

**RULES
OF
STATE DEPARTMENT OF TRANSPORTATION**

**CHAPTER 672-17
GOVERNING PUBLIC-PRIVATE PARTNERSHIPS**

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672-17 -.01 Statement of Policy.

- (a) It is the policy of the Department to consider the feasibility of private involvement in projects the Department undertakes pursuant to Sections 32-2-78, 32-2-79, 32-2-80 of the Official Code of Georgia Annotated. The objectives of the Department's Public-Private Partnerships program include, but are not limited to, the following:
- (1) Expedite project delivery and maximize innovation in project financing and delivery;
 - (2) Leverage and supplement limited public funds available for public projects;
 - (3) Facilitate the collaboration and cost and risk sharing in public projects between the public and private partners;
 - (4) Foster flexibility in procurement methods to provide the best value to the public;
 - (5) Encourage cooperative partnerships between and among the public and private sectors;
 - (6) Promote the use of local labor and resources, as well as disadvantaged, minority and small business enterprises, consistent with applicable law; and

- (7) Advance the investment policies of the Department as provided for by paragraphs (1) through (10) of subsection (a) of Section 32-2-41.1 of the Official Code of Georgia Annotated.
- (b) The Department shall identify and report to the Board by July 31, of each odd-numbered year those projects that are suitable for a Public-Private Partnership. Factors to be considered may include, but are not limited to, potential for value added by the private sector, the Department's preparedness, project maturity, financial feasibility, project scope, and market interest. In identifying projects, the Department will coordinate and work collaboratively with the Director, and endeavor to seek input from relevant governmental agencies, local governments and the public. The report may be supplemented by the Department and re-submitted to the Board prior to the next reporting period.

672-17 -.02 Definitions.

The following terms, as used in this Chapter, shall have the following meanings unless the context thereof indicates to the contrary:

- (a) "Board": The State Transportation Board.
- (b) "Commissioner": The Commissioner of the State Department of Transportation.
- (c) "Department": The Department of Transportation.
- (d) "Director": The Director of Planning provided for by Section 32-2-43 of the Official Code of Georgia Annotated.
- (e) "Guidelines": Policies and procedures adopted by the Department which establishes the manner in which the Department intends on receiving and evaluating Proposals.
- (f) "Person" or "person": Any individual, co-partnership, association, corporation, joint venture, limited liability company, business entity, consortium of business entities, firm or joint stock company, their lessees, trustees, assignees or receivers as appointed by any court.
- (g) "Private contribution": Resources supplied by a private entity for a Public-Private Partnership, including funds, financing, income, revenue, cost sharing, technology, staff, materials, equipment, expertise, data, or engineering, planning, design, construction, operations or maintenance services, or other items of value.
- (h) "Private Partner": A person that has entered into an agreement with the Department for a Public-Private Partnership.

- (i) “Proposal”: A written submittal for a Public-Private Partnership submitted in response to a formal solicitation issued by the Department.
- (j) “Proposer”: A person that has submitted a statement of qualifications, proposal, or other submission in order to participate in an ongoing procurement for a Public-Private Partnership.
- (k) “Public-Private Partnerships” or “P3”: An arrangement between the Department and one or more private or public persons that provides for one or more of the planning, development, design, construction, reconstruction, extension, expansion, financing, operation, maintenance and other services for a Transportation Project that may include, but is not limited to, the following:
 - (1) Acceptance of private contribution to a Transportation Project in exchange for a public benefit concerning that Transportation Project;
 - (2) Sharing of resources and the means of providing Transportation Projects;
 - (3) Cooperation in researching, developing and implementing Transportation Projects;
 - (4) Use of innovative financing methods;
 - (5) Use of innovative project delivery methods; or
 - (6) Use of leases, licenses, permits, or franchises.

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 Section 14-8-1 *et seq.* of the Official Code of Georgia Annotated.

- (l) “Request for Proposals”: A request for a submittal from a person for a Public-Private Partnership, as described in subsection (c)(1) of Rule 672-17-.04.
- (m) “Request for Qualifications”: A request for a submittal from a person of a description of that person’s experience, competence, and capability to enter into and implement a Public-Private Partnership, as described in subsection (b)(1) of Rule 672-17-.04.
- (n) “Transportation Project” or “Project”: A project as defined under Code Section 32-2-78 of the Official Code of Georgia Annotated.

672-17 -.03 Guidelines.

The Department will establish Guidelines for a Public-Private Partnership process that may provide, among other things, requirements and procedures for solicitations, public involvement process, public notice opportunities, and review and approval steps to negotiate and execute a final contract. The Guidelines are advisory and descriptive in nature, and do not impose any legal obligations or liability on the Board, the Department or any of their members, employees, representatives and consultants. A copy of the Guidelines may be obtained from the Office of the Chief Engineer,

Department of Transportation, One Georgia Center, 22nd Floor, 600 W. Peachtree Street, NW, Atlanta, Georgia 30308.

