

# SENATE BILL REPORT

## SSB 6277

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As Passed Senate, February 9, 2024

**Title:** An act relating to creating a new statutory framework for the use of public-private partnerships for transportation projects.

**Brief Description:** Creating a new statutory framework for the use of public-private partnerships for transportation projects.

**Sponsors:** Senate Committee on Transportation (originally sponsored by Senators Liias, King, Hunt, Nobles and Shewmake).

**Brief History:**

**Committee Activity:** Transportation: 1/25/24, 2/05/24 [DPS].

**Floor Activity:** Passed Senate: 2/9/24, 48-1.

**Brief Summary of First Substitute Bill**

- Creates a new statutory framework for the implementation of public-private partnerships for transportation projects.

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### SENATE COMMITTEE ON TRANSPORTATION

**Majority Report:** That Substitute Senate Bill No. 6277 be substituted therefor, and the substitute bill do pass.

Signed by Senators Liias, Chair; Lovick, Vice Chair; Shewmake, Vice Chair; King, Ranking Member; Holy, Assistant Ranking Member; Cleveland, Fortunato, Hansen, Hawkins, Kauffman, Lovelett, MacEwen, Nobles, Padden, Valdez, Wilson, C. and Wilson, J..

**Staff:** Brandon Popovac (786-7465)

**Background:** Transportation Innovative Partnerships—Generally. The Transportation

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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 part of the legislation nor does it constitute a statement of legislative intent.*

Innovative Partnership (TIP) Program provides a framework for project delivery through public-private partnerships (P3s). The intent of the program is 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 the state's ten-year experience with the previously enacted public-private partnership program. TIP program goals include reducing the cost of project delivery, encouraging business investment in public infrastructure, and developing partnerships between private entities and the public sector to advance public purposes on mutually beneficial terms. The TIP program provides guidance regarding the review and selection of projects, approval and execution of the procurement contracts, and additional oversight of the project. Responsibility for each of these functions is delegated to either the Washington State Transportation Commission (WSTC) or the Washington State Department of Transportation (WSDOT).

Eligible Projects and Financing. A project is eligible under the TIP program if it facilitates the safe transport of people or goods via any mode of travel. Certain concurrent development projects are also eligible if they provide revenues to support a transportation project or they advance public purposes. Development of these eligible projects may be financed through various methods, including grant anticipation revenue bonds, federal funds, assistance from the Transportation Infrastructure Account, state or local revenues pursuant to appropriation, and user fees, fares, lease proceeds, or receipts from sales. A project may also be financed by tolls if authorized by the Legislature.

The state treasurer must issue any indebtedness for a state transportation project that is developed under the TIP program and is owned, operated, used, or leased by the state as a public facility. For other public projects that are developed in conjunction with a transportation project, financing must be approved by the State Finance Committee or the governing board of a public benefit corporation.

Project Solicitation, Review, and Selection. WSTC, in coordination with WSDOT, may solicit projects for potential development under the TIP program. Before approving a project for solicitation, WSTC must ensure the project is either a priority need for the state or that it is included in the state's transportation plan. WSDOT may evaluate projects for inclusion in the TIP program, and it may recommend projects for solicitation that meet the policy goals of the TIP program. WSTC may also consider and accept unsolicited proposals.

After WSDOT has received responses to a request for proposals under the TIP program, it must conduct a preliminary review to ensure that the proposals are complete. Proposals are then forwarded to an evaluation panel appointed by WSTC, which must include a financial expert, an independent representative from a contracting firm, an observer from the State Auditor's office or the Joint Legislative Audit and Review Committee, and a WSDOT representative. The evaluation panel must consider whether the proposal meets the criteria specified in the request for proposals, and the panel may consider any other factors that it believes necessary to ensure the project benefits the public interest. For a tolled project, the

panel must consider other factors relating specifically to the impact of the tolled project. After receiving recommendations from the evaluation panel, the WSTC may proceed to negotiations with one proposer, competitive negotiations with more than one proposer, or reject all proposals.

