

# SENATE BILL REPORT

## SB 5862

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As of February 3, 2016

**Title:** An act relating to public-private partnerships for state transportation projects and programs.

**Brief Description:** Concerning public-private partnerships for state transportation projects and programs.

**Sponsors:** Senators Fain, Ericksen, Baumgartner and Angel.

**Brief History:**

**Committee Activity:** Transportation: 2/16/15.

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### SENATE COMMITTEE ON TRANSPORTATION

**Staff:** Kim Johnson (786-7472)

**Background:** In 2005, legislation was enacted establishing a statutory process for securing public-private partnership financing of certain transportation projects – referred to as the Transportation Innovative Partnerships Act. The intent, as stated in the legislation, was to provide a more desirable and effective approach to developing transportation projects in partnership with the private sector by applying lessons learned from other states and from this state's ten-year experience with chapter 47.46 RCW – referring to the state's previously enacted public-private partnership program. The public-private partnership process, established in 2005, contains various requirements applicable to both toll and nontoll transportation projects, including detailed evaluation and selection criteria, state-issued debt requirements, and requirements for expert review panels and advisory committees.

The 2005 process generally required the Washington State Transportation Commission (WSTC) to: (1) approve or review public-private partnership contracts; (2) adopt rules to govern the program; (3) adopt guidelines to address security and performance issues; and (4) select potential public-private partnership projects. The Washington State Department of Transportation (WSDOT) was generally required to evaluate potential projects under the Commission's direction.

In 2011, the Legislature directed the Joint Transportation Committee (JTC) to conduct a study to evaluate the role public-private partnerships could potentially play in financing state transportation projects with a focus on how best to protect the public interest. The final JTC

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

report was published January 25, 2012. The study made several recommendations regarding the statutory framework governing public-private partnerships, including the repeal of the existing statutes.

**Summary of Bill:** The Transportation Innovative Partnerships Act is repealed and internal references are corrected accordingly.

The public policy goals for public-private partnerships in Washington are identified and the execution and enforcement of contracts must be carried out consistent with the goals. Policy goals listed include that the state should maintain control or ownership of assets; an objective comparison should be conducted for any proposed project to determine whether delivering the project via public-private partnership generates a positive value for the public sector; public-private partnerships toll projects should conform to the state's toll-setting policies and changes in toll rates must be controlled by contractual limits; public-private partnership projects must be consistent with state laws governing public works projects including apprenticeship and prevailing wage; and the state must maintain the ability to terminate the contract if the private partner is no longer able to deliver the specifications of the contract.

A new independent Office of Transportation Partnerships Washington (OPTW) is established in WSDOT that is charged with determining whether it is in the best interest of the state to procure an eligible project as a public-private partnership and to prepare and assist in negotiating a procurement and contract. The OPTW also administers the Transportation Partnerships Washington Executive Board, conducts studies, requests legal and technical expert assistance as necessary, and monitors eligible projects and identifies the resources needed to reach procurement readiness. The OPTW may charge fees for applications, transactions, or other periodic service.

A new Transportation Partnerships Washington Executive Board (Board) is created to oversee the affairs of the OPTW in procuring public-private partnership projects. The Board is comprised of four ex-officio non-voting legislators; a representative from the Office of the State Treasurer; a representative of the Office of Financial Management; the chair of the WSTC; the Secretary of WSDOT; and an appointee of the Governor. A majority of the Board present at a meeting at which a quorum is present is sufficient to pass a resolution of the Board. There are non-compete requirements for six-months following any of the Board member's tenure.

This act does not apply to solicited proposals developed pursuant to Title 39 RCW, Public Works Contracts. When soliciting a private entity for a public-private agreement, WSDOT may use sealed bidding, selection of proposals based on qualifications or best value; or any competitive selection process deemed appropriate by WSDOT. Factors WSDOT may consider when evaluating bids or proposals are provided. However, WSDOT must select a private entity on a competitive basis to the maximum extent possible.

After selecting a proposal for a public-private partnership, WSDOT must enter into an agreement for a transportation facility. The agreement must contain a list of provision which includes delineated responsibilities for planning, financing, design, construction, maintenance, or operation of the facility; type of property interest a private entity may have in the facility; whether user fees are collected and how those fees are determined or

modified; and grounds for termination or amendment of the agreement. The solicitation of proposal processes is set out and mandatory topics are identified that must be covered by a P3 agreement.

In the event of termination of the agreement, a transportation facility must revert to WSDOT and be dedicated to public use. Other specific remedies WSDOT may exercise in case of material default are listed.

WSDOT may request the issuance for the sale of bonds of the state for the purpose of providing funds for financing or operating a transportation facility. WSDOT and a transportation facility operator may apply and use private activity bonds available under any federal program. Any debt issued for a public-private partnership may not be considered a debt of the state or a political subdivision.

Any combination of private and public monies may be used to finance a transportation facility via a public-private agreement.

WSDOT is authorized to exercise eminent domain to acquire property or other property interest for transportation projects that are part of a public-private partnership agreement. State and local traffic laws apply and law enforcement entities may exercise their jurisdiction on any transportation facility subject to a public-private partnership agreement.

Real property and leasehold interests in real property that are being used for transportation purposes and part of public-private partnership agreement are exempt from taxation.

Personal property that is being used for the maintenance and operation of a transportation facility pursuant to a public-private partnership agreement is exempt from taxation.

**Appropriation:** None.

**Fiscal Note:** Available.

[OFM requested ten-year cost projection pursuant to I-960.]

**Committee/Commission/Task Force Created:** Yes.

**Effective Date:** The bill contains several effective dates. Please refer to the bill.

**Staff Summary of Public Testimony:** PRO: I introduced this bill because I wanted to continue to have the conversation about public-private partnerships. Public-private partnerships can benefit the public and I get excited when I see these words together. One Bus Away is an example of public-private partnership. Bringing the public and private sectors together can generate revenue. This is a worth while effort. The Legislature has been working on this issue for a long time. It is a good move to repeal the existing statutes. The private equity investment in public infrastructure will continue to evolve and this bill is flexible enough to work with the changes ahead. There are other types of public-private partnerships that we hope will not get caught up in this bill, community. The community does not interfere with this bill and are usually very small.

CON: I have done some research on P3 and I have yet to find a P3 that did it for saving money. P3 seems to address shortage of funds to build transportation. However, we should focus on the public interest; who is the owner, who gets to answer the questions about public-private partnerships. These projects will cost more. How will the tolling be set? What are the standards for the operation and maintenance? How will the construction be overseen? I took one thing away from the JTC study in 2011; this state will spend a lot more money on attorneys, negotiators, and experts to make sure that these projects are delivered in the best interest of the public.

OTHER: The former act has not met our needs. We have some issues with WSDOT having to come back to the Legislature to get approval to toll a facility that is part of a negotiated P3 transportation contract. The OST believes that the Legislature should maintain the current tolling approval and rate setting structure.

**Persons Testifying:** PRO: Senator Fain; Michael Groesch, WA Business Roundtable; Richard Schilling, Autograph.

CON: Vince Oliveri, Professional and Technical Employees.

OTHER: Duke Schaub, Associated General Contractors of Washington; Scott Merriman, Office of State Treasurer.

**Persons Signed In To Testify But Not Testifying:** No one.