

AMENDED IN ASSEMBLY APRIL 21, 2008

CALIFORNIA LEGISLATURE—2007–08 REGULAR SESSION

ASSEMBLY BILL

No. 2600

Introduced by Assembly Member Niello

February 22, 2008

~~An act relating to state and local government.~~ *An act to add Part 6 (commencing with Section 22400) to Division 2 of the Public Contract Code.*

LEGISLATIVE COUNSEL'S DIGEST

AB 2600, as amended, Niello. ~~State and local~~ government: infrastructure.

Existing law authorizes various state ~~and local~~ governmental programs to support the development of infrastructure.

This bill would ~~state the intent of the Legislature to enact legislation to authorize a state and local governmental entities agency or department to enter into a performance-based infrastructure partnerships partnership with a private partner~~ for eligible facilities.

Vote: majority. Appropriation: no. Fiscal committee: ~~no~~ yes. State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. *Part 6 (commencing with Section 22400) is added*
- 2 *to Division 2 of the Public Contract Code, to read:*

1 PART 6. PERFORMANCE-BASED INFRASTRUCTURE

2
3 22400. *Whenever used in this part, unless the context otherwise*
4 *requires:*

5 (a) *“Eligible facility” means a facility developed, operated, or*
6 *held in accordance with this part, including an existing, enhanced,*
7 *upgraded, or new facility used or useful as public infrastructure,*
8 *including, but not limited to, facilities related to transportation,*
9 *water, wastewater, public buildings, and other public facilities,*
10 *as well as appurtenances thereto.*

11 (b) *“Information technology” includes, but is not limited to, all*
12 *electronic technology systems and services, automated information*
13 *handling, system design and analysis, conversion of data, computer*
14 *programming, information storage and retrieval,*
15 *telecommunications, which include voice, video, and data*
16 *communications, requisite system controls, simulation, electronic*
17 *commerce, and all related interactions between people and*
18 *machines.*

19 (c) *“Performance-based infrastructure partnership” means*
20 *either of the following:*

21 (1) *An agreement whereby a private partner assists the public*
22 *sponsor, or the public sponsor and a local agency or agencies, in*
23 *defining a feasible project and negotiates fair and reasonable*
24 *terms for implementing the project.*

25 (2) *An agreement whereby a private partner assumes*
26 *responsibility for delivering, improving, operating, or maintaining*
27 *eligible facilities, in accordance with established performance*
28 *specifications and payment terms.*

29 (d) *“Private partner” means a person, entity, or organization*
30 *that is not the federal government or another public sponsor.*

31 (e) *“Public sponsor” means a department or agency of the state.*

32 22401. *A public sponsor may enter into a performance-based*
33 *infrastructure partnership for an eligible facility pursuant to this*
34 *part.*

35 22402. (a) *Notwithstanding any other requirements of state*
36 *law, a public sponsor may procure a private partner and award*
37 *performance-based infrastructure partnerships under this part*
38 *using any of the following:*

39 (1) *A call for project proposals, whereby the public sponsor*
40 *describes the public infrastructure facility or facilities, and private*

1 *entities are invited to submit proposals to develop, construct,*
2 *operate, maintain, and finance.*

3 *(2) A solicitation including, but not limited to, requests for*
4 *qualifications, short-listing of qualified proposers, requests for*
5 *proposals, negotiations, and best and final offers.*

6 *(3) An unsolicited proposal, provided that if the public sponsor*
7 *determines there is sufficient merit to pursue an unsolicited*
8 *proposal, the public sponsor provides reasonable opportunity for*
9 *other entities to submit competing proposals for consideration and*
10 *possible contract award.*

11 *(b) For a procurement in which a public sponsor issues a*
12 *request for qualifications, request for proposals, or a similar*
13 *solicitation document, the request shall generally set forth the*
14 *factors that the public sponsor will evaluate when reviewing the*
15 *submittals. The public sponsor may, in its sole discretion, determine*
16 *which factors it will consider and the relative weight of those*
17 *factors in the evaluation process to obtain the best value for the*
18 *public sponsor.*

19 *(c) A public sponsor may pay a stipend to an unsuccessful*
20 *proposer, but only if the public sponsor has determined that the*
21 *proposal submitted was responsive to the public sponsor's request*
22 *for proposals and met all requirements established by the public*
23 *sponsor for the project. The public sponsor may determine the*
24 *amount of the stipend in its sole discretion, but the stipend amount*
25 *may not exceed the public sponsor's estimate of the value of the*
26 *work product received from the unsuccessful proposer. In exchange*
27 *for the stipend, the public sponsor may require the unsuccessful*
28 *proposer to grant to the public sponsor the right to use any work*
29 *product contained in the unsuccessful proposer's proposal,*
30 *including technologies, techniques, methods, processes, and*
31 *information contained in the recipient's project design.*

32 *(d) The public sponsor may charge a reasonable administrative*
33 *fee for the evaluation of an unsolicited project proposal.*

34 *(e) The public sponsor may procure services, award agreements,*
35 *and administer revenues as authorized in this part.*

36 *(f) The public sponsor may retain financial, legal, and other*
37 *consultants and experts inside and outside the public sector to*
38 *assist in the procurement, evaluation, and negotiation of a*
39 *performance-based infrastructure partnership and for the*
40 *development and operation of eligible facilities under this part.*

1 (g) Notwithstanding any other provision of state law, the public
2 sponsor may, through the private partner, procure information
3 technology that is necessary to the performance of its duties under
4 this part, as long as the cost to procure the information technology
5 is fair and reasonable.

