



# California Passes First Significant Transportation PPP Law in 20 Years

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Twenty years ago, California was a pioneer in the field of transportation public-private partnerships (PPPs).<sup>[1]</sup> California's surge led to the development of significant PPP markets in a number of states, including Florida, Texas and Virginia. These states were able to learn from California's experience and have brought much needed transportation infrastructure to their states through the use of PPPs. While California's authorizing statute subsequently lapsed, other states moved forward with transportation PPP programs that in recent years have adopted international best practices.

California returns to the forefront of the transportation PPP market with the enactment of Senate Bill 4 (SBX2 4), passed by the California legislature near the end of the second extraordinary 2009-2010 session and signed into law by Governor Schwarzenegger on February 20, 2009.

SBX2 4 also allows for Caltrans and other public agencies to use design-build for certain types of public projects, including transportation projects.<sup>[2]</sup>

## **Broad PPP Authorization for Caltrans and Regional Transportation Agencies**

SBX2 4 authorizes Caltrans and regional transportation agencies (RTAs) to enter into PPPs for "transportation projects" via "comprehensive development lease agreements" until December 31, 2016.<sup>[3]</sup> It defines "transportation projects" as highway, public street, rail, or related facilities supplemental to existing facilities currently owned and operated by Caltrans or RTAs.<sup>[4]</sup> SBX2 4 does not limit the number or location of PPP projects that Caltrans or RTAs can pursue. However, Caltrans and RTAs must nominate candidate PPP projects for approval by the California Transportation Commission.<sup>[5]</sup> To receive approval, a project must satisfy four performance objectives: (1) improve mobility through improved travel times or reducing delay in the corridor, (2) improve operation/safety in the corridor, (3) provide quantifiable air quality benefits in the region, and (4) address known forecast demand.<sup>[6]</sup>

## **PPP Procurements under SBX2 4**

For projects on the state highway system, Caltrans is designated as the responsible agency for providing predevelopment services (including performance specifications, preliminary engineering, prebid services, the preparation of project reports and environmental documents, and construction inspection services). Caltrans is also the responsible agency for preparing project technical documents and information "deemed necessary to describe adequately the needs of the department or regional transportation agency."<sup>[7]</sup> Caltrans employees or consultants may perform this work.<sup>[8]</sup>

PPPs may be formed via either solicited or unsolicited proposals.<sup>[9]</sup> For solicited proposals Caltrans and RTAs may use, but are not limited to using, requests for qualifications, pre-qualifications, short-lists, requests for proposals and negotiations. The statute authorizes use of qualifications and best value for final evaluation and proposal selection.<sup>[10]</sup> The California Transportation Commission is charged with establishing the evaluation criteria for each project. Caltrans and RTAs may accept unsolicited proposals, provided the agencies subsequently issue a request for competing proposals. Caltrans and RTAs may award a project to an entity that submitted an unsolicited proposal if they receive at least one other responsible bid.<sup>[11]</sup>

While the bill requires Caltrans/RTAs to submit the final lease agreement to the Legislature and the newly created Public Infrastructure Advisory Commission (PIAC – see discussion below) for review 60 days prior to execution, legislative/PIAC approval is not required.<sup>[12]</sup>

## **Creation of the Public Infrastructure Advisory Commission (PIAC)**

One of the most significant changes brought about by SBX2 4 is the creation of PIAC. PIAC will be an auxiliary organization established by the Business, Transportation and Housing Agency that will serve as a clearinghouse for PPP-related services and information.<sup>[13]</sup> SBX2 4 authorizes PIAC to:

- Identify candidate PPP projects throughout California;
- Research PPP best practices/lessons learned;
- Assemble information related to PPPs that Caltrans/RTAs can utilize;
- Upon request, advise Caltrans/RTAs regarding best practices or the suitability of particular projects; and
- Upon request, provide procurement-related services to Caltrans/RTAs, which could include running PPP procurements.

