

**UNSOLICITED PROPOSALS UNDER  
THE COMMONWEALTH  
PROCUREMENT CODE**

**MARCH 2006**

STAFF REPORT



General Assembly of the Commonwealth of Pennsylvania  
JOINT STATE GOVERNMENT COMMISSION  
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The release of this report should not be interpreted as an endorsement by the members of the Executive Committee of the Joint State Government Commission of all the findings, recommendations and conclusions contained in this report.

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The Joint State Government Commission was created by the act of July 1, 1937 (P.L.2460, No.459) as amended, as a continuing agency for the development of facts and recommendations on all phases of government for the use of the General Assembly.

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# JOINT STATE GOVERNMENT COMMISSION, MARCH 2006

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March 2006

TO THE MEMBERS OF THE GENERAL ASSEMBLY:

The Joint State Government Commission is pleased to present this staff report on unsolicited proposals under the Commonwealth Procurement Code, culminating a study undertaken pursuant to House Resolution 391 of 2005.

The Commission acknowledges with gratitude the staffs of the Department of General Services (DGS), the Pennsylvania Department of Transportation (PennDOT), the Independent Regulatory Review Commission, and the Governor's Office of Legislative Affairs for their assistance with this study. The Commission also thanks the procurement officials from Maryland, Oregon, Texas, Washington, and Virginia for their time and assistance.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Roger A. Madigan".

Roger A. Madigan  
Chair

## TABLE OF CONTENTS

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Executive Summary .....	1
Chapter 1. Summary of Activities .....	3
Chapter 2. Procurement Policy and Unsolicited Proposals .....	7
Chapter 3. Statutory Treatment in Other States .....	19
Chapter 4. Policy Options .....	39
Selected Bibliography .....	53
Appendices	
A: 2005 House Resolution No. 391 .....	55
B: Georgia Statute on Unsolicited Proposals .....	57



## EXECUTIVE SUMMARY

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This study was mandated by 2005 House Resolution No. 391, which directed the Joint State Government Commission “to study the ways in which the Commonwealth’s procurement laws may be changed to allow citizens, businesses and public and private universities and colleges to make unsolicited proposals to Commonwealth agencies, boards and commissions.”<sup>1</sup> The commission met with staff of the Department of General Services (DGS) and the Department of Transportation (PennDOT) to gather background on current practices relating to unsolicited proposals, to obtain their views on how effective those practices are and what changes, if any, they believed needed to be made to the procurement statutes.

Three primary goals of procurement policy have been identified: equity, integrity, and economy and efficiency. Expanded receptiveness to unsolicited proposals may promote equity by opening state procurement to providers who have not previously contracted with the Commonwealth. Economy and efficiency may be enhanced by bringing unique and innovative proposals to the attention of procurement officials. The options provided by such proposals may enhance discretion in the system at a time when government procurement policies throughout the nation have been criticized for their rigidity. At the same time, evaluation of unsolicited proposals can draw staff time away from other activities. Furthermore, contracts originating from unsolicited proposals raise some concerns because of the potential for bid-rigging, especially when the proposal results in a sole-source contract.

DGS and PennDOT officials believe no statute should be enacted regulating State agencies’ responses to unsolicited proposals. In their view, the current unregulated system works reasonably well and there is no problem sufficiently serious to warrant legislative intervention. In addition to the increased administrative burden and the appearance of bid-rigging or favoritism, they predict that an additional procedure will actually restrict discretion. Innovative proposals will be inhibited unless trade secrets in the proposals are made exempt from disclosure under the Right to Know Law. Use of unsolicited proposals may run afoul of current provisions of the State Adverse Interest Act. In any event, requiring cost-benefit and employment impact analysis of each unsolicited proposal, as one legislative proposal contemplates, would impose an intolerable burden on procurement officials.

With the help of counsel to DGS, commission staff conducted a comprehensive review of the relevant statutes of the other States. The statutes of twelve other States include provisions relating to unsolicited proposals. In eight of these States, the authority applies only to contracts relating to transportation facilities; in seven of these the authority to approve unsolicited proposals applies only to public-private partnership

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<sup>1</sup> 2005 House Resolution No. 391 is reproduced as Appendix A.

projects. The provisions dealing with unsolicited proposals differ considerably in their level of detail, with some delegating the matter explicitly or by implication, subject to relatively few statutory guidelines (e.g. Arizona), while others prescribe the procedure step-by-step (e.g. Georgia). About 38 States, including Pennsylvania, have no statutory provisions to deal with unsolicited proposals. Pennsylvania officials consider unsolicited proposals under their general authority under the Commonwealth Procurement Code and some other States do this also; still other States interpret the silence of their statutes as an implied prohibition on accepting unsolicited proposals.

Commission staff and DGS collaborated on drafting measures that would address the problems raised by unsolicited proposals. These measures can give assurance that unsolicited proposals will be fairly considered, that proposers will be apprised of official responses to them, and that the criteria for evaluation will be known. DGS maintains that if any change is necessary, an addition to official policy of the kind set forth in Chapter 4 is sufficient to accomplish these objectives. If the General Assembly wishes to go further, a draft amendment to the Commonwealth Procurement Code is supplied. To decide whether action is needed, the General Assembly may wish to direct procuring agencies to collect data on the receipt and disposition of unsolicited proposals.

