GREENING TOGETHER:
A SURVEY OF OPTIONS AND POSSIBILITIES FOR USING PUBLIC-PRIVATE PARTNERSHIPS TO SUPPORT LOCAL SUSTAINABLE EFFORTS

A White Paper from the University of Oregon Environmental and Natural Resources Law Center’s Sustainable Land Use Project

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About this Paper
This white paper is part of a series of reports from the University of Oregon Environmental and Natural Resources Law (ENR) Center’s Sustainable Land Use Project on how we choose to develop, or not develop, lands within our communities. The work in this white paper was conducted by an ENR law student fellow.

About the Author
The author of this white paper is ENR Bowerman Fellow Jason Nelson-Elting. At the time this paper was written (2013), Jason was a third-year law student at the University of Oregon School of Law.

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About the ENR Center
As part of the ENR Center’s mission of "engaging the law to support sustainability on earth," the ENR Center administers seven theme-based, interdisciplinary research projects that team law student enthusiasm with faculty expertise in an effort to bring intellectual energy to bear on some of the most challenging and cutting-edge environmental issues of our day. The seven interdisciplinary research projects include the Conservation Trust Project; the Energy Law and Policy Project; the Food Resiliency Project; the Global Environmental Democracy Project; the Native Environmental Sovereignty Project; the Oceans Coasts and Watersheds Project; and the Sustainable Land Use Project. Each academic year, the Center awards one-year fellowships to a select group of University of Oregon School of Law students to work with ENR faculty members on specific research projects within each of the theme-based, interdisciplinary research projects.

About the Sustainable Land Use Project
The Sustainable Land Use Project is one of seven theme-based, interdisciplinary research projects administered by the University of Oregon ENR Center. The Project is led by faculty leader Mary Christina Wood. The mission of the Sustainable Land Use Project is to evaluate land use laws, theories, and practices to ensure sustainable development in our communities. Through student and faculty led research, the Project addresses key environmental and policy issues relating to all levels of the land use law, policy, planning, and management. Important issues the Project has recently explored include reform of pro-automobile federal transportation laws for increased sustainability and lower environmental impacts in today’s transportation systems, the rise of eco-friendly building trends in Portland, Oregon, and
identification of potential legal obstacles and effective legal and planning strategies for greater open space protection for the City of Medford, Oregon.
Greening Together:  
A Survey of Options and Possibilities for Using Public-Private Partnerships to Support Local Sustainable Efforts

This paper provides a brief summary of Public-Private Partnership (PPP) basics, along with a survey of the various ways PPPs can be structured. It then provides two examples of green PPPs that were designed to create and improve infrastructure supporting local sustainability efforts. Two appendices are also attached: Appendix A outlines the concerns that should be addressed in any PPP contract, and Appendix B includes the statutory language that governs the Oregon Innovative Partnership Program, which is discussed below.

Public-Private Partnerships on the Rise

The use of PPPs is on the rise in the United States at least in part because public agencies are struggling to find funding to address the large amount of infrastructure needs throughout the country. There are many potential benefits that can arise from government agencies partnering with private firms to meet those needs. Specifically, by utilizing a PPP the government will likely see projects completed more quickly and cheaply and will gain access to private capital. Projects will probably be completed more quickly because private entities can make significant up-front capital investments to begin construction, which motivates them to complete the projects and begin collecting revenue as soon as possible. Also, that access to private capital can prevent delays caused by the lack of funding that sometimes occurs in projects undertaken by the government alone. When structured well, PPPs can be an extremely valuable tool to help public agencies further the public good.

Recently, local governments have encouraged PPPs to increase private-sector involvement in the completion of certain types of infrastructure projects. An example of such encouragement is Oregon Revised Statutes (“ORS”) § 367.804, which was written into law in 2003 as part of the Oregon Innovative Partnership Program. That statute required the Oregon Department of Transportation (“ODOT”) to establish the Oregon Innovative Partnerships Program. According to the statute, the goals of the program are to “(a) develop an expedited project delivery process; (b) maximize innovation; and (c) develop partnerships with private entities and units of governments.” The Oregon Innovative Partnership Program exempts the procurement process of certain transportation projects from the normal public contracting rules, and it outlines a parallel process that allows projects to be started and completed more quickly and efficiently. The expedited process makes it easier for public agencies to partner with private entities to complete certain transportation projects that will improve the wellbeing of local communities.