672-17 -.04 Solicitation Process.

- (a) Applicability. If the Department decides to procure a Public-Private Partnership, it will solicit participation through a procurement process in accordance with the requirements of these Rules. Such procurement process may involve, without limitations, Request for Qualifications, listing of the most qualified Proposers, Request for Proposals, discussions, interviews, one-on-one meetings, requests for additional information or clarifications, written questions and responses, negotiations, and/or best and final offers.
- (b) Request for Qualifications.

(1) General. As part of a solicitation for a Public-Private Partnership, the Department may, in its sole discretion, issue a Request for Qualifications. A Request for Qualifications for a Public-Private Partnership will set forth the basic criteria for professional experience, competence, and capability to undertake and perform a proposed Public-Private Partnership, and such other information as the Department considers relevant or necessary in the Request for Qualification. At its sole discretion, the Department may elect to furnish conceptual designs, fundamental details, technical studies and reports or detailed plans of the proposed project in the Request for Qualifications. The Request for Qualifications may request one or more conceptual approaches to bring the Public-Private Partnership to fruition.

(2) Notice. If the Department initiates a solicitation by issuing a Request for Qualifications, as applicable, the Department shall, at least thirty (30) days prior to the date for receipt of responses to such request, post the legal notice for said request on the Department of Administrative Services website or in substantially the same manner utilized by the Department to solicit Requests for Qualifications, as applicable.

(3) Evaluation. The Department, after evaluating the qualification submittals received in response to a Request for Qualifications, will identify and approve a list of qualified Proposers that is composed of those Proposers that are considered most qualified to respond to a Request for Proposals for a proposed Public-Private Partnership. The list will comprise of at least two (2) qualified Proposers, but no more than five (5) qualified Proposers. Notwithstanding the foregoing, the Department has the right to cancel or suspend the solicitation at any time. In evaluating the qualification submittals, the Department will consider such qualities that the Department considers relevant to the Public-Private Partnership, which may include the Proposer's financial condition, stated capacity and willingness to assume responsibility and risk, management stability, technical capability, experience, staffing, and organizational structure. The Request for

Qualifications shall include the criteria used to evaluate the qualification submittals and the relative weight given to the criteria. The Department shall notify each Proposer providing a qualification submittal whether it is on the list of most qualified Proposers.

(c) Request for Proposals.

(1) General. The Department may issue a Request for Proposals by providing notice pursuant to subsection (c)(2) or (c)(3) of this Rule 672-17-.04. A Request for Proposals shall indicate the general scope of the Public-Private Partnership, the proposed financial participation of the Department and the Proposer in the Public-Private Partnership, and other factors that will be used in evaluating the Proposal including the submission of detailed documentation regarding the Public-Private Partnership or unique capabilities or qualifications that will be required by the Proposer. The Request for Proposals may require the submission of additional information relating to:

- (i) the Proposer's qualifications and demonstrated technical and financial competence;
- (ii) the Proposer's technical proposal for and approach to implementing the Public-Private Partnership, including all assumptions;
- (iii) the Proposer's schedule for implementing the Public-Private Partnership;
- (iv) the Proposer's financial and/or price proposal for and approach to implementing the Public-Private Partnership;
- (v) a detailed estimate with all material quantities and price assumptions used to form the basis of the Proposal;
- (vi) factors used in evaluating the Proposal; or
- (vii) any other information the Department considers relevant or necessary.

(2) Notice of Request for Proposals without Request for Qualifications. If the Department initiates a solicitation by issuing a Request for Proposals and has not established a list of most qualified Proposers using a Request for Qualifications, the Department shall, at least ninety (90) days prior to the date for receipt of Proposals in response to such request, post the legal notice for said request on the Department of Administrative Services website or in substantially the same manner utilized by the Department to solicit requests for proposals.

(3) Notice of Request for Proposals following Request for Qualifications. If the Department has issued a Request for Qualifications and has a list of at least two most qualified Proposers in response to the Request for Qualifications, the Department may notify and issue a Request for Proposals to such qualified Proposers. The Department may, in its sole discretion, issue a draft Request for

Proposals to such qualified Proposers for review and comment prior to issuing the final Request for Proposals.

(4) Payment for work product. The Request for Proposals may stipulate an amount of money that the Department will pay to an unsuccessful Proposer that submits a Proposal that is responsive to the requirements of the Request for Proposals. The Request for Proposals may also stipulate an amount of money that the Department may pay to Proposers in the event that the Department cancels the procurement before the receipt of Proposals. The Request for Proposals shall specify the criteria and conditions under which such payments will be made. In determining the amount of payment, if any, for work product, the Department shall consider:

- (i) the effect of a payment on the Department's ability to attract quality Proposers and meaningful Proposals and to generate competition;
- (ii) the work product expected to be included in the Proposal and the anticipated value of that work product;
- (iii) the complexity of the Public-Private Partnership; and
- (iv) the costs anticipated to be incurred by a Proposer in preparing a Proposal.