The following is a summary of the advantages and disadvantages of adopting a provision regulating the consideration of unsolicited proposals:

- An unsolicited proposal provision could encourage businesses that have not supplied goods or services to the Commonwealth to come forward with proposals.
- By removing a real or perceived barrier to entry to government procurement, the provision may assist small enterprises and those owned by members of historically disadvantaged groups.
- The provision may create opportunities for bid rigging or at least give the appearance of doing so. Unless care is taken to provide an opportunity to bid to comparable vendors, competition may be stifled.
- The Commonwealth may achieve substantial economies from the use of innovative products and services.
- Vendors who do not submit unsolicited proposals may be stimulated to greater efforts by competition from those who do.
- By providing additional options, unsolicited proposals may empower procurement officials to obtain better results for the Commonwealth.
- Dealing with an increased number of unsolicited proposals from largely unfamiliar proposers could draw the time and effort of officials from more important tasks.



## CHAPTER 1

### SUMMARY OF ACTIVITIES

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This staff study of unsolicited procurement proposals was mandated by 2005 House Resolution No. 391, which was adopted by the House of Representatives on July 2, 2005. That resolution directed the Commission to “make a report of its activities to the Governor and the General Assembly not later than November 30, 2005.”

On July 28, 2005, staff of the Joint State Government Commission interviewed members of the staff of the Department of General Services (DGS), the agency primarily responsible for procurement for the Commonwealth. Staff members of DGS participating in this meeting were Gary F. Ankabrandt, deputy chief counsel for procurement and real estate; John Paul Jones, legislative liaison; and Curtis M. Topper, deputy secretary for procurement.

Commission staff interviewed members of the staff of the Pennsylvania Department of Transportation (PennDOT) on October 16, 2005. Participating on behalf of PennDOT were Robert J. Shea, assistant chief counsel, general law division (assigned from the Office of General Counsel) and Diane Chamberlin, acting director of the Bureau of Office Services.

With the assistance of DGS, Commission staff collected statutory provisions from Arizona, Colorado, Delaware, the District of Columbia, Florida, Georgia, Maryland, Texas, Virginia, and Washington. Staff has also been in telephone and e-mail contact with executive staff in Colorado, Georgia, Maryland, Oregon, Texas, Washington, and Virginia.

Commission staff submitted a progress report to the Speaker of the House, the House Minority Leader, and the Governor on November 30, 2005. At that time, a policy proposal was being prepared for circulation among executive staff, which formed the germ for the policy statement and the draft statute included in this report.

In January, DGS advised Commission staff of the completion of the policy proposal, which had been cleared with the Office of the Governor and agencies for which DGS acts as procurement agent. DGS embodied its proposal in an amendment to the *Field Procurement Handbook*, which is included in this report at page 42. Following a meeting with DGS staff on February 6, 2006, Commission staff adapted that proposal into the draft statute set forth at page 44, which may be useful if the General Assembly decides that legislation is required. The draft statute was written with the assistance of Messrs. Ankabrandt, and Topper and Ms. Mary Benefield Seiverling of DGS staff, along with Will Danowski of the Governor’s Office of Legislative Affairs.



## CHAPTER 2 PROCUREMENT POLICY AND UNSOLICITED PROPOSALS

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Federal, State, and local governments combined spend between \$600 and \$800 billion annually on procurement, with the largest expenditures involving state procurements of approximately \$300 billion. The federal government wrote 11.4 million contracts for goods and services, 95 percent of which were valued between \$2,500 and \$100,000.<sup>2</sup> With such large amounts being spent, it is not surprising that government procurement has been strictly controlled through statutes and regulations. In many countries to this day, government procurement routinely constitutes an occasion for bribery and political favoritism.

Recent proponents of government reform have viewed government activities, including procurement, as overregulated, leading to inefficiencies and diseconomies. They have urged policymakers to “throw away the rulebook” and permit administrators to exercise more discretion, thus somewhat deemphasizing the traditional concern with corruption and favoritism. Of course, the reformers advocate eliminating administrative regulations that interfere with productivity, while maintaining those that further essential procurement policies. (Presumably nobody wants to return to the procurement practices characteristic of this Commonwealth 100 years ago,<sup>3</sup> let alone those General Sherman employed in Georgia and South Carolina.)

Among the restrictive practices under examination is the practice of having the government initiate every procurement procedure. Historically, for a supplier to start a government contract process was almost as unheard of as for a court to file a lawsuit. More recently, it has come to be recognized that procurement originating from unsolicited proposals from prospective suppliers may promote the use of innovative products and services by government purchasers. (The Federal Acquisition Regulations (FAR) defines an unsolicited proposal as “a written proposal for a new or innovative idea that is submitted to an agency on the initiative of the offeror for the purpose of obtaining

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<sup>2</sup> Kennedy, Patrick D., and Maeve E. Cannon, “Government Procurement Basics,” *CPA Journal* 74 (2004): no.5, <http://www.nysscpa.org/printversions/cpaj2004/405/p60.htm>. Federal government purchases under \$2,500 are made by credit card and are not subject to the same stringent procurement regulations that larger purchases must meet.