The Various Structures of Public-Private Partnerships

Many types of PPP structures are possible, and there is no universally appropriate arrangement or model. The ideal structure will depend on the specifics of the particular
project, and the public agency will need to consider various factors before deciding which structure to use. For example, the government should consider the costs and benefits of the project, potential sources of financing, commercial arrangements, and the specific investors and government participants.

In all cases, a contract will outline the rights and responsibilities of both the public agency and the private entity. A number of possible PPP contract structures are described below. The list is not comprehensive, and hydrids of the various structures are possible, but the list does explain the most common types of PPP contracts, which call for varying degrees of public agency and private entity involvement.

Design and Build

A Design-Build ("DB") contract is a very basic, short-term type of PPP that resembles – but differs from – a simple purchase contract. In a DB contract, the public agency owns the assets and is responsible for maintenance and operation, while a single private entity is responsible for both the design and construction of the project. When using a DB contract, the PPP is a short-term arrangement, extending only through the end of the building process. For example, a county might utilize a DB contract for the construction of a bridge or canal.

In a DB contract, the public agency partners with a single private entity – perhaps an architect or contractor – who is solely responsible for the design and successful completion of the project. This differs from the traditional purchase contract arrangement, in which the public agency would usually work with one entity to design a project and at least one other to build it. In a DB arrangement, the private entity will likely hire subcontractors, but the public agency conveniently has a single point of contact throughout the entire design and building processes. Benefits of DB contracts include savings in time and money through efficiencies, the potential for the public agency to shift more of the risk to the private entity than normal, and less chance for conflict because only a single private entity is responsible for the successful completion of the entire project.

Operations, Maintenance, and Management

In an Operations, Maintenance, and Management ("OMM") contract, the public agency maintains ownership of the facility or service, while the private entity is in charge of all operations, maintenance, and management. For example, this type of contract is commonly used when cities partner with private entities to provide wastewater services.

Public agencies benefit from contracting out the responsibility for maintaining ongoing operations, because doing so allows the government to apply its limited resources elsewhere. Private entities benefit from OMM contracts because they are essentially given monopoly rights to the provision of the service. Under an OMM for the provision of wastewater or garbage service, for example, the private entity charges user fees to generate revenue and has no competition. The private entity might also enhance its return on investment by spending capital to increase efficiencies and improve profit margins.

Design, Build, Operate, and Maintain

The Design-Build-Operate-Maintain ("DBOM") structure integrates aspects of both the DB contract and the OMM contract. Under a DBOM contract, a single private entity is responsible for designing and building the project – likely with the help of subcontractors – as well as the ongoing operations and maintenance of
the completed project. Under a DBOM contract, the public agency retains full ownership of the project and might also provide oversight and financing.\textsuperscript{18}

Because the private entity is responsible for most aspects of the project under a DBOM contract, the amount of resources the public agency must expend is significantly reduced. The private entity earns revenue from fees for completing the project as well as user fees for operating the completed project. It also enjoys a relatively high amount of freedom in both the building and operations phases, subject to the public agency’s oversight.

