

Title 412 - Nebraska Department of Transportation - Roadway Design Division

Chapter 4 - When Use of Public Private Partnerships may be Appropriate

01.01 DEFINITIONS

For purposes of this rule and regulation, the terms below have the following meanings:

01.01A “Alternative Project Delivery Method” means one of the methods of contracting for public projects authorized in Neb. Rev. Stat. §§ 39-2808 et seq, including Public Private Partnerships.

01.01B “Public Private Partnership, or P3” means a project delivery method for construction or financing of capital projects or procurement of services under a written public-private partnership agreement entered into pursuant to Neb. Rev. Stat. § 39-2825 between at least one private partner and the State of Nebraska.

01.01C “Value-for-Money” means the process used to compare the financial impacts on the Department of use of a P3 project delivery method against other project delivery methods. This process looks to determine the ideal delivery method when considering cost, quality, time and performance.

01.02 PURPOSE.

This rule and regulation implements Neb. Rev. Stat. § 39-2825, generally relating to establishing criteria to be used in determining when a P3 Alternative Project Delivery Method should be considered for a particular Department of Transportation (“The Department”) transportation project.

01.03 PUBLIC POLICY

The Department promotes and encourages the use of P3 when (a) determined to be more appropriate than the other Alternative Project Delivery Methods based on consideration of the criteria set out in 01.04, (b) found to be in the State’s best interest, and (c) its use is consistent with the limitations of the Constitution of Nebraska.

01.04 CRITERIA TO WEIGH IN ANALYZING WHEN USE OF P3 MAY BE APPROPRIATE FOR DELIVERY OF A DEPARTMENT TRANSPORTATION PROJECT

01.04A The Director of Transportation (“The Director”) or designee will make an initial determination whether any proposed project will be considered for use of an Alternative Project Delivery Method or whether the project should be developed under the traditional design-bid build method of Neb. Rev. Stat. § 39-1348 et seq. If a proposed project is selected by the Director as a candidate for an Alternative Project Delivery Method, then the following criteria shall be applied in determining whether to use P3. The Director

reserves the right to reconsider the use of P3 or another Alternative Project Delivery Method whenever such reconsideration is in the best interest of the Department.

01.04B Subject to the provisions of Section 01.05, the following are qualitative considerations that the Department may evaluate when determining whether it is appropriate to use a P3 delivery method:

01.04B1 Whether a project presents complex technical requirements;

01.04B2 Whether a project affords a material opportunity to employ private sector innovations, technical concepts, or specialized knowledge/expertise;

01.04B3 Whether there is a need to accelerate completion or to contract for a date certain for project completion;

01.04B4 Whether the project affords the Department an opportunity to allocate typical public-sector risks to a private partner in exchange for the private sector meeting performance-based requirements rather than technical specifications;

01.04B5 Whether there are favorable market conditions, by way of greater competition for projects, a program of projects, or financial market conditions being conducive to private sector investment under a Value-for-Money analysis;

01.04B6 Whether P3 delivery may better meet the public expectations for project approach, project cost and completion;

01.04B7 Whether the project lends itself to delegating lifecycle, technology, or long-term performance responsibilities to the private partner(s);

01.04B8 Whether the project will be required to function at a high level, low failure rate, under intense use conditions;

01.04B9 Whether P3 delivery may make for more efficient use of State resources, including but not limited to human capital; and

01.04B10 Whether there is Value-for-Money in transactional/procurement costs to pursue P3 delivery rather than conventional delivery.

01.04C Subject to the provisions of 01.05, the following are capital planning, budgetary, and other monetary considerations that the Department may take into account when determining whether it is appropriate to use a P3 delivery method:

01.04C1 Whether there is need, or opportunity, in the project to predict, control, or reduce life cycle costs;

01.04C2 Whether there is a market opportunity to involve private investment to better manage capital planning dollars relative to the need to deliver the project in the nearer term;

01.04C3 Whether the project presents an opportunity to capture savings from the economies of scale;

01.04C4 Whether there is a market opportunity to involve private investment to maximize the timing and use of State revenue; and

01.04C5 Whether the project needs to emphasize (and thus to impose) operating and maintenance discipline to diminish or eliminate unexpected or deferred maintenance, or to plan for and manage expenses relating to planned maintenance, by shifting duties to the private partner.

01.05 INTERPRETIVE INTENT; CONSTRAINTS

01.05A The Department decision whether the P3 delivery method is appropriate is both project and situation-specific. Nothing in this rule and regulation will be construed to compel use of P3 delivery solely by virtue of the analysis of the project and situation-specific considerations against the foregoing criteria. If the Department determines by weighing the project and situation-specific considerations of a proposed project that P3 may be appropriate, the Department may nevertheless elect to deliver the project via other project delivery methods.

01.05B The foregoing list of criteria is not exclusive. The foregoing list is not presented in any order, and no single criterion is to be construed as more or less important than another based upon its placement on the list. Some criteria are overlapping. No single criterion is determinative, nor is any single criterion required, for the Department to determine when use of the P3 delivery method is appropriate for a particular project.

01.05C The foregoing criteria may be considered as criteria favoring project delivery methods other than P3 as may be authorized under Nebraska law.

01.05D Analysis as to whether P3 delivery may be appropriate, in part according to the foregoing criteria, shall consider such additional criteria, constraints, requirements, impositions, and considerations, when appropriate, including the use of federal funding, federal participation, or other basis upon which federal law imposes requirements regarding delivery method, features, procurement, requirements, risk apportionment, or other features of the project.

01.05E Nothing in this rule and regulation will be construed to limit any other provision of Nebraska law, rule, or regulation, including published procurement policies and manuals.

01.05F The decision whether to use the P3 alternate delivery method is in the sole discretion of the Department and any such decision shall not create

a right or cause of action for anyone, or the right to appeal or to contest the decision.

