATIVES PROGRAM IN TRANSPORTATION

§ 2001 Findings and declaration of policy.

The General Assembly hereby finds and declares that:

(a) It is essential for the economic, social and environmental well being of the State and the maintenance of a high quality of life that the citizens of the State have an efficient transportation system.

(b) The State has limited resources to fund the maintenance and expansion of the State transportation system and therefore alternative funding sources should be developed to supplement public revenue sources.

(c) A significant alternative to public revenue sources is a public-private sector initiatives program permitting private entities to undertake all or a portion of the study, planning, design, development, financing, acquisition, installation, construction, improvement, expansion, repair, operation and maintenance of public transportation projects for the citizens of Delaware in exchange for the right to lease or own the facilities for an agreed-upon period and earn a reasonable rate of return through tolls or user fees.

(d) In addition to alleviating the strain on the public treasury and allowing the State to use its limited resources for other needed projects, public-private initiative projects also do all of the following:

- (1) Take advantage of private sector efficiencies in designing and building transportation projects and financial and development expertise;
- (2) Allow for the rapid formation of capital necessary for funding transportation projects;
- (3) More quickly reduce congestion in existing transportation corridors and provide the public with alternate route and mode selections;
- (4) Provide the opportunity to link transportation investments with land use measures which further the State's growth management and clean air policies;
- (5) Provide sound investment opportunities for the private sector; and
- (6) Require continued compliance with environmental requirements and applicable state and federal laws that all publicly financed projects must address.

(e) The Department should be permitted and encouraged to test the feasibility of building privately-funded transportation systems and facilities through innovative agreements with the private sector by developing projects, and the Secretary should be granted authority to entertain, solicit, evaluate, negotiate and administer such agreements.

(f) The Department is encouraged and authorized to take full advantage of every financing opportunity and mechanism provided by federal legislation, including transportation legislation facilitating federal financing or grants for construction, improvement, leasing, operation or related functions as to roads, bridges, tunnels or other transportation systems.

(g) A Public-Private Initiatives Program Revolving Loan Fund, which would allow available federal and State funds to be leveraged, should be established to provide a source of public funds for partial financing of projects.

70 Del. Laws, c. 280, § 1; 74 Del. Laws, c. 69, §§ 82-84.;

§ 2002 Definitions.

As used in this chapter, unless the context indicates a different intent:

(a) "Agreement" means an agreement entered into by the Secretary and one or more contracting parties for a project.

(b) "Contracting party" means any individual, corporation, partnership, company, trust, association, joint venture, pool, syndicate, sole proprietorship, unincorporated association, body politic, authority or any other form of entity not specifically listed herein entering into an agreement with the Secretary for a project.

(c) "Project" means any public transportation project undertaken under this chapter.

(d) "Department" means the Department of Transportation.

(e) "Metropolitan planning organization" means a metropolitan planning organization established and designated pursuant to 23 U.S.C. § 134 (1993).

(f) "Secretary" means the Secretary of Transportation.

(g) "Transportation System" means any capital-related improvement and addition to the State's transportation infrastructure, including but not limited to highways, roads, bridges, vehicles and equipment, ports and marine-related facilities, park and ride lots, rail and other transit systems, facilities, stations and equipment, rest areas, tunnels, airports, transportation management systems, control/communications/information systems and other transportation-related investments, or any combination thereof.

70 Del. Laws, c. 280, § 1; 74 Del. Laws, c. 69, §§ 82, 85.;

§ 2003 Projects.

(a) *Project.* — Subject to subsection (c) of this section, the Secretary may entertain and solicit proposals from, and may negotiate and enter into agreements with, private entities or consortia thereof, for projects using in whole or in part private sources of financing involving (i) all or a portion of the study, planning, design, construction, leasing, financing, operation and maintenance of transportation systems, or (ii) the repair, and/or expansion, leasing, financing, operation and maintenance of existing transportation systems, or any combination of the foregoing.