**Design, Build, Finance, Operate, and Maintain**

In the Design-Build-Finance-Operate-Maintain ("DBFOM") arrangement, the public agency retains ownership over the project, while one or more private entities take on the responsibilities of the project’s design, building, financing, operation, and maintenance.\textsuperscript{19} Essentially, this type of arrangement is a DBOM contract with the added financing responsibility. Typically, DBFOM projects are partially financed with bonds or other debt that leverages the projects’ future revenue streams, such as user fees or tolls.\textsuperscript{20} Further financing might also be secured through grants or private sector equity investment.\textsuperscript{21}

**Lease and Purchase**

A lease and purchase contract is a type of installment-purchase contract under which the private entity finances and builds the facility and then leases it to the public agency.\textsuperscript{22} The public agency gains equity in the facility with each installment payment, and it gains full ownership at the end of the lease term.\textsuperscript{23} Either the public agency or the private entity might be responsible for operating the facility under this type of arrangement.\textsuperscript{24}

**Sale and Leaseback**

In a sale and leaseback contract, the owner of the facility – either the public agency or the private entity – sells the facility to the other party and then leases it back over time, eventually regaining full ownership.\textsuperscript{25} While there are a variety of reasons a sale and leaseback might be used, the most important is that both parties can save money by transferring ownership of a facility to the party that is least regulated.\textsuperscript{26}

**Keys to a Successful Public-Private Partnership**

According to Karen Williams, an Oregon attorney who is an expert in PPPs, “the secret to facilitating collaborations between public sector and private entities is to encourage each side to recognize its limitations and optimize each other’s strengths.”\textsuperscript{27} In other words, the parties “take raw-material components and come up with something more than either could do alone.”\textsuperscript{28} While each PPP is different, Chastity O’Steen and John Jenkins have identified four key elements to a successful project.\textsuperscript{29} The key elements are: (1) public agency commitment; (2) direct and continued public agency involvement; (3) a detailed business plan; and (4) the right private entity partner.\textsuperscript{30}

Public agency commitment – and the commitment of all involved stakeholders – is important to ensure that the procurement process unfolds in a predictable and reliable manner.\textsuperscript{31} Continued public partner involvement is important to hold the private partner accountable and evaluate the PPP’s performance against benchmarks or other criteria.\textsuperscript{32} A detailed business plan, which should include the contract outlining each partners’ duties and obligations, is important to ensure that all parties involved understand what the PPP will require of them during each stage of the project.\textsuperscript{33} Finally, the right private partner
is important to maintain an amicable working relationship and to complete the PPP successfully and on time.

As discussed in the section below, the public agency should choose its private entity partner based on who will provide the greatest value over the life of the PPP, not necessarily who can provide the lowest up-front cost.34

The Procurement Process and Selecting the Right Partner

The government’s use of an efficient procurement process is essential to save time and money and to reap all the benefits of the PPP.35 The procurement process must be customized on a project-to-project basis, but the basic elements are: (1) decide on the type of procurement process to utilize; (2) prepare the necessary paperwork and distribute it to potential private partners; (3) evaluate the resulting proposals; and (4) award the contract to the best bidder.36

Most PPPs are begun through the Request for Qualifications (“RFQ”) / Request for Proposals (“RFP”) process.37 This type of procurement process allows the government to select its partner based on the total value the partner will provide throughout the life of the project, rather than simply on the lowest bid.38 To begin the RFQ/RFP process, the government gives as much information about the project as possible to potential partners who, if interested, are invited to respond.39 The RFQ/RFP should include a description of the proposed project along with information about the public agency’s expected contribution, the expected level of participation from the private entity, the timeline, and the current state of the project (such as whether it has already begun or if it will be an update or addition to existing buildings or infrastructure).40

Once the government has received proposals from interested potential partners, it must evaluate them and award the contract to the bidder who it determines will provide the greatest value over the life of the project. In evaluating the proposals, the government should look for a partner with relevant demonstrated experience that evidences its ability to meet the project’s objectives.41 In selecting its partner, the government should review each private entity’s submitted proposal and evaluate them based on such factors as the entity’s qualifications and experience, financial capability, references, risk transference, and current litigation or controversy.42 After examining each of the submitted proposals, the government should award the contract to the partner that the government determines will provide the greatest total value over the entire life of the project.