PIAC may charge Caltrans/RTAs a fee for the last two items. The details of this fee structure would be set forth in an agreement between PIAC and Caltrans or the relevant RTA.<sup>[14]</sup>

## **Other Significant Provisions**

SBX2 4 includes a prohibition on PPP contract provisions that would infringe on the authority of Caltrans/RTAs to develop, maintain, repair, rehabilitate, operate or lease any transportation project. Caltrans/RTAs may, however, agree to pay compensation when the private partner can demonstrate that there have been adverse effects on toll revenue/user fees due to the development of competing facilities (excluding projects that: are identified in regional transportation plans, relate to safety, create incidental capacity increases, add high occupancy vehicle (HOV) lanes or are outside the project boundaries). The compensation amount is limited to that necessary (combined with toll revenues) to meet debt service obligations.<sup>[15]</sup> This provision is the Legislature's response to the well-known controversy that arose between Caltrans and the developer of

the SR 91 express lanes when Caltrans attempted to construct additional non-tolled lanes in the project right of way.

Other highlights of the PPP procurement process and lease terms required by SBX2 4 include:

- Facilities constructed under SBX2 4 may be tolled and the revenues generated by the facility may be used, in part, to provide the private partner with a reasonable return on its investment;<sup>[16]</sup>
- The specific toll rates must be set forth in lease agreements and any proposed increase in those rates not otherwise established or identified in the lease agreement must be approved by Caltrans or the RTA, as appropriate;<sup>[17]</sup>
- Caltrans or the relevant RTA must always retain ownership of the subject facility;<sup>[18]</sup>
- For Caltrans' projects, the California Transportation Commission must certify Caltrans' determination of the useful life of a project;<sup>[19]</sup>
- At the end of the lease term, the private partner must hand over the facility in a condition meeting the pre-set performance and maintenance standards;<sup>[20]</sup>
- Lease agreements must authorize the private partner to use design-build contracting;<sup>[21]</sup>
- Facilities constructed under SBX2 4 are exempted from real property and ad valorem taxes;<sup>[22]</sup> and
- Converting currently non-tolled lanes into tolled lanes is prohibited, with the exception of HOV to high occupancy toll lane conversions.<sup>[23]</sup>

## Conclusion

The new PPP authority under SBX2 4 creates a powerful new tool for California to stimulate transportation infrastructure investment and address serious funding constraints that are delaying important transportation projects. Determining suitability of potential projects for use of this new tool is the next important step in the implementation process. RTAs interested in learning more about the SBX2 4 PPP provisions and how to implement PPPs under the new authority are encouraged to contact us.

[1] In 1989, California passed Assembly Bill 680, which created Streets & Highway Code Section 143 and gave Caltrans and regional transportation agencies the authority to carry out public-private partnership projects. This authority, despite its flaws, resulted in the construction of both the SR-91 express lanes in Orange County and the Southbay Expressway (SR-125 toll road) in San Diego County.

[2] Nossaman has released two other E-Alerts that discuss the sections of SBX2 4 regarding transportation design-build projects and the non-transportation design-build aspects of the bill.

[3] Sts. & Hy. Code, § 143, subd. (t). Unless otherwise noted, all references to Streets and Highway Code Section 143 are references to the SBX2 4 version of this section, which will not be the official version of Section 143 until May 21, 2009.

[4] Sts. & Hy. Code, § 143, subd. (a)(6).

[5] Sts. & Hy. Code, § 143, subd. (c)(2).

[6] Sts. & Hy. Code, § 143, subd. (c)(3) & (c)(4).

[7] Sts. & Hy. Code, § 143, subd. (f)(1)(A).

[8] Sts. & Hy. Code, § 143, subd. (f)(1)(B).

[9] Sts. & Hy. Code, § 143, subd. (g)(1).

[10] Sts. & Hy. Code, § 143, subd. (g)(1)(C).

[11] Sts. & Hy. Code, § 143, subd. (g)(1)(E).

[12] Sts. & Hy. Code, § 143, subd. (c)(5).

[13] Sts. & Hy. Code, § 143, subds. (a)(5) & (b).

[14] Sts. & Hy. Code, § 143, subd. (b)(2).

[15] Sts. & Hy. Code, § 143, subd. (i).

[16] Sts. & Hy. Code, § 143, subd. (j)(1).

[17] Sts. & Hy. Code, § 143, subd. (j)(2).

[18] Sts. & Hy. Code, § 143, subd. (d).

[19] Id.

[20] Id.

[21] Sts. & Hy. Code, § 143, subd. (e).

[22] Sts. & Hy. Code, § 143, subd. (o).

[23] Sts. & Hy. Code, § 143, subd. (q).