(b) *Eligibility.* — The Secretary may entertain and solicit proposals from any source whatsoever; provided however, that the Secretary shall only enter into agreements regarding a transportation project that has been specifically authorized by the General Assembly, and that such authorization

includes all material terms of the proposed project, including without limitation any terms concerning repayment of debt or capital to or for the benefit of any private entity; further provided (i) which has been authorized by the Delaware General Assembly (except that no agreement may be entered into which compels (A) direct or indirect expenditures or loans on the part of the State in excess of the total sum which may be appropriated by the Delaware General Assembly as the State's financial participation with respect to said transportation system or; (B) credit enhancements which pledge the full faith and credit of the State); and/or (ii) for which the General Assembly has provided specific or categorical funding authorization for purposes of implementing this chapter; and (iii) which is consistent with § 8419(2)(a) of Title 29, applicable provisions of the Department's long range transportation plan, any applicable recommendations developed by the Cabinet Committee on State Planning pursuant to Chapter 91 of Title 29, and applicable provisions of the Federal Clean Air Act [42 U.S.C. § 1857 et seq. and 42 U.S.C. § 7551].

(c) *Proposals.* —

(1) The Secretary shall solicit proposals through a request for proposals pursuant to Chapter 69, Title 29, accompanied by material explaining of the Public-Private Initiatives Program enacted hereunder and describing the selection process and criteria. The Secretary may identify in these requests for proposals specific systems, corridors or routes for improvement.

(2) Alternatively, potential projects may be identified and proposed by any potential contracting party. Such unsolicited proposals will also be accepted provided they satisfy the criteria outlined in accordance with this chapter. In the event that an unsolicited proposal is deemed in compliance with this chapter and accepted for review, the Secretary shall publicly announce, not less than once a week for 2 consecutive weeks in a newspaper published or circulated in each county of the State, the acceptance of the unsolicited proposal along with a detailed description of the unsolicited proposal, and shall provide 60 days within which other interested parties may submit proposals relating to the same subject. Notwithstanding any other provisions of this Code to the contrary, all proposals made pursuant to this chapter may provide for the design-build mode of infrastructure development;

(3) Proprietary information contained in proposals not selected for projects and records of negotiations in progress shall be exempt from public disclosure.

(d) *Fees authorized.* — To offset a portion of the costs of initiating this program and reviewing proposals received for projects under this chapter, the Department is authorized to assess a non-refundable Proposal Review Fee for each proposal not to exceed \$50,000.

(e) *Selection and approval.* —

(1) The projects shall be selected by a project committee, chaired by the Secretary, consisting of the Secretary, the Director of Financial Management and Budget, the Chief Engineer of the Department of Transportation, and up to 4 other persons to be appointed by the Secretary. The projects shall be selected without regard to the provisions of Chapter 69 of Title 29.

Each proposal shall be weighed on its own merits and ranked according to the selection criteria stipulated in the request for proposals, provided that upon receipt of all proposals the project committee may group similar types of project proposals together for purposes of evaluation and selection, and provided further that the proposals selected by such committee from any such group of proposals must be those with the highest ranking within that group, and provided further that such committee may elect not to select any proposals from an established group of proposals, and provided further that as to similar proposals or proposals that are mutually exclusive so that the undertaking of 1 would preclude the need, desirability, or ability of undertaking the other, only the

proposal with the highest ranking among such proposals shall be selected, and, subject to approval as set forth above, proceed to negotiations. Each of the agreements shall be negotiated individually as a stand-alone project.

(2) Each selected project must be subsequently approved, within 45 days of its selection, by both (i) the directly affected metropolitan planning organization or organizations and (ii) the Council on Transportation established pursuant to § 8409 of Title 29 or its successor, in that order. If a directly affected metropolitan planning organization approves a selected project, it shall be deemed to have given its approval to amend the Transportation Improvement Program to include such project. If the Council on Transportation approves a selected project, it shall be deemed to have given its approval to amend the Capital Improvements Program to include such project. Approval for each selected project by the affected metropolitan planning organization and the Council on Transportation shall be based solely upon the project's compatibility with State and regional transportation plans, compliance with applicable laws and regulations, and fiscal impact upon the State Capital Improvement Program or regional Transportation Improvement Program. If either organization disapproves a project, it shall set forth in writing its reasons for doing so. If neither approval nor disapproval is granted within 45 days after such proposal was delivered to any affected metropolitan planning organization or the Council on Transportation, such proposal shall be deemed approved by those organizations. Moreover, in the event that a project is disapproved as provided above, the Department may resubmit the plan or revise version thereof no sooner than 60 days after notification that the plan has been disapproved by either party.