Public Contracting Law Considerations

There is a common misconception that PPPs are not constrained by the restrictions of laws and regulations that apply to public contracts generally.43 In reality, state and local public contracting laws will govern the PPP procurement process in most cases. In Oregon, for example, the Oregon Public Contracting Code44 applies, with only a few exceptions that are not applicable to this paper, to “all public contracting.”45 Public contracting is defined broadly to mean “any procurement activities . . . relating to obtaining, modifying or administering public contracts or price agreements.”46 Public contracts, in turn, are defined to include sales, purchases, leases, rentals, or acquisitions by a public body of any property or services, excluding grants.47 Thus, the Oregon Public Contracting Code will govern any contract between a public agency in Oregon and a private entity for the exchange of property or services.
The Oregon Public Contracting Code's requirements are extensive and outside the scope of this paper. But those requirements' general purpose is to instill confidence and a fair process in the procurement process and to encourage the efficient use of government funds. Because the Oregon’s Public Contracting Code’s requirements are so numerous and somewhat complicated, an attorney experienced in public contracting issues may be helpful in determining how to structure a PPP’s procurement process to comply with those requirements.

As noted above, however, ORS § 367.804 directs ODOT to provide for an expedited procurement process for certain types of transportation projects in order to spur innovation under the Oregon Innovative Partnership Program. Accordingly, ODOT may accept unsolicited bids from private entities in some cases, which would otherwise be disallowed under the Oregon Public Contracting Code. Allowing unsolicited bids is a way to encourage partnerships with private entities that might have innovative ideas about ways to generate revenue while improving transportation infrastructure. Such ideas might never be put into practice if the responsibility were always on the government to invent and propose them.

Many other states have also passed statutes allowing for an expedited procurement process for transportation projects. Interestingly, no state seems to have yet adopted a statute allowing for a similar expedited process outside the realm of transportation. If states were to pass laws encouraging innovative PPPs in areas other than transportation, those laws might help spur the development of facilities that utilize revenue-producing green technology, such as the examples that follow.

Examples of Successful “Green” Public-Private Partnerships

The following are two examples of successful PPPs that were used to create infrastructure that supports sustainability efforts. The first example is a materials recovery facility (“MRF”) that was built in Southfield, Michigan and was developed under traditional public procurement rules. The second is the nation’s first solar highway project, which was completed near Portland, Oregon and developed under the Oregon Innovative Partnership Program.

The ReCommunity Materials Recovery Facility

The Resource Recovery and Recycling Authority of Southwest Oakland County (RRRASOC) Materials Recovery Facility (the “MRF”) is just one example of the many successful partnerships that public agencies have forged with private entities in order to complete environmentally important and innovative public projects. The MRF was completed in 1994 in Southfield, Michigan through a partnership between RRRASOC, an intergovernmental municipal solid waste authority and ReCommunity Detroit, a private corporation. Because the contract between RRRASOC and ReCommunity contained an operations component, ReCommunity had an incentive to increase its return on investment by using its own funds to improve the facility’s efficiency. Indeed, ReCommunity recently invested roughly $4.5 million to upgrade the MRF to a single-stream processing facility that is capable of handling mixed recyclable material.

As a result of the upgrade, the MRF is now able to process up to 25 tons of recyclable material each hour. The MRF’s single-stream processing capability also means that recycling is easier and more convenient for people living in the communities the MRF serves, because those people no longer
have to sort their recyclables before leaving them at the curb or depositing them into bins. The communities served by the MRF that were able to begin using large recycle bins in lieu of smaller separate bins saw a 4% decrease in collection costs and an average 60% increase in the amount of recyclable material collected. The MRF’s upgraded capacity also had the added benefit of more than quadrupling the number of people employed to operate the facility.

Through its partnership with ReCommunity, which specializes in MRF technology, RRRASOC was able to improve not only its environmental impact through increased recycling, but also its community’s economic wellbeing through the creation of jobs. Similar MRF facilities have been developed around the country, and their popularity appears to be on the rise. While many of these PPPs have been successful, they still must be developed under traditional public contracting rules. Perhaps the increased popularity and visibility of these projects will lead states to pass legislation encouraging the development of other similar projects by expediting the procurement process for innovative green PPPs beyond just the realm of transportation. The transportation project discussed below is an example of an innovative PPP that was developed using an expedited procurement process.