(5) Discussions and negotiations. Based on the evaluation factors as set forth in the Request for Proposals, the Department shall rank all Proposals that are complete, in conformance with, and responsive to the Request for Proposals, and shall select in order of preference two or more of the Proposers whose qualifications and proposed services are deemed most meritorious for negotiations. Such negotiations may include, but are not limited to, one-on-one meetings, and requests for Proposal revisions and/or best and final offers. Notwithstanding the foregoing, the Department reserves the right in its sole discretion to engage in individual discussions with, to negotiate with, and/or award a contract to only one Proposer when it is clearly more qualified and suitable than the other Proposers or when the Department receives only one responsive Proposal.

(6) Best value selection and award. Pursuant to the Guidelines, the Department shall submit a recommendation to the Board regarding approval of the Proposal determined to provide the apparent best value to the State of Georgia upon contract terms that are the most satisfactory and advantageous to the State of Georgia. Before making such selection, the Department shall consult with participating local governing authorities. The Board may approve or disapprove the recommendation, and if approved, the award will be subject to the successful completion of negotiations, any necessary federal action, execution by the Commissioner of the appropriate agreement(s), and satisfaction of such other conditions that are identified in the Request for Proposals. Upon award of a contract for a Public-Private Partnership, the Department will notify the Proposers

in writing of the Department's rankings, and shall also make the rankings available to the public.

(7) Public comment on Proposals. The Department shall provide opportunity for written public comment with respect to the Proposal(s) responsive to a Request for Proposals at least ten (10) days after receipt of the Proposal(s) by posting an executive summary of the Proposal(s) on the Department of Administrative Services website or in substantially the same manner utilized by the Department to solicit requests for proposals for public written comment for a minimum of thirty (30) days. Further, the Department shall hold at least one public hearing prior to the expiration of the period for receipt of written public comments, which may be held in a county where the Project, or portion thereof, is located. All public hearings required to be held pursuant to applicable law will be directed and overseen by the Department, with participation by such other entities as it deems appropriate. Notwithstanding the foregoing, information in a Proposal that is proprietary or confidential shall not be disclosed to the public pursuant to subsection (b) of Rule 672-17-.06.

(8) Approval of contract. Prior to the execution of any contract(s) between the Department and the apparent best value Proposer, the Board shall approve the contract(s) recommended by the Department.

(d) Terms of contract. The contract for a Public-Private Partnership shall identify the rights and obligations of the Department and the Private Partner with respect to the Project. By way of example only, a contract for a Public-Private Partnership may include, but is not limited to, the following:

(1) Provisions authorizing the Private Partner to impose, collect and enforce user fees, tolls, fares, rents, tax increments or similar charges and fees;

(2) Provisions allowing the Department to accept payments of money from the Private Partner and to divide revenues with the Private Partner;

(3) Provisions addressing how the development costs and the Project risks will be allocated;

(4) Provisions establishing performance criteria and/or incentives;

(5) Provisions addressing the acquisition and ownership of rights-of-way, real estate, capital improvements and other property interests that may be required;

(6) Provisions addressing responsibility for reconstruction or renovations that is required in order for the Project to meet applicable government standards at the end of the term of the contract;

(7) Provisions providing for security, patrolling and law enforcement on, in or for the Project;

(8) Provisions identifying any technical specifications that must be satisfied, and a process whereby the Private Partner may request and receive authorization to deviate from such specifications on making a showing satisfactory to the Department;

(9) Provisions addressing how public funds may be contributed toward the Public-Private Partnership and the basis of such contribution, including the use of state and federal loan programs, and grant and credit programs;

(10) Provisions regarding the Private Partner's compensation, including but not limited to, provisions regarding the use of availability payments, retention of fees, tolls, fares, rents or similar charges and fees, and generation and use of other revenues;

(11) Provisions specifying the conditions under which the Private Partner is entitled to compensation for lost revenues or other demonstrable damages resulting from the construction of a competing facility by the Department;

(12) Provisions specifying events of default and remedies available to the Private Partner and the Department, including compensation that may be payable to the Department or Private Partner in connection with termination of the Public-Private Partnership;

(13) Provisions allowing for the resolution of disputes through non-binding dispute resolution and the procedures to commence such non-binding dispute resolution; and

(14) Provisions regarding the maintenance and auditing of the Private Partner's work product, books and records.

Notwithstanding the foregoing, the terms of a contract for a Public-Private Partnership shall not convey rights or obligations to the Department or Private Partner that are prohibited by, contrary to, or in violation of applicable law.

672-17 -.05 Conduct Governing Solicitations.