(3) The Secretary shall promptly notify the Co-chairs of the Joint Bond Bill Committee of the Delaware General Assembly when a project has been duly selected by the project committee. After the Co-chairs' receipt of such notice, the Co-chairs shall meet and either approve or reject the project. Upon their approval of the project, it shall be deemed as an amendment to the Capital Improvements Program for the fiscal year in which the approval is granted.

(f) *Compliance.* — Except as otherwise expressly provided in this chapter, all projects must comply with all applicable rules and statutes in existence at the time the agreement is entered into, including but not limited to this title, § 711 of Title 19, § 6960 of Title 29 and 49 C.F.R. Part 21, provided that the provisions of Chapter 69 of Title 29 other than § 6960 of Title 29 thereof shall not be applicable to the projects regardless of the use of State funds. Compliance with § 6960 of Title 29, or in the alternative, federal prevailing wage laws, shall be required without regard to the source of funds for a project. Each agreement may provide for protection for the contracting party from future discretionary regulatory changes which would substantially or materially change the terms and conditions or financial assumptions of the agreement.

(g) *Financing.* —

(1) The Department is authorized, notwithstanding any other provision of this Code, to (i) use any federal, state or other funds, including without limitation funds obtained from or through the Delaware Transportation Authority, any loans from the Public-Private Initiatives Program Revolving Loan Fund established in § 2912 of this title and federal transportation funds, to finance, secure, guarantee, service project debt or repay project costs; and (ii) do such things as necessary and desirable to maximize the funding and financing of such projects, provided that private capital participation in the total capital cost for each project shall be negotiated with the other terms of the agreement. Notwithstanding other provisions of this chapter, the amount of such participation shall be taken into account in determining the negotiated rate of return on the investment in the

project. In addition, the projected total percentage of public capital investment, as well as the limits of the Department's financial liability for the project, shall be expressly disclosed in the agreement.

(2) The Department, either directly or through a designated party, may apply for, receive and accept from any federal agency or any other governmental body grants or financial support of whatever nature for any purpose described in this chapter. The Department may transfer or lend the proceeds of any such grant, or utilize such proceeds available for credit enhancement, to public agencies or contracting parties, on terms and conditions complying with applicable federal and state law.

70 Del. Laws, c. 280, § 1; 71 Del. Laws, c. 150, § 78; 72 Del. Laws, c. 164, § 1; 74 Del. Laws, c. 69, §§ 82, 86-92.;

§ 2004 Ownership and lease of project transportation systems.

(a) Agreements may provide for either private or State ownership of the project during the construction period, depending on the project structure determined by the Secretary. Each agreement shall provide for State ownership or control of the underlying real property at all times, except as provided in subsection (b) or subsection (c) of this section. After completion and final acceptance of each project, or discrete segment thereof, the agreement shall provide for State ownership of the project and lease to the contracting party, unless the State elects to provide for ownership of the project or portion thereof by the contracting party during the term of the agreement in which case the agreement shall provide for the transfer of the project to the State at no charge at the expiration of the term of the agreement. The State shall lease each of the projects, or applicable project segments, to the contracting parties for up to 50 years after completion of such projects. An agreement may provide for lease payments to consist of royalties.

(b) If state ownership or control of railroad rights-of-way used in a project is not feasible, for example, but not by way of limitation, due to federal ownership of said rights-of-way, an agreement for a project may nonetheless be approved, subject to the following limitations:

(1) State ownership or control of any other real property utilized in the project, as well as compliance with all other provisions of subsection (a) of this section, shall nonetheless be required;

(2) The negotiations on the rate of return to the contracting party during the term of the agreement shall take this reduced ownership/control factor into account; and

(3) All expenses relating to the indemnification of the owner of any railroad rights-of-way must be borne by the contracting party, notwithstanding the provisions of § 2008 of this title.