The Oregon Solar Highway

The Oregon Solar Highway is a 104-kilowatt ground-mounted solar array south of Portland that feeds clean, renewable energy into the electricity grid. The project is located just off the interchange of Interstates 5 and 205, and the solar panels feed energy into the grid during the day, which offsets over one-third of the energy that is needed to illuminate the freeway at night. The Oregon Solar Highway was the first project of its kind in the country, and it was developed through an innovative PPP between ODOT, Portland General Electric (“PGE”), and U.S. Bank. Under the agreement, which is a somewhat complex hybrid DBFOM contract, ODOT owns the land where the project is located, but a subsidiary of PGE owns and operates the project itself. In addition to feeding clean energy into the grid and offsetting the energy needed to illuminate the freeway, the project also takes advantage of renewable energy tax credits, grants, and accelerated depreciation to benefit PGE’s customers, including the State of Oregon and ODOT.

The Oregon Solar Highway was made possible in part due to the expedited procurement process provided by the Oregon Innovative Partnership Program. The project provides an excellent example of the kind of innovation that can occur when states provide an expedited process for developing PPPs that support sustainability efforts. As similar projects continue being forged across the country, hopefully states will continue to encourage and make it easier to utilize green PPPs that improve both the environmental and economic well being of local communities.

Conclusion

Public-private partnerships are on the rise in the United States because they can provide cash-strained local governments with a tool to complete public projects more cheaply and efficiently than would otherwise be possible. There are certain best practices that public agencies should follow to ensure they receive the greatest possible benefit from their partnerships with private entities. Except in the case of transportation projects in certain states, state and local public contracting rules will govern the PPP procurement process. While it may be beneficial for state legislatures to
expand the exception to those rules beyond transportation projects, none has yet done so. Assuming rules and best practices are followed, these kinds of projects can provide an excellent opportunity to capitalize on innovative technologies and improve communities’ environmental impacts as well as their economic wellbeing.
Appendix A – Outline of Concerns to Address in Public-Private Partnership Contracts

Definitions
Identify all terms that are specifically defined in the contract.

Interpretations
Specify which principles, and which jurisdiction’s law, should govern the interpretation of the language, definitions, and provisions included in the contract.

Duration
Define the duration of the contract and the relationship between the parties.

Roles of the parties
Specify what the role will be of both the public agency and the private entity during each phase of the project.

Critical Dates
Set forth the date before which the private entity must begin providing its services. If the private entity fails to meet its deadlines, the public agency should have the right to amend or terminate the contract.

Submission of Design and Information to Agency
Explain how the submission of designs and information from the private entity to the public agency will be handled before the private entity beings providing services. The public agency should have the right to review and comment on all materials it receives.

Warranties
Both parties should give warranties that guarantee the truth of certain information they have given to the other party. A breach of warranty should not result in termination of the contract, but it should give rise to damages.

Performance Monitoring
Establish schedules, criteria, and methodology for the monitoring of the private entity’s service performance and how the cost of that monitoring will be divided. Specify the consequences for failing to meet certain threshold levels of performance.

Maintenance
Outline the responsibilities each party will bear with respect to maintenance of the equipment and facilities at the site of the completed project.

Changes in Services
Outline the process and responsibilities of the parties for handling both anticipated and unanticipated changes to the project. The process for handling changes should include notification, estimations, approval, and implementation.

Protection Against Late or Sub-Standard Service Delivery
Specify the public agency’s protections against the private entity providing late or sub-standard service. Examples of potential protections include liquidated damages and performance bonds.

Service Interruptions Due to Supervening Events
Specify the circumstances or events that will relieve the private entity from liability for not completing or delivering its goods or services on time.

Price and Payment Mechanisms
Outline the compensation structure and any financial incentives that might be available to the private entity for reaching certain performance benchmarks.

Auditing of the Project by the Agency
Define the rights of the public agency to access and audit information from the private entity so the public agency can meet its own reporting requirements.