<sup>3</sup> The construction of the Capitol Building, which was dedicated on October 6, 1906, occasioned perhaps the most spectacular procurement scandal in Pennsylvania history. “Not before or since has Pennsylvania built anything so grand.” But the purchasing system for the building was described at the time as “an excellent business selling air to the State,” and the building itself suspected of representing “a palatial monument of fraud.” The Commonwealth paid \$13 million for \$9 million worth of buildings and furnishings. The aftermath of this project included fourteen indictments, five convictions, and reportedly three suicides. Paul B. Beers, *Pennsylvania Politics Today and Yesterday: The Tolerable Accommodation* (University Park, Pa.: Pennsylvania State University Press, 1980), 31-35.

a contract with the Government, and that is not in response to a request for proposals . . . or any other Government-initiated solicitation or program.”<sup>4</sup>

## Goals of Procurement Policy

Steven Kelman, a leading expert on procurement policy, has identified three primary goals of procurement regulation:

- to provide fair access to bidders in competing for government business
- to reduce the chances for corruption in the procurement process
- to procure at the lowest possible price for goods and services of the quality desired.<sup>5</sup>

## Equity

To be genuinely equitable, the procurement system must provide fair access to all qualified vendors. Vendors have expressed the concern that large, well-established firms have an advantage over their smaller rivals in the procurement process.<sup>6</sup> Small firms compete at a disadvantage not only because of their size, but also because the larger firms may have more experience. Businesses owned by women or underrepresented minority groups, and small or local vendors can frequently offset this disadvantage by availing themselves of provisions that favor such firms.<sup>7</sup>

It has been argued that equity for minority- and women-owned vendors may be improved by adopting policies that remove the barriers that face all small vendors. Such measures include lowering taxes, streamlining licensure and other regulatory requirements, outsourcing and privatization of services, and prompt payment of amounts owed on contracts. Most pertinently, such a program should include aggressive recruiting of prospective suppliers so as to maximize opportunities for competition, thereby serving economic as well as equity goals.<sup>8</sup>

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<sup>4</sup> 48 CFR § 2.101. FAR has been an influential model for state procurement statutes and regulations, as shown by the use of provisions borrowed from FAR in other states.

<sup>5</sup> Kelman, Steven, *Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance* (Washington, D.C.: AEI Press, 1990), 11.

<sup>6</sup> Miami-Dade County Commission on Ethics and Public Trust and Florida Atlantic University “Accountability in Public Procurement Conference,” September 27, 2002  
[www.co.miami-dade.fl.us/ethics/accweb.pdf](http://www.co.miami-dade.fl.us/ethics/accweb.pdf).

<sup>7</sup> Kennedy and Cannon. The Commonwealth Procurement Code includes provisions encouraging selection of small and disadvantaged businesses. See 62 Pa.C.S. ch. 21.

<sup>8</sup> Holland, Robert, “Seattle’s Contract Equity Program: How Should We ‘Boost’ Small Disadvantaged Businesses?” (Seattle: Washington Policy Center, March 2000), <http://www.washingtonpolicy.org/ECP/PBHollandECPBoost.html> (accessed December 28, 2005).

In the opinion of a former Deputy Secretary for Procurement for the DGS, Pennsylvania's procurement process affords relatively little opportunity to small, innovative firms.<sup>9</sup> DGS does not keep data specifically on unsolicited proposals, such as the number received, reply date, and how many eventuated in a contract, so it is difficult to make a judgment on how disadvantaged unsolicited proposals are. The staff of PennDOT did not recall any contract let that had originated in an unsolicited proposal, so it seems a fair inference that unsolicited proposals face great disadvantages in that department.

## **Integrity**

The second goal of procurement regulations is to maintain a system free of favoritism and corruption. High standards of conduct are necessary because the procurement of goods and services by the government is an activity with great potential for fraud and abuse. "Procurement officials free to make decisions unconstrained by rules might give contracts to their relatives, take bribes, or just lazily refrain from doing the work necessary to protect the government's interests."<sup>10</sup> Strong internal controls and transparency of solicitation and bid processes can enhance the public image of the procurement process.

The Commonwealth Procurement Code addresses ethics and integrity on the part of both officials and contractors:

Public employment is a public trust. It is the policy of this Commonwealth to promote and balance the objective of protecting government integrity and the objective of facilitating the recruitment and retention of personnel needed by this Commonwealth. Implementation of this policy requires that employees discharge their duties impartially so as to assure fair competitive access to Commonwealth agency procurement by responsible contractors and that they conduct themselves in a manner that fosters public confidence in the integrity of the Commonwealth procurement process. It is also essential that those doing business with the Commonwealth agencies observe high standards of honesty and integrity.<sup>11</sup>

The concept of integrity includes the avoidance of conflicts of interest on the part of procurement officers and others influencing the procurement system, because actions tainted by such conflicts are more likely to be corrupt in fact and always carry the appearance of impropriety. The State Adverse Interest Act<sup>12</sup> includes restrictions directed specifically at prohibiting conflicts of interest. Insofar as it deals directly with procurement practices, the statute forbids an adviser or consultant to the Commonwealth

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<sup>9</sup> Glenn Reber, currently on Commission staff.

<sup>10</sup> Kelman, Steven, "Remaking Federal Procurement," *Visions of Governance in the 21<sup>st</sup> Century*, Cambridge, Mass.: John F. Kennedy School of Government, 2002, 10. (Also published as *Public Contract Law Journal* 31 (2002): 581-622.)

<sup>11</sup> 62 Pa.C.S. § 2301. The federal government also provides stringent integrity standards for public contracts. See 48 C.F.R. § 3.101-1.