Contract Execution. After WSTC selects an apparent successful proposer, WSDOT must notify the proposer of the state's intent to negotiate and execute an agreement. The negotiation must be referred to a negotiation team within WSDOT. Any agreement under the TIP program must include terms relating to: maintenance complying with collective bargaining agreements and civil service laws; security for the payment of laborers, subcontractors, and suppliers; project financing and auditing; how the parties will share costs, management, and any cost overruns; contract incentives and penalties; requirements for facilities that revert to state ownership; and law enforcement on TIP projects. Before any agreement is executed, there must be a process that provides for public involvement in the process, the attorney general must review the legal sufficiency of the agreement, and WSTC must conduct a financial analysis of the project and consider WSDOT's ability to complete the project internally. WSTC must conduct a final review, and it may approve the agreement, reject the agreement, or return the agreement for further negotiations.

Additional Oversight. WSDOT must convene an expert review panel to review, analyze, and make recommendations to the Governor and WSTC on whether to approve, reject, or continue negotiations on a proposed project agreement. The panel must consist of at least three, but no more than five members, each of who hold expertise relevant to the TIP program. For projects with costs of \$300 million or more, WSTC must appoint an advisory committee. The committee must consist of at least five, but no more than nine, members, and meet at least twice each year, review concepts and proposals for eligible projects, and submit comments to public sector partners.

Use of Project Revenues. The transportation innovative partnership account receives proceeds from bonds issued for- and other revenue from- the project, to be used for repayment of loan guarantees or extensions of credit made to or on behalf of private partners engaged in all elements of an eligible project. Account funds may only be expended as approved by the Legislature through appropriation or statutory direction. The state treasurer must establish separate subaccounts within the account for each transportation project initiated under the TIP program.

Miscellaneous Provisions. Other TIP program provisions address the use of federal funds or other sources for P3 purposes, use of public and private sector experts in project procurement, use of environmental impact and engineering studies for selection proposals, confidentiality of submitted project proposals, prevailing wage requirements if public funds are used to pay costs of an eligible project, and the state's authority to exercise eminent domain to implement an eligible project and to enter into implementation agreements with other units of government.

Program Studies. In 2011, the Legislature directed the Joint Transportation Committee (JTC) to conduct a study to evaluate the role P3s could potentially play in financing state transportation projects with a focus on how best to protect the public interest. The final JTC report was published January 25, 2012, and made several recommendations regarding the statutory framework governing P3s, including the repeal of the existing statutes.

In 2023, the Legislature directed JTC to convene a workgroup to study and recommend a new statutory framework for TIP program. Specific tasks include a review and update of the 2012 JTC report and development of a process for implementing P3s that serve and best protect a defined public interest. The workgroup may evaluate P3 opportunities for fish culvert work and commercial retail options at state ferry terminals. The workgroup must also submit a preliminary report and any draft legislation recommendations by the end of 2023, along with a final report and draft legislation recommendations by July 1, 2024.

**Summary of First Substitute Bill:** The entirety of the TIP program is repealed, with certain provisions modified or fully retained as follows.

Transportation Innovative Partnerships—Generally. Legislative findings express a new P3 law is needed to: transparently deliver better public value, including expedited project delivery; allocate project risks to the most abled parties; better align private sector incentives with public priorities; and provide consistency in project review and approval process. WSDOT, rather than WSTC, is responsible for: the review and selection of projects, consistent with existing project procurement and contracting requirements and practices; approval and execution of the procurement contracts; and additional oversight of the project. Any preliminary rules or guidelines developed under WSDOT's powers and duties must be submitted to the chairs and ranking members of the Legislative Transportation Committees for review and comment by November 30, 2026. The Legislature retains its role as toll imposition authority for any eligible P3 toll projects, and WSTC retains its role as toll rate setting authority for any eligible P3 toll projects.

Eligible Projects and Financing. A project is eligible as a P3 if it facilitates the safe transport of people or goods via any mode of travel. Development of these eligible projects may be financed through various methods, including grant anticipation revenue bonds, federal funds, assistance from the Transportation Infrastructure Account, state or local revenues pursuant to appropriation, private entity contributions including equity investments, and user fees, fares, lease proceeds, or receipts from sales. WSDOT may develop a finance plan requiring the state or private partner to issue debt, enter into contracts or leases, or secure financing through legislative appropriation or a lien or exchange of real property. The restriction that any debt issued on a P3 project must be state-issued debt is removed. WSDOT may only execute any agreement, including if it impacts the state's debt capacity or credit rating, upon review and approval of the finance plan and proposed financing terms by the state finance committee. WSDOT may request the state treasurer to issue revenue bonds on its behalf to finance a P3 project.