**Consequences of Poor Performance**
Outline the consequences, whether financial or otherwise, to the private entity of failing to adequately perform its services.

**Change in Law**
Clearly and fairly allocate the risks to the parties of any unforeseen changes in the law that might affect the project.

**Early Termination**
Define the parties’ rights and consequences with respect to early termination of the contract.

**Handback**
Specify the conditions and procedure for handing the project assets back to the public agency in the event the contract is terminated.

**Private Partner Indemnities**
Require the private entity to indemnify the public agency against damages that might be incurred as a result of the private entity’s action or inaction.

**Information and Confidentiality**
Balance the public agency’s need for information to be made public in the interest of transparency with the private entity’s need for confidentiality due to the sensitivity of certain commercial information.

**Intellectual Property Rights**
If relevant to the particular project, address any intellectual property concerns that might be implicated.

**Dispute Resolution**
Outline the procedures for handling disputes relating to the PPP without undergoing litigation, which should be a last resort.
Appendix B – Oregon

Innovative Partnership Program

367.800 Findings. The Legislative Assembly finds that:

1. Entrepreneurial approaches to the acquisition, design, management and financing of transportation projects will accelerate cost-effective project delivery.

2. Entrepreneurial approaches can bring substantial benefits to the public in transportation project development and execution.

3. Risk management is a critical component of partnerships for transportation projects.

4. Successful implementation of an Oregon innovative partnership program for transportation projects requires that risk in a project be managed and shared by public and private sector participants, with the partner best able to control a risk bearing responsibility for the risk.

5. The Legislative Assembly and the executive branch of government accept responsibility for providing predictability for partnerships for transportation projects and for allowing negotiated agreements to be implemented.

6. The development, acquisition and construction of transportation projects creates jobs and furthers economic development in Oregon by, among other things:
   a. Increasing the economy and efficiency of public transportation, improving the flow of commerce into and around the state and the surrounding region, improving the attractiveness of Oregon to new businesses and supporting the operations and prosperity of existing businesses; and
   b. Improving the movement of people into and around the state and the surrounding region, alleviating congestion and crowding and reducing the burdens on existing public transportation systems and transportation facilities.

367.802 Definitions. As used in ORS 367.800 to 367.824:

1. “Agreement” means a written agreement, including but not limited to a contract, for a transportation project that is entered into under ORS 367.806.

2. “Private entity” means any entity that is not a unit of government, including but not limited to a corporation, partnership, company, nonprofit organization or other legal entity or a natural person.

3. “Transportation project” or “project” means any proposed or existing undertaking that facilitates any mode of transportation in this state or that facilitates the collection of taxes and fees as an alternative to the motor vehicle fuel taxes imposed under ORS 319.020 and 319.530.

4. “Unit of government” means any department or agency of the federal government, any state or any agency, office or department of a state, any city, county, district, commission, authority, entity, port or other public corporation organized and existing under statutory law or under a voter-approved charter and any intergovernmental entity created under ORS 190.003 to 190.130, 190.410 to 190.440 or 190.480 to 190.490. [2003 c.790 §2; 2011 c.470 §8]

367.804 Goals of Oregon Innovative Partnerships Program; authority of Department of Transportation; confidentiality; expenses.

1. The Department of Transportation shall establish the Oregon Innovative Partnerships Program for the planning, acquisition, financing, development, design, construction, reconstruction, replacement, improvement, maintenance, management, repair, leasing and operation of transportation projects.

2. The goals of the program are to:
   a. Develop an expedited project delivery process;
   b. Maximize innovation; and
   c. Develop partnerships with private entities and units of government.

3. As part of the program established under this section, the department may:
   a. Solicit concepts or proposals for transportation projects from private entities and units of government.
   b. Accept unsolicited concepts or proposals for transportation projects from private entities and units of government.
   c. Evaluate the concepts or proposals received under this subsection and select potential projects based on the concepts or proposals. The
evaluation under this paragraph shall include consultation with any appropriate local government, metropolitan planning organization or area commission on transportation.