<sup>12</sup> Act of July 19, 1957 (P.L.1017, No.451); 71 P.S. § 776.1 et seq.

from being a party to a contract with the Commonwealth<sup>13</sup> and also forbids a state employee from dealing in any way with a contract to which he or she is a party (including influencing or attempting to influence the making of the contract, or supervising the performance of the contract)<sup>14</sup> or from being a party to a contract with the state agency that employs him or her.<sup>15</sup>

Unsolicited proposals raise an integrity issue because of the clear potential they present for bid rigging. If the proposal is accepted, the contract is likely to be awarded on a sole source basis, perhaps without adequate consideration of alternatives. Even if the contract is bid competitively, the solicitation or request for proposals may be drafted so as to exclude comparable vendors from any realistic chance to obtain the contract or the notice and time schedule for responding may limit competitive opportunities. As noted later in this chapter, the federal government has met considerable difficulty in preserving competition against unsolicited proposals. It is therefore vital that procurement officials conduct a genuine search for alternative suppliers before awarding sole-source contracts based on unsolicited proposals.

The State Adverse Interest Act may unfairly handicap unsolicited proposals because of its vague definition of “state advisor,”<sup>16</sup> since no person within that definition is permitted to be a party to a procurement contract with the Commonwealth. While the mere submission of an unsolicited proposal clearly does not disqualify under this Act, both DGS and PennDOT staff voiced concern that other communication between the proposer and the Commonwealth may cause the proposer to drift into advisor status. Since a proposer aims to be paid under a procurement contract, his or her situation is quite different from the unpaid advisors typically included within the definition. The General Assembly may wish to clarify the scope of “state advisor,” possibly as part of a revision of the Act.<sup>17</sup> The draft statute set forth in this report suggests an approach to defining appropriate exclusions from the Act.<sup>18</sup>

## **Economy and Efficiency**

Under the current procurement laws, some measure of economy is supplied by the rule that the contract must be awarded to the “lowest responsible and responsive bidder.” The Commonwealth Procurement Code requires procurement officers to award contracts

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<sup>13</sup> State Adverse Interest Act, § 3; 71 P.S. § 776.3.

<sup>14</sup> State Adverse Interest Act, § 4; 71 P.S. § 776.4.

<sup>15</sup> State Adverse Interest Act, §§ 5 and 6; 71 P.S. §§ 776.5 and 776.6.

<sup>16</sup> “State advisor” is defined as “a person who performs professional, scientific technical or advisory service for a State agency . . . and who receives no compensation for his service other than reimbursement for expenses incurred by him in furnishing such service.” State Adverse Interest Act, § 2(7); 71 P.S. 776.2(7). (The term also includes uncompensated members of public advisory, professional licensure, and similar boards.) “State consultant” is defined as “a person who, as an independent consultant, performs professional, scientific, technical or advisory services for a State agency and who receives a fee, honorarium or similar compensation for such service.” § 2(9); 776.2(9) The prohibition against participation in state contracts is in § 3 (§ 776.3), read together with § 2(4) (§ 776.2(4)).

<sup>17</sup> The Act was enacted in 1957, was amended once (in 1982), and is not codified.

<sup>18</sup> See proposed § 536(j) on page 50.

to the lowest responsible bidder under the preferred competitive sealed bidding method and the competitive electronic auction method.<sup>19</sup> Contracts under the competitive sealed proposal procedure or for insurance and notary bonds are awarded to the most advantageous proposal, which is a more flexible standard.<sup>20</sup> At first glance, it would appear that contracting with the lowest bidder would maximize economy, but this approach can add hidden costs that outweigh economic savings and stifle efficiency.<sup>21</sup>

Established procurement practices have come under increasing attack on the grounds that they fail to ensure the greatest possible economy and efficiency, primarily because they overly constrain sound administrative discretion.<sup>22</sup> Kelman argues that prevailing rules and practices commonly force the government to accept goods and services below the quality necessary for excellent performance:

Taken together, the goals of equity, integrity, and economy embody a vision of the goals we should seek from government organizations with deep roots in our tradition of thinking about public administration. One might note, however, that nowhere included among these goals—or emphasized in the tradition of thinking about public administration out of which they grow—is the goal of excellence in the performance of the organization’s substantive tasks.<sup>23</sup>

Studies on government bureaucracy find that procurement systems are overly rule-bound. “The major justification of many rules is to prevent abuse, not to produce generally good decisions.”<sup>24</sup> A rule-based system can guide officials to focus on process rather than on results. No rule directs them to “get a good deal for the government,” because “such a ‘rule’ would provide insufficient guidance to personnel about what to do, and hence wouldn’t fill the role rules are supposed to fill.”<sup>25</sup> In this way, focus on inputs and process can stifle procurement managers’ discretion, when such discretion could improve results.<sup>26</sup>

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<sup>19</sup> 62 Pa.C.S. §§ 512(g), 512.1(f). Contracts are awarded by competitive sealed bidding “unless otherwise authorized by law” (§ 511).

<sup>20</sup> 62 Pa.C.S. §§ 513(g), 519(f). Bids for certain professional services are awarded to the offeror determined to be the most qualified (§ 518(e)).

<sup>21</sup> Kelman, “Remaking Federal Procurement,” 21.

<sup>22</sup> Author and activist Philip K. Howard cites the case of a New York city commissioner who bypassed contracting procedures to rebuild Brooklyn’s Carroll Street Bridge. Although the bridge was completed in one-seventh of the time anticipated and for 70 percent of the allotted budget, the commissioner was reprimanded for circumventing the established contracting and procurement rules. Howard, Philip K., *The Death of Common Sense: How Law is Suffocating America* (New York: Warner Books, 1994), 64.

<sup>23</sup> Kelman, *Procurement and Public Management*, 11.