(c) An agreement for a project in which the state does not assume ownership or control of the underlying real property involved in the project may be approved, subject to the following limitations:

(1) Compliance with all other provisions of subsection (a) of this section shall nonetheless be required;

(2) The negotiations on the rate of return to the contracting party during the term of the agreement shall take this reduced ownership/control factor into account; and

(3) All expenses relating to the indemnification of the owner of any such real property must be borne by the contracting party, notwithstanding the provisions of § 2008 of this title.

70 Del. Laws, c. 280, § 1; 71 Del. Laws, c. 150, §§ 80, 81; 72 Del. Laws, c. 164, § 2; 74 Del. Laws, c. 69, §§ 82, 93.;

§ 2005 Exercise of Department's powers.

For purposes of facilitating these projects and to assist the contracting parties in the financing, development, construction leasing, maintenance and operation of such projects, the agreements may include provisions for the Department to exercise any powers conferred upon it by law, including but not limited to the lease of rights of way and airspace, granting of necessary easements and rights of access, power of eminent domain, granting of development rights and opportunities, issuance of permits or other authorizations, protection from competition, remedies in the event of default of either of the parties, granting of contractual and real property rights, liability during construction and the term of the lease, and the authority to negotiate acquisition of rights of way in excess of appraised value. Amounts paid by a contracting party for any right-of-way in excess of the appraised value thereof may be considered a contribution to the project only to the same extent that such excess amounts could be paid by the Department to acquire the right-of-way under applicable law.

70 Del. Laws, c. 280, § 1; 74 Del. Laws, c. 69, §§ 82, 94.;

§ 2006 Authorization of tolls and user fees; limitations on toll and user fee revenues.

(a) *Authorization of tolls and user fees.* — Each agreement may authorize the contracting party to impose tolls or user fees for use of the transportation system constructed and/or leased by it to allow a reasonable rate of return on investment. The agreement may authorize the contracting party to collect tolls or user fees through both conventional methods and non-conventional methods including, but not limited to, automatic vehicle identification systems, electronic toll collection systems and, to the extent permitted by law, video-based toll collection enforcement. The agreement may authorize the collection of tolls and user fees by a third party.

(b) *Classification of tolls and user fees.* — A contracting party may establish different toll rates or user fees based on categories such as vehicle class or vehicle weight and may further vary toll rates by time of day or year.

(c) *Maximum rate of return.* — A maximum rate of return on investment shall be negotiated by the parties and stated in the agreement. A contracting party may establish and modify toll rates and user fees as long as the maximum rate of return on investment is not exceeded.

(d) *Uses of revenues.* — Each agreement shall require that over the term of the lease toll or user fee revenues be applied to payment of the contracting party's capital outlay costs for the project, including interest expense, the project's operations costs, costs of toll collections, administration of the project, any reimbursement to the State for the costs of project review and oversight, maintenance and police services, establishment and funding of a fund to ensure the adequacy of maintenance expenditures, a reasonable return on investment to the contracting party, and any other use mutually agreed upon by the parties and specifically set forth in the agreement, regardless of any contrary provisions of Delaware law.

(e) *Excess revenues.* — As agreed upon by the parties the agreement may require that any revenues in excess of the maximum rate of return allowed in the agreement either be applied to any indebtedness incurred by the contracting party in connection with the project and/or be paid to one or more other entities or funds including, but not limited to, the Revolving Loan Fund established in § 2012 of this title, the State's Transportation Trust Fund established under § 1404 of this title, the Department, or the State. For the purpose of determining whether there are revenues in excess of the maximum rate of return (or in excess of any incentive rate of return authorized by the agreement pursuant to subsection (f) of this section), the agreement shall expressly provide for an annual audit to be performed (at the expense of the contracting party) by the same auditor chosen to perform the annual

audit of the Transportation Trust Fund pursuant to § 1323 of this title and the certification of the rate of return which the contracting party has realized during the audited period. The contracting party shall maintain its books and corporate records in the State.

(f) *Incentive rates of return.* — Notwithstanding § 2006(c) of this title, each agreement or an amendment to each agreement may provide for incentive rates of return in excess of the maximum rate of return established in the agreement for the attainment of specific safety, performance, transportation demand management or other goals set forth in the agreement or amendment.