(d) Charge an administrative fee for the evaluation in an amount determined by the department.

(4) Following an evaluation by the department of concepts or proposals submitted under subsection (3) of this section, and the selection of potential transportation projects, the department may negotiate and enter into the agreements described in ORS 367.806 for implementing the selected transportation projects.

(5) Except as provided in subsection (6) of this section:

(a) Information related to a transportation project proposed under ORS 367.800 to 367.824, including but not limited to the project’s design, management, financing and other details, is exempt from disclosure under ORS 192.410 to 192.505 until:

(A) The department shares the information with a local government, metropolitan planning organization or area commission on transportation under subsection (3)(c) of this section; or

(B) The department completes its evaluation of the proposed project and has selected the proposal for negotiation of an agreement.

(b) After the department has either shared the information described in paragraph (a) of this subsection with a local government, metropolitan planning organization or area commission on transportation, or has completed its evaluation of the proposed project, the information is subject to disclosure under ORS 192.410 to 192.505.

(6) Sensitive business, commercial or financial information that is not customarily provided to business competitors that is submitted to the department in connection with a transportation project under ORS 367.800 to 367.824 is exempt from disclosure under ORS 192.410 to 192.505 until the information is submitted to the Oregon Transportation Commission in connection with its review and approval of the transportation project under ORS 367.806.

(7) The department may, in connection with the evaluation of concepts or proposals for transportation projects, consider any financing mechanisms, including but not limited to the imposition and collection of franchise fees or user fees and the development or use of other revenue sources.

(8) The department and any other unit of government may expend, out of any funds available for the purpose, such moneys as may be necessary for the evaluation of concepts or proposals for transportation projects and for negotiating agreements for transportation projects under ORS 367.806. The department or other unit of government may employ engineers, consultants or other experts the department or other unit of government determines are needed for the purposes of doing the evaluation and negotiation. Expenses incurred by the department or other unit of government under this subsection prior to the issuance of transportation project revenue bonds or other financing shall be paid by the department or other unit of government, as applicable, and charged to the appropriate transportation project. The department or other unit of government shall keep records and accounts showing each amount so charged. Upon the sale of transportation project revenue bonds or upon obtaining other financing for any transportation project, the funds expended by the department or other unit of government under this subsection in connection with the project shall be repaid to the department or the unit of government from the proceeds of the bonds or other financing, as allowed by applicable law. [2003 c.790 §3]

367.806 Agreements.

(1) As part of the program established under ORS 367.804, the Department of Transportation may:

(a) Enter into any agreement or any configuration of agreements relating to transportation projects with any private entity or unit of government or any configuration of private entities and units of government. The subject of agreements entered into under this section may include, but need not be limited to, planning, acquisition, financing, development, design, construction, reconstruction, replacement, improvement, maintenance, management, repair, leasing and operation of transportation projects.

(b) Include in any agreement entered into under this section any financing mechanisms, including but not limited to the imposition and collection of franchise fees or user fees and the development or use of other revenue sources.
The agreements among the public and private sector partners entered into under this section must specify at least the following:

(a) At what point in the transportation project public and private sector partners will enter the project and which partners will assume responsibility for specific project elements;
(b) How the partners will share management of the risks of the project;
(c) How the partners will share the costs of development of the project;
(d) How the partners will allocate financial responsibility for cost overruns;
(e) The penalties for nonperformance;
(f) The incentives for performance;
(g) The accounting and auditing standards to be used to evaluate work on the project; and
(h) Whether the project is consistent with the plan developed by the Oregon Transportation Commission under ORS 184.618 and any applicable regional transportation plans or local transportation system programs and, if not consistent, how and when the project will become consistent with applicable plans and programs.

(3) The department may, either separately or in combination with any other unit of government, enter into working agreements, coordination agreements or similar implementation agreements to carry out the joint implementation of any transportation project selected under ORS 367.804.

(4) Except for ORS 383.015, 383.017 (1), (2), (3) and (5) and 383.019, the provisions of ORS 383.003 to 383.075 apply to any tollway project entered into under ORS 367.800 to 367.824.