6 22403. (a) In a performance-based infrastructure partnership,
7 the public sponsor may include any of the following:

8 (1) Provisions authorizing the private partner to collect user
9 fees, tolls, fares, or similar charges, including provisions regarding
10 enforcement, what the private partner will do with the collected
11 moneys, and what technology the private partner is required to
12 use to collect the fees, tolls, fares, or similar charges.

13 (2) Provisions allowing the public sponsor to accept payments
14 of money and share revenues with the private partner.

15 (3) Provisions addressing how the public sponsor and private
16 partner will share development costs and manage project risks.

17 (4) Provisions establishing performance criteria and incentives.

18 (5) Provisions addressing the acquisition of rights-of-way and
19 other property interests that may be required.

20 (6) Provisions addressing the responsibility for reconstruction
21 or renovations that are required in order for a facility to meet
22 applicable government standards upon reversion of the facility to
23 public ownership.

24 (7) Provisions ensuring patrolling and law enforcement on
25 public facilities.

26 (8) Provisions identifying any public sponsor specifications that
27 must be satisfied, including provisions allowing the private partner
28 to request and receive authorization to deviate from the
29 specifications on making a showing satisfactory to the public
30 sponsor.

31 (9) Provisions requiring a private partner to provide
32 performance and payment security, the penal sum or amount of
33 which may be less than the value of the contract involved, based
34 upon the public sponsor's determination, made in its sole discretion
35 and on a facility-by-facility basis, of what is required to adequately
36 protect the public sponsor.

37 (10) Provisions authorizing the private partner to receive a
38 reasonable rate of return on the private partner's investment.

39 (11) Provisions specifying remedies available and dispute
40 resolution procedures.

1 **(b)** *A performance-based infrastructure partnership agreement*
2 *between a public sponsor and the private partner shall provide*
3 *that all work created by the private partner during the course of*
4 *performance of the agreement shall be considered work made for*
5 *hire and shall be the property of the public sponsor.*

6 **(c)** *A performance-based infrastructure partnership agreement*
7 *between a public sponsor and the private partner shall provide*
8 *that the private partner agrees to indemnify, defend, and save*
9 *harmless the state, its officers, agents, and employees from any*
10 *and all claims and losses accruing or resulting to any and all*
11 *contractors, subcontractors, suppliers, laborers, and any other*
12 *person, firm, or corporation furnishing or supplying work services,*
13 *materials, or supplies in connection with the performance of the*
14 *performance-based infrastructure partnership or work associated*
15 *therewith, and from any and all claims and losses accruing or*
16 *resulting to a contractor, subcontractor, supplier, laborer, and*
17 *any other person, firm, or corporation who may be injured or*
18 *damaged in the performance of activities under the*
19 *performance-based infrastructure partnership or its activities.*

20 22404. **(a)** *Any lawful source of funding and financing may*
21 *be utilized for the development or operation of an eligible facility*
22 *under this part.*

23 **(b)** *The public sponsor may accept from the United States or*
24 *its agencies funds or credit assistance as is available to it for*
25 *carrying out the purposes of this part, whether the funds are made*
26 *available by grant, loan, or other financing arrangement. The*
27 *public sponsor may enter into agreements and other arrangements*
28 *with the United States or its agencies as may be necessary, proper,*
29 *or convenient for carrying out the purposes of this part.*

30 **(c)** *The public sponsor may accept from any source a grant,*
31 *donation, gift, or other form of conveyance of land, money, other*
32 *real or personal property, or other valuable thing made to the*
33 *public sponsor for carrying out the purposes of this part.*

34 22405. **(a)** *A proposer may identify those portions of a*
35 *proposal or other submission that the proposer considers to be*
36 *trade secrets or confidential commercial, financial, or proprietary*
37 *information. In order for confidential and proprietary information*
38 *and trade secrets to be exempt from disclosure, the private entity*
39 *shall do all of the following:*

1 (1) Invoke the exclusion upon submission of the information or
2 other materials for which protection is sought.

3 (2) Identify the data or other materials for which protection is
4 sought with conspicuous labeling.

5 (3) State the reasons why protection is necessary.

6 (4) Fully comply with applicable provisions of law with respect
7 to information the proposer contends should be exempt from
8 disclosure.

9 (b) Notwithstanding any other provision of law, in order to
10 maximize competition under this part, proposals shall not be
11 subject to release or disclosure by the public sponsor until the
12 award of the performance-based infrastructure partnership
13 contract and the conclusion of a protest or other challenge to the
14 award, absent an administrative or judicial order requiring an
15 earlier release or disclosure.

16 SEC. 2. If any provision of this act, or the application thereof
17 to any person or circumstance, is held invalid, the invalidity shall
18 not affect other provisions or applications of the act which can be
19 given effect without the invalid provision or application, and to
20 this end the provisions of this act are severable.

21 ~~SECTION 1. It is the intent of the Legislature to enact~~
22 ~~legislation to authorize state and local governmental entities to~~
23 ~~enter into performance-based infrastructure partnerships for eligible~~
24 ~~facilities.~~