(g) *Continuation of tolls.* — After expiration of the lease or ownership period of a project to or by a contracting party, the Department may continue to charge tolls or user fees for the use of the project. The Department may delegate such authority to continue to collect tolls or user fees for the use of the project to a third party, provided that such revenues must first be used for operations and maintenance of the project and, subsequently, any revenues determined by the Secretary to be excess must be paid by such 3rd party to the State's Transportation Trust Fund, the Department or the State.

70 Del. Laws, c. 280, § 1; 74 Del. Laws, c. 69, § 95.;

§ 2007 Reimbursement for services rendered by department or other State agencies.

(a) *Police services.* — Each project is deemed to be part of the State Transportation System. The Delaware State Police shall have primary jurisdiction over each project except with respect to all or any portion of a project located in a jurisdiction where primary law enforcement responsibility is delegated to another law enforcement agency by law or by applicable status of forces agreements or otherwise. Each law enforcement agency rendering services pursuant to the above shall receive reimbursement for such services in accordance with an agreement that the contracting party shall enter into with such agency.

(b) *Maintenance services.* — Agreements for maintenance services may be entered into under this chapter with the Department or other State agencies, provided that such agreements shall provide for full reimbursement for services rendered by the Department or such other agencies.

(c) *Coordination of permits and licenses.* — The Department shall, with the mandatory assistance of all applicable State agencies and departments, establish a unified permitting and licensing process in the Department for the processing and issuance of all necessary permits and licenses for projects under this chapter, including, but not limited to, all environmental permits, businesses and tax licenses and transportation permits. The Department shall seek the cooperation of federal and local agencies to expedite all necessary federal and local permits, licenses and approvals necessary for the projects, provided, however, that the agreements shall provide for full reimbursement for services rendered by the Department or other agencies.

(d) *Other.* — The Department may provide services for which it is reimbursed including, but not limited to, preliminary planning, environmental certification (including the procurement of all necessary environmental permits), and preliminary design of the projects.

70 Del. Laws, c. 280, § 1; 74 Del. Laws, c. 69, § 82.;

§ 2008 Liability coverage; indemnification.

Each agreement must require that liability insurance coverage of an amount appropriate to protect the project's viability is secured and maintained by the contracting party. Each agreement may provide for State indemnification of the contracting party for design and construction liability where the State has approved relevant design and construction plans.

70 Del. Laws, c. 280, § 1; 74 Del. Laws, c. 69, § 82.;

§ 2009 Other agreement provisions.

(a) *Grant of rights to contracting party.* — An agreement may include provisions authorizing the State to grant necessary easements and lease to a contracting party existing rights of way or rights of way subsequently acquired. An agreement may also include provisions to lease the airspace above or below the right of way associated with the project to the contracting party at less than fair market value during the term of the contracting party's lease of the project, provided that if the Department continues to lease the airspace rights to the contracting party after the expiration of such lease term, it must do so only at fair market value. The agreement may also grant the contracting party the right of first refusal to undertake projects utilizing real estate and airspace owned by the Department within or contiguous to the right of way, provided that in the judgment of the Secretary such projects must contribute to the public use and benefit of the project, and provided further that nothing herein shall derogate from the Department's power to declare real estate or airspace owned by the Department surplus to the needs of the Department pursuant to § 137 of Title 17 or any successor provision.

(b) *Miscellaneous.* — An agreement may include any contractual provision that is necessary to protect the project revenues required to repay the costs incurred to study, plan, design, finance, acquire, build, install, lease, operate, enforce laws, and maintain the transportation system including, but not limited to, a traffic guarantee, an equity guarantee or insurance provided that such provision will not unreasonably prohibit the development of essential public transportation systems and facilities.

70 Del. Laws, c. 280, § 1; 74 Del. Laws, c. 69, §§ 82, 96.;

§ 2010 Operation of toll facility.

At the request of a contracting party operating a toll facility hereunder, the Department may adopt and enforce reasonable regulations consistent with State law which (i) set maximum and minimum speeds, (ii) exclude undesirable vehicles, cargoes, or materials from the use of the facility, (iii) establish high occupancy or express lanes for use during all or any part of a day and limit the use of such lanes to certain traffic, (iv) determine points of access, (v) determine truck/trailer multiples, (vi) determine truck weight stations, and (vii) determine truck weight limits.