Project Solicitation, Review, and Selection. WSDOT, rather than WSTC, may evaluate transportation projects already programmed for other delivery models as appropriate for P3 delivery. Before soliciting or procuring a P3 project, WSDOT must make formal findings that a P3 delivery model is in the public's interest. WSDOT must adopt rules addressing findings processes and criteria, including public ownership retention, agreement transparency, and public oversight of private entity management. If there is a finding of public interest, WSDOT must provide notice and intent to deliver the project as a P3 project to the public, transportation committees of the Legislature, and Governor. WSDOT may solicit, evaluate, and select potential P3 proposals, but must first provide an opportunity for public comment. WSDOT may also provide stipends for respondents to a P3 project solicitation.

Contract Execution. Before an agreement is executed, WSDOT must make a formal finding that the negotiated partnership agreement is expected to result in best value for the public, which is determined by: a comparison of total delivery costs as a P3 project compared to traditional or other alternative delivery methods; a comparison with current project delivery capacity and scheduling, documenting the advantages of advancing a P3 project; and other factors such as cost, risk sharing, asset and service quality, and innovation.

Any partnership agreement entered into by WSDOT must include terms relating to: maintenance complying with collective bargaining agreements and civil service laws; security for the payment of laborers, subcontractors, and suppliers; and project financing. Any partnership agreement entered into by WSDOT and the private partners must include terms relating to how the parties will share costs, management, and any cost overruns; private partner compensation and maximum rate of return; incentives and penalties; requirements for facilities that revert to state ownership; default by either party; and public communication and participation with project development.

Use of Project Revenues. The public-private partnerships account is created as a nonappropriated account. Account deposits are derived from bond proceeds issued for and other revenue from the project, to be used for repayment of loan guarantees or extensions of credit made to or on behalf of private partners engaged in all elements of an eligible project. The state treasurer may establish separate subaccounts within the account for each initiated P3 transportation project.

Miscellaneous Provisions. TIP program provisions that address the use of federal funds or other sources for P3 purposes, use of public and private sector experts in project procurement, use of environmental impact and engineering studies for selection proposals, confidentiality of submitted project proposals, prevailing wage requirements if public funds are used to pay costs of an eligible project, and the state's authority to exercise eminent domain to implement an eligible project and to enter into implementation agreements with other units of government are retained.

TIP program provisions that address unsolicited proposal rule requirements, advisory

committee requirements for projects of \$300 million or more, and expert review panel review and approval processes for proposed project agreements are removed.

Technical corrections to internal references are made.

**Appropriation:** None.

**Fiscal Note:** Available.

**Creates Committee/Commission/Task Force that includes Legislative members:** No.

**Effective Date:** The bill takes effect on January 1, 2026.

**Staff Summary of Public Testimony on Original Bill:** *The committee recommended a different version of the bill than what was heard.* PRO: The state is facing unprecedented transportation project costs. The intent of implementing P3s is not a magic solution but provides one more tool for project delivery. P3 delivery should apply to major projects if the contractor is providing the financing to help expedite project delivery. WSTC currently oversees P3s in the state, and the current process is complex and lengthy. WSTC supports streamlining the P3 process, making it more viable. WSTC should have a more involved role on certain P3 projects.

CON: The bill is a very complicated piece of legislation that is being rushed through. Involvement of private equity takes control away from the public and shifts risks onto the public. The cost of any P3 project failure falls upon the public. No project has shown to be cheaper when shared through private partners.

OTHER: There needs to be clear and convincing evidence that the public benefit be upheld with a health impact statement for major transportation projects. Climate Commitment Act funds should not be used for major projects that have a negative health impact.

**Persons Testifying:** PRO: Senator Marko Liias, Prime Sponsor; Reema Griffith, Wash. State Transportation Commission.

CON: Bill Moyer, Solutionary Rail.

OTHER: Breck Lebegue.

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