<sup>24</sup> *Ibid.*, 12.

<sup>25</sup> *Ibid.*, 25.

<sup>26</sup> *Ibid.*

Kelman disparages rules mandating automatic rejection of late-arriving proposals<sup>27</sup> or prohibiting face-to-face meetings between bidders and government employees once the procurement process has begun. He vigorously condemns the rule that forbids the use of information about past performance of vendors, which denies the government the benefit of information used by any intelligent shopper.<sup>28</sup> If this rule were relaxed, unsolicited proposals might be disadvantaged because they are usually put forward by providers with a sparser track record than those who receive solicitations, but if Kelman's view is accepted, the disadvantage would have a reasonable basis and might not apply as strongly to a truly unique and innovative proposal.

David Osborne and Ted Gaebler's work inspiring the "reinventing government" movement cites numerous examples of how institutional changes to contracting and procurement systems can benefit constituents through more effective use of resources.<sup>29</sup> While Osborne and Gaebler focus on the benefits of making public services more competitive by using methods developed in the private sector, their analysis suggests that similar benefits could occur through greater receptivity to unsolicited proposals, thereby taking more advantage of the entrepreneurial energies of that sector.

In a study published by the Rand Corporation, Conrad Peter Schmidt argues that the three procurement goals identified by Kelman are frequently in conflict. "In many respects the shift to managing for efficiency in the public sector requires the elimination of rules and procedures put in place to assure fairness and equity in public administration."<sup>30</sup> Most of the rules and regulations are "the result of efforts to assure fair access to federal procurement contracts and to control fraud, abuse, and graft within the process."<sup>31</sup>

It is commonly perceived that current bureaucratic structures limit the ability, opportunity, and incentives necessary for risk-taking and innovative behavior on the part of government employees, and that such risk-taking behavior will improve the effectiveness and efficiency of government bureaucracies.<sup>32</sup>

One may wonder whether Schmidt and similar observers are too optimistic about how much the crooked timber of humanity has straightened out in the last hundred years.

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<sup>27</sup> Kelman cites FAR 15.208, which forbids acceptance of late arriving proposals. The intent of the regulation is to preclude late bidders from learning useful information about timely competitors. The regulation denies the procurement officer from using discretion in considering proposals that might be late for valid reasons, however, such as a computer crash or an unforeseen illness.

<sup>28</sup> Ibid., 14.

<sup>29</sup> Osborne, David and Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (Reading, Mass.: Addison-Wesley Publishing Company, 1992).

<sup>30</sup> Schmidt, Conrad Peter, "Changing Bureaucratic Behavior: Acquisition Reform in the U.S. Army" (Rand Corporation: 2002), <http://www.rand.org.publications/MR/MR1094/>, 8.

<sup>31</sup> Ibid., 8.

<sup>32</sup> Ibid., 9.



Schmidt's paper centers on a case study evaluating employee implementation of a new Department of Defense (DoD) procurement policy mandating the discontinuance of standards and specifications unique to the military as contract requirements; in their place, individual employees were to select the contractor based on the "form, fit, and function" of the product offered. This program was intended to increase efficiency by eliminating rigid rules and empowering managers' discretion. The reform met resistance from some managers and procurement officers who were unwilling to loosen their procedures and exercise greater initiative even when directed to do so by their superiors<sup>33</sup> Schmidt attributes this recalcitrance to DoD's institutional structure. "The legal environment faced by public managers, combined with the emphasis on public accountability, makes for a very risk-averse bureaucracy."<sup>34</sup>

In light of these studies, radical changes in procurement methods are likely to meet resistance due to risk averseness and unwillingness to change work processes. "A person in a rule-bound system will be discouraged . . . from considering new ways of doing business or better approaches to delivering public value that are not covered by rules."<sup>35</sup> Similar factors could also be an obstacle to special procedures designed to expand reception of unsolicited proposals.<sup>36</sup> Bureaucratic resistance is likely to be greater if the reform requires more detailed and elaborate consideration of unsolicited proposals than appears to be justified. Of course, the studies by Kelman and Schmidt do not bear directly on the extent of bureaucratic inertia in the Commonwealth's government, and such an inquiry would be far beyond the scope of this study as well.

### **Use of Unsolicited Proposals**

The potential for realizing economies through unsolicited proposals appears to be constrained in Pennsylvania. Under current Commonwealth procurement regulations, unsolicited proposals are largely excluded from official channels and their consideration is not guided by explicitly pertinent statutes or regulations. Even in informal settings Commonwealth procurement officials are reluctant to discuss unsolicited proposals with vendors lest they inadvertently violate the Commonwealth Procurement Code or the State Adverse Interest Act.<sup>37</sup> Vendors frequently approach PennDOT managers at trade shows and transportation industry conferences and offer their products. Fear of exposure to liability causes the managers to resist such proposals. One official expressed the additional concern that accepting unsolicited proposals would allow for an overwhelming number of such proposals to flood the bureaucracy.<sup>38</sup>

Perhaps reflecting the impact of the reinventing government movement, Federal procurement regulations have been drafted to recognize and encourage the use of

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<sup>33</sup> Ibid., 10, 11.

<sup>34</sup> Ibid., 11, 12.

<sup>35</sup> Kelman, "Remaking Federal Procurement," 24.

<sup>36</sup> Schmidt, "Changing Bureaucratic Behavior," 11.

<sup>37</sup> Meeting between Pennsylvania Department of Transportation staff and Commission staff, October 17, 2005.