A Proposer and any other person on a Proposer's team, including consultants and subconsultants, shall be governed according to the following rules of conduct:

- (a) Such persons shall conduct their business in Georgia strictly in accordance with the laws of the State of Georgia, and of the United States, and with the lawfully promulgated regulations of the Department.

(b) Such persons shall:

(1) Operate competitively without regard to any artificial territories or boundaries which may have been created or designated by agreement with any other potential consultant, sub-consultant, contractor or subcontractor.

(2) Not agree with any other person, directly or indirectly, to submit a Proposal deliberately higher than the Proposal submitted by any other potential Proposer; to submit a nonresponsive Proposal or to agree not to submit a Proposal.

(3) Not seek to prevent or discourage anyone, through threats or intimidation, implied or direct, from submitting a Proposal.

(4) Not seek or engage in an agreement, directly or indirectly, with any other potential competitor, to allocate any contract or subcontract to its firm or any other firm.

(c) As a requirement of submitting a Proposal or of an award of any contract with a Proposer, the Proposer will make any certifications, warranties or commitments as may be required by the solicitation documents and applicable laws, rules, regulations or policies.

672-17-.06 General Rules for Public-Private Partnerships.

(a) The Department and Board reserve all rights available to them by law in administering these rules, including without limitation, the right in their sole discretion to:

(1) reject any and all responses to Requests for Qualifications or Request for Proposals at any time;

(2) suspend, discontinue or terminate evaluation of any and all responses to Requests for Qualifications or Request for Proposals at any time;

(3) suspend, discontinue or terminate final contract negotiations with any Proposer at any time prior to the actual authorized execution of such final agreement by all parties;

(4) discuss and negotiate with a Proposer without being bound by any provision in its Proposal;

(5) modify, issue addenda to, or cancel any Request for Qualifications or Request for Proposals;

- (6) request or obtain additional information about any Proposal, or request revisions thereto;
 - (7) revise, supplement or withdraw all or any part of the Guidelines; and
 - (8) undertake such other action or exercise such other rights as may be provided for in the Request for Qualifications or Request for Proposals.
- (b) Except as specifically provided under subsection (c)(7) of Rule 672-17-.04, no Proposal shall be made public until the procurement phase of a Public-Private Partnership Project, including any evaluation, competitive one-on-one interviews, negotiations and award, have been completed. At all times thereafter, the Department shall not disclose any trade secret or proprietary information. Subject to the foregoing, all Proposals submitted to the Department become the property of the Department and Proposers should familiarize themselves with the provisions of the Georgia Open Records Act, Section 50-18-70 et seq. of the Official Code of Georgia Annotated. If a Proposer has special concerns regarding information it desires to make available to the Department, but which it believes to be a trade secret, proprietary information or other information excepted from disclosure, the Proposer should specifically designate that information as such in its Proposal. The Proposer's designation shall not be dispositive of the trade secret, proprietary or exempted nature of the information so designated.

672-17-.07 Protests.

- (a) Scope of protests. Except as otherwise provided by applicable law, this Rule prescribes the exclusive protest procedures and requirements for Public-Private Partnerships procured under these Rules. Protests are limited to the following:
- (1) exclusion from the list of most qualified Proposers; or
 - (2) award of a contract for Public-Private Partnership.
- (b) Deadline and filing. Protests must be filed as soon as the basis for the protest is known, but no later than fourteen calendar days after the notification of qualified Proposers or award of a contract, as applicable. A protester excluded from the list of qualified Proposers is not eligible to protest an award of a contract. Protests must be filed in the form and manner required by these Rules and the solicitation documents, and sent to the Office of the Commissioner, Department of Transportation, One Georgia Center, 22nd Floor, 600 W. Peachtree Street, NW, Atlanta, Georgia 30308. Failure to file a protest within the time and in the form and manner required under these Rules and the solicitation documents shall forfeit and be a waiver of any rights to protest any action by the Department, the Board, and their respective representatives relating to these Rules.

- (c) Content. Protests must be in writing and shall describe in detail the grounds for the protest, its legal authority, and its factual basis, including any supporting documentation to enable the Department to evaluate the merits of the protest. The protest must be verified under oath.
- (d) Decision on protest. The protest shall be decided on the basis of written submissions. However, the Department may, in its sole discretion, allow the protester to orally present the basis of its protest. No testimony or other evidence shall be taken or presented at such hearing. The Department shall issue a decision on the protest within 60 days of the filing of the protest, and the decision shall be final, conclusive and non-appealable.
- (e) Exclusivity of rights and remedies. Each protester, by responding to a Request for Qualifications or Request for Proposals, as applicable, shall be deemed to expressly recognize the limitation on its rights to protest as provided by these Rules and the solicitation documents, and shall be deemed to expressly waive all other rights and remedies that otherwise may be available at law or equity.