70 Del. Laws, c. 280, § 1.;

§ 2011 Plans and specifications.

The plans and specifications for each project constructed pursuant to this chapter shall comply with the Department's standards for state projects and any applicable federal standards. Each project is deemed to be part of the state highway system for purposes of identification, maintenance standards, and enforcement of traffic laws and for the purposes of applicable sections of this title.

70 Del. Laws, c. 280, § 1; 74 Del. Laws, c. 69, § 82.;

§ 2012 Public-Private Initiatives Program Revolving Loan Fund.

(a) *Establishment of Fund.* — There is hereby established a Public-Private Initiatives Program Revolving Loan Fund which shall be maintained and administered by the Department in accordance with the provisions of this chapter and such rules as the Department may from time to time prescribe. The Fund shall be available for the purpose of providing financial assistance in accordance with the provisions of this section. Subject to the provisions of any applicable bond resolution governing the investment of bond proceeds deposited in the Fund, the Fund shall be invested and reinvested in the same manner as other State funds. The Fund shall retain any investment earnings. Subject to the

provisions of any applicable bond covenants or resolutions or any other applicable laws or regulations governing the Fund, the Department may, with the approval of the Delaware General Assembly, transfer monies from the Fund to the Transportation Trust Fund.

(b) *Fund deposits.* — The following shall be deposited in the Fund:

- (1) Federal grants and awards or other federal assistance received by the State for the purpose of deposit therein and eligible for deposit therein under applicable federal law;
- (2) State funds appropriated for deposit to the Fund;
- (3) Payments received from any public or private agency in repayment of a loan previously made from the Fund or pursuant to 23 U.S.C. § 129(a)(7) or successor legislation;
- (4) Net proceeds of bonds approved by the Delaware General Assembly which have been designated by the Delaware General Assembly for deposit in the Fund;
- (5) Interest or other income earned on the investment of moneys in the Fund; and
- (6) Any additional moneys made available to the Fund by the Secretary from any sources, public or private, including excess toll revenues, with the approval of the General Assembly for the purposes for which the Fund has been established.

(c) *Accounting of deposits.* — In order to facilitate the determination of the amount of funds available for financing Projects which meet either federal eligibility criteria or state eligibility criteria but not both, deposited funds commingled in the Fund shall also be accounted for separately based on whether their source is federal or state.

(d) *Permitted uses of funds.* — Amounts in the Fund may be used only:

- (1) To make loans for the construction, reconstruction, resurfacing, restoring, rehabilitation or replacement of public or private toll transportation facilities or other transportation systems within the State, or the study of the feasibility thereof;
- (2) To guarantee, or purchase insurance for, bonds, notes or other evidences of obligation issued by the contracting party developing a public or private toll facility or other transportation system for the purpose of financing all or a portion of the cost of such toll facility or system, if such action would improve the credit market access of the contracting party or reduce interest rates payable by such party;
- (3) To earn interest on Fund accounts;
- (4) For the reasonable cost of administering the Fund; and
- (5) To be used for any purpose authorized by this chapter.

(e) *Terms of loan agreements.* — The following terms shall apply to all loans made from the Fund:

- (1) Loans shall bear interest at the average rate of interest earned by the State's pooled investment fund for the period beginning with the 1st month following the date that the loan is funded and ending on the last day of the month preceding the start of repayment; provided, however, that in the event the Department funds a loan with the proceeds of a bond issue, the rate of interest charged shall be no less than the cost the Department incurs to borrow such funds irrespective of the average rate of interest earned by the State's pooled investment funds;
- (2) Loan repayment shall begin no later than 5 years from the date that the facility or system is opened to toll traffic and shall be completed by no later than 30 years from the time the loan was obligated;

(3) The loan may be subordinated to other debt financing except for loans made by any other public agency; and

(4) Reasonable origination or processing fees may be charged.

70 Del. Laws, c. 280, § 1; 74 Del. Laws, c. 69, §§ 97, 98.;