<sup>38</sup> Ibid.

unsolicited proposals. W. Noel Keyes observes that the federal government has sought to “eliminate restraints which discourage the generation and acceptance of innovative ideas through unsolicited proposals.”<sup>39</sup> However, the regulations and practices relating to unsolicited proposals have sometimes acted to discourage competition. The General Accounting Office (GAO) found that one-fourth to one-third of non-competitive contracts awarded in response to unsolicited proposals were awarded without adequate exploration of alternatives.<sup>40</sup> A reason given for missing these alternatives was that “the contracting officer accepted recommendations of technical personnel on the assumption that they were aware of what was available in the marketplace.”<sup>41</sup> However, according to Keyes, regulations do not authorize that kind of circumvention of competitive requirements.<sup>42</sup>

[T]he commitment made by the government in awarding a contract on the basis of an unsolicited proposal, without seeking competition from other sources, is a serious matter and involves the control of expenditures by Congress and by fiscal officials. Neither the executive nor the judicial departments should knowingly weaken that control. Even if the amounts owing on any contract are small, the principle is large and such contracts very naturally lead to follow-up procurements; [*sic*] awards of which the proposer understandably desires. Therefore, the award of both initial and follow-up procurements much be continually tempered by consideration of the competitive requirements in the statutes and regulations.<sup>43</sup>

Any reform increasing the use of unsolicited proposals, then, must ensure competitive opportunities for comparable proposals from alternative suppliers, most likely through vigilant legislative executive and legislative oversight.

Policies that allow procurement managers to consider unsolicited proposals can promote efficiency because they may allow managers to consider alternative vendors whose typically small size may allow them to develop and market innovations more quickly than their rivals. Equity may also be improved by opening the Commonwealth’s contracting process to firms that are not as large or well-established as traditional competitors.

## **Views of Pennsylvania Government Executives**

As noted in the summary of activities, Commission staff interviewed officials actively involved with procurement from DGS and PennDOT, which are probably the

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<sup>39</sup> W. Noel Keyes, “Competition and Sole Source Procurements: A View through the Unsolicited Proposal Example” *Public Contract Law Journal* 14 (1984): 284, 287.

<sup>40</sup> *Ibid.*, 295.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*, 297.

<sup>43</sup> *Ibid.*, 290.

departments that conduct the largest amount of procurement for the Commonwealth.<sup>44</sup> These officials did not favor the adoption of a statutory requirement to regulate the consideration of unsolicited proposals chiefly because the handling of unsolicited proposals does not raise problems that require legislative relief and a legislatively mandated procedure will inevitably pull staff away from more productive activities. However, DGS and Commission staff have drafted statutory language to formally authorize and regulate the consideration of unsolicited proposals, should the General Assembly wish to do so.

Depending on how the term is defined, DGS receives hundreds of unsolicited proposals a year at every level through fax machine, phone calls, e-mail, ordinary mail, promotional materials, and letters. Some of these proposals have no specific addressee. In most years, fewer than ten of these proposals are innovative and unique. Formal and detailed responses to all proposals would entail a substantial administrative burden. It is unnecessary to mandate responses to proposals of serious merit because that can be and is done under existing policies.

The representatives from DGS emphasized that flexibility is among the strengths of the current Commonwealth Procurement Code, and a detailed procedure for unsolicited proposals would actually tend to restrict the discretion of procurement officials. The use of unsolicited proposals always gives at least the appearance that the proposer is being afforded favorable treatment; even if the contract is put out for bidding, the proposer has an advantage in being able to help set the terms of the official solicitation before any competitor.

DGS has no formalized procedure for receiving unsolicited proposals, but has a policy of responding in some way to all of the numerous proposals that are sent to it. Depending on the merit DGS sees in the proposal, the response may vary from a letter of thanks and acknowledgment to an invitation to bid competitively on a contract whose specifications have been modified to permit consideration of the proposed alternative. An unsolicited proposal is generally considered by the deputy secretary for procurement, who delegates it to an appropriate member of DGS staff if it appears to justify further consideration. If the proposal may have merit, the proposer may be invited to meet with the deputy secretary or another responsible official.

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<sup>44</sup> Under 62 Pa.C.S. § 301(a) DGS is given overall responsibility for the “formulation of procurement policy governing the procurement, management, control and disposal of supplies, services and construction for executive and independent agencies” of the Commonwealth, and is authorized to act as purchasing agent for executive and agencies. Independent agencies are generally directed to use DGS as purchasing agent for supplies or construction, but may procure services themselves; such agencies are directed to follow the procedures of the Commonwealth Procurement Code for any procurement of supplies, services, or construction (§ 301(b)). Probably the greatest exception in terms of money expended covers “heavy or specialized construction,” including “bridge, highway, dam, airport . . . or railroad” construction, which may be purchased by the “appropriate purchasing agency” and need not be purchased through DGS or under DGS policies, although they are subject to the requirements of the Code (§ 301(c)(1)). The bulk of the procurements under this paragraph would be performed by PennDOT.

The department believes its current policy is adequate for assuring fair consideration of unsolicited proposals and that a formal procedure is unnecessary. Despite the availability of a formal process for contesting any perceived unfairness in a bidding process, disappointed bidders constantly complain to members of the General Assembly, and the department predicted that this will likely be the case with respect to any procedure for unsolicited bidding. DGS officials are decidedly opposed to any requirement of a formal cost benefit or job creation analysis, as this would constitute an insupportable burden in view of the numerous documents DGS receives that could arguably constitute unsolicited proposals.