(5) The provisions of ORS 279.835 to 279.855 and ORS chapters 279A, 279B and 279C do not apply to concepts or proposals submitted under ORS 367.804, or to agreements entered into under this section, except that if public moneys are used to pay any costs of construction of public works that is part of a project, the provisions of ORS 279C.800 to 279C.870 apply to the public works. In addition, if public moneys are used to pay any costs of construction of public works that is part of a project, the construction contract for the public works must contain provisions that require the payment of workers under the contract in accordance with ORS 279C.540 and 279C.800 to 279C.870.

(6) (a) The department may not enter into an agreement under this section until the agreement is reviewed and approved by the Oregon Transportation Commission.

367.808 Evaluation of proposed agreements; role of Attorney General.

(1) At the request of the Department of Transportation, the Attorney General may appoint
special assistant attorneys general for the purpose of evaluating partnership agreements entered into or to be entered into as part of the program established under ORS 367.804. The special assistant attorneys general shall be under the direction and control of the Attorney General and may:

(a) Advise the Department of Transportation concerning the legality of specific proposed partnerships;
(b) Advise the department on legal procedures and practices related to implementation of specific projects that use a partnership;
(c) Assist the department in negotiating partnership agreements;
(d) Assist the department in preparing any document related to a specific partnership;
(e) Advise the department regarding accounting, investment and tax requirements applicable to specific projects that use a partnership; and
(f) Advise the department regarding any relevant federal securities or other laws and related disclosure requirements.

(2) When the Attorney General, as part of the review under ORS 291.047, reviews an agreement entered into under ORS 367.806, the Attorney General shall:

(a) Recognize that the agreement is the product of a partnership; and
(b) Defer to the business judgment of the department and the Oregon Transportation Commission concerning the assignment of risks and the incentives provided within the agreement.

[2003 c.790 §5]

[Note: ORS §§ 367.810-367.826 are omitted]
END NOTES


3 Id.

4 Id.

5 Darr at 53.

6 See Appendix A for an excerpt of the statutes found in the Oregon Innovative Partnership Program.

7 Oregon Revised Statutes (“ORS”) § 367.804(1).

8 ORS § 367.804(2).

9 O'Steen & Jenkins at 271-72.

10 Id.

11 Id.


13 Id.

14 Id.

15 Id.

16 Id.

17 See id.

18 Id.

19 Id.

20 Id.

21 Id.

22 Id.

23 Id.

24 Id.

25 Id.

26 See id.


28 Id.

29 O'Steen & Jenkins at 302-03.

30 See id. at 302.

31 Id.

32 See id.

33 Id.

34 See id.

35 See id. at 278.

36 Id.


38 Id.

39 Id.

40 See id.

41 Id. at 6.

42 Id. at 9-17.


44 The Oregon Public Contracting Code is found in ORS Chapters 279 and 279A-C.

45 See ORS § 279A.025.

46 ORS § 279A.010(1)(aa).

47 ORS § 279A.010(1)(za).

48 See generally ORS § 279A.015.

49 See Oregon Administrative Rule 731-070-0020.

50 See e.g. Arizona Revised Statutes Annotated §§28-7701 to 7710; California Streets & Highways Cod § 143; Colorado Revised Statutes §§ 43-3-202 to 202.5, 43-1-1201 to 1209; Virginia Code §§ 56-556 to 575.


54 Id.

55 Id.

56 Id.

57 Id.


60 Id.

61 Id.

62 Id.

63 Id.

64 This outline is based in part on the template contract found at: http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CEkQFjAB&url=http%3A%2F%2Fwww.yesser.gov.sa%2Fen%2Fpublicconsultation%2Fdocuments%2Fppp_contract_template-en.doc&ei=4stpUdq7KYGbiAKHoYH4Cg&usg=AFQjCNHIfVTlh7xq_Et43ib0-gW-n8gUg&bvm=bv.45175338,d.cGE