Analysis of this issue must consider the State Adverse Interest Act. Since the Act forbids a state advisor or state consultant from bidding on a subsequent contract dealing with the subject matter of the consultation, adding a formal procedure might preclude the informal offeror from bidding on the contract because he or she might be deemed within one of these prohibited categories.

PennDOT officials have not taken any unsolicited proposal beyond the informational stage. The reluctance to adopt such proposals arises from the fear that they will generate litigation because of perceived favoritism, problems with handling proprietary information, and difficulties raised by the State Adverse Interest Act.

If a statutory mandate for considering unsolicited proposals were adopted, PennDOT would want to retain discretion to reject proposals without subjecting itself to additional liability. Sole source criteria should apply to such proposals. (Generally, PennDOT does not favor sole source procurement and finds it preferable to bid contracts where possible.) The provisions authorizing the receipt of unsolicited proposals should not apply to proposals otherwise barred by the State Adverse Interest Act.

The PennDOT representatives observed that an amendment to the Commonwealth Procurement Code regulating the response to unsolicited proposals would raise the issue of coordination among agencies, especially if the provision required a proposal that was “innovative and unique,” as some sister States do. Agencies could easily give conflicting judgments in applying that formula to particular proposals.

Under current law, the Commonwealth cannot protect trade secrets that are disclosed in contract documents from public disclosure under the Right-to-Know Law.<sup>45</sup> The agency may refrain from disclosing such secrets voluntarily, but executed contracts must be disclosed to competitors upon request to the same extent as to other members of the public, as the Right-to-Know Law contains no exception for trade secrets. The protection of trade secrets has not given rise to much litigation, but potential suppliers may decline to contract with the Commonwealth in order to protect them.

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<sup>45</sup> Act of June 21, 1957 (P.L.390, No.212); 65 P.S. §§ 66.1—66.9.

## Summary of Policy Considerations

The following is a summary of the advantages and disadvantages of adopting a provision regulating the consideration of unsolicited proposals in the context of the three broad policy objectives identified in this chapter. It is assumed that adoption of such a provision would encourage prospective private sector suppliers to submit such proposals.

- An unsolicited proposal provision could encourage businesses that have not supplied goods or services to the Commonwealth to come forward with proposals.
- By removing a real or perceived barrier to entry to government procurement, the provision may assist small enterprises and those owned by members of historically disadvantaged groups.
- Unless care is taken to provide an opportunity to bid to comparable vendors, competition may be stifled.
- The provision may create opportunities for bid rigging or at least give the appearance of doing so.
- The Commonwealth may achieve substantial economies from the use of innovative products and services.
- Vendors who do not submit unsolicited proposals may be stimulated to greater efforts by competition from those who do.
- By providing additional options, unsolicited proposals may empower procurement officials to obtain better results for the Commonwealth.
- Dealing with an increased number of unsolicited proposals from largely unfamiliar proposers could draw the time and effort of officials from more important tasks.



## CHAPTER 3

# STATUTORY TREATMENT IN OTHER STATES

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In most of the States, the statutory law makes no explicit provision for receiving and considering unsolicited proposals intended to lead to a procurement contract with the State. Staff research has identified provisions from twelve States that regulate unsolicited proposals. A listserv inquiry through the National Association of State Procurement Officers (NASPO) yielded responses from ten States, six of which indicated they did not respond to unsolicited proposals and two others indicated they had no provision covering such cases.

Thirty-eight States have no statutory provisions to deal with unsolicited proposals. Some of these States may nevertheless accept and review unsolicited proposals under their general procurement authority, as Pennsylvania procurement officials do. As the NASPO responses show, other States interpret statutory silence on unsolicited proposals to imply prohibition of their consideration. Among the twelve States that have provisions for accepting unsolicited proposals, in eight the authority is limited to transportation projects, in seven of which the authority to approve unsolicited proposals in those projects is authorized only for public-private partnership projects. The breakdown of specific States under this classification is shown in Table 1.

“ ‘Public-private partnerships’ (PPP) refer to contractual agreements formed between a public agency and private sector entity that allow for greater private sector participation in the delivery of transportation projects. Traditionally, private sector participation has been limited to separate planning, design, or construction contracts on a fee for service basis—based on the public agency’s specifications.” The expanded private sector role may be “in the planning, financing, design, construction, operation, and maintenance of a transportation facility.” While much of the use of PPPs has been in the context of transportation projects, they are used regularly in other sectors, including “water and wastewater, education, health care, corrections, building construction, power, parks and recreation, and technology.”<sup>46</sup> The “partnership” of the private entity may consist in its bearing the risk for project delays or its ownership and operation of the facility after the firm has built the facility.<sup>47</sup> Unsolicited proposals are especially valuable where only one firm is interested in pursuing a project or where a private firm possesses unique expertise that may accelerate the completion of a project.<sup>48</sup>

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<sup>46</sup> U.S. Department of Transportation, Federal Highway Administration, “PPPs Defined” <http://fhwa.dot.gov/ppp/defined.htm> (accessed December 14, 2005).

<sup>47</sup> United States Department of Transportation, *Report to Congress on Private-Public Partnerships* (December 2004), 10. <http://www.fhwa.dot.gov/reports/pppdec2004/index.htm>.

<sup>48</sup> *Ibid.*, 107-08.

**Table 1**

**Authority to Accept Unsolicited Proposals**

<b>State</b>	<b>Transportation Only</b>	<b>Public-Private Partnerships Only</b>	<b>Transportation and Other Contracts</b>	<b>Remarks</b>
Arizona			✓	Transportation authority limited to two pilot projects
Colorado	✓	✓		
Delaware	✓	✓		
Florida	✓			Transportation authority includes PPPs and non-PPP turnpike service projects
Georgia	✓	✓		
Maryland			✓	Transportation authority limited to two interstate compacts; other authority also limited to certain contracts
Minnesota	✓	✓		Authority limited to toll facilities
Nevada	✓	✓		Authority limited to non-toll facilities
Oregon	✓	✓		
Texas			✓	Transportation authority limited to PPPs; Other authority limited to real estate transactions



Virginia			✓	Transportation authority limited to PPPs
Washington	✓	✓		Unsolicited proposals may be accepted after Jan. 1, 2007

**Note:** This table refers only to statutes that authorize receipt of unsolicited proposals explicitly or by clear implication.

**Source:** Statutes available through FindLaw website (<http://www.findlaw.com/11stategov/index.html>); Nossaman, Gunther, Knox, Elliott LLP, Overview of States with Significant Transportation Public Private Partnership (“PPP”) Authority (May 2005) (supplied to Commission staff by the Oregon Department of Transportation, Office of Innovative Partnerships and Alternative Funding).

Statutes authorizing affirmative responses to unsolicited proposals differ greatly in their approach and level of detail.

## **Non-Directive Authorizations**

### **Bare Authorization**

The most minimal authorization permits the procuring agency to “receive proposals,” or the grant of authority to contract for the project may impliedly authorize the procuring agency to consider any proposal relevant to the authorized project without regard to whether it was solicited. This approach has been used in some States with respect to public-private transportation initiatives.<sup>49</sup>

*Nevada.* A Nevada public-private initiative statute authorizes persons to submit proposals regarding transportation facilities—in effect soliciting by statute.<sup>50</sup> Upon receipt of the proposal, the procuring body may request other persons to submit comparable proposals if the initial proposal appears to be in the public interest. (Nev. Rev. Stat. § 338.164)

### **Authorization with Criteria**

Several States authorize acceptance of unsolicited proposals in certain contexts, and give little detail beyond that.

<sup>49</sup> See Minn. Stat. Ann. § 160.85 (toll roads, bridges, and similar facilities).

<sup>50</sup> Nev. Rev. Stat. §§ 338.161—338.168.

**Arizona.** The statutory strategy in the Arizona Procurement Code is to define “unsolicited proposal” and list the criteria for adopting such proposals. “Unsolicited proposal” is defined as “a written proposal that is submitted on the initiative of the offeror for the purposes of obtaining a contract with this state and that is not in response to a formal or informal request from this state.”<sup>51</sup> The unsolicited proposal provision is a listed exception to the general rule requiring state contracts to be “awarded by competitive sealed bidding.”<sup>52</sup> The main provision reads as follows:

**[Ariz. Stat. Ann.] § 41-2557. Unsolicited proposals.**

A contract may be awarded based on an unsolicited proposal only if the director determines that the conditions of either section 41-2536 [sole source procurement] or 41-2537 [emergency procurements] exist. The determination shall include all of the following:

1. The proposal is innovative and unique.
2. The proposal is not available without restriction from another source and does not closely resemble a similar product which is either available or pending in the industry.
3. The technical office of the purchasing agency receiving the proposal has sufficiently supported its recommendations with facts and circumstances that preclude competition.
4. The procurement officer has approved in writing the award of a contract based on the unsolicited proposal.

Thus in Arizona the legislature has limited its requirements to defining unsolicited proposals, limiting their application to sole source and emergency procurements, and four basic substantive and procedural requirements that must be met in order to award a contract based on such a proposal.

**Interstate Compacts.** Provisions for furnishing property, services, or construction in the Woodrow Wilson Bridge and Tunnel Compact and the Washington D.C. Metropolitan Area Transit Regulation Compact state requirements similar to ¶¶ 1 and 2 of the Arizona statute.<sup>53</sup>

**Virginia.** Virginia’s policy is similar to Pennsylvania in that the Virginia Department of General Services receives unsolicited proposals under its general authority to administer the Virginia Public Procurement Act.<sup>54</sup> Virginia has established the Commonwealth Competition Council, which is generally mandated to “develop an institutional framework for a statewide competitive program to encourage innovation and

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<sup>51</sup> Ariz. Rev. Stat. § 41-2531 ¶ 16.

<sup>52</sup> Ariz. Rev. Stat. § 41-2532.

<sup>53</sup> See D.C. Code §§ 9-1107.01 ¶ 73(d) and § 9-1115.03 ¶ 35(a).

<sup>54</sup> Va. Code § 2.2-4300 et seq.

competition within state government.” (Va. Code § 2.2-2622 A1) If the council receives an unsolicited proposal, the following provision applies:

**§ 2.2-2623. Unsolicited proposals.**

The Governor or the General Assembly may direct any state agency to perform a public/private performance analysis covering any commercial activity for which the [Commonwealth Competition] Council has received a qualifying unsolicited proposal from a private entity that is consistent with the Council’s purposes and duties as provided in § 2.2-2622.

The council’s mission is to look for government services that could be outsourced to the private sector if the private sector can perform them more efficiently or cost effectively.<sup>55</sup> The council’s analysis of an unsolicited proposal requires a directive from the Governor or the legislature.

The department has codified into regulations its policy regarding unsolicited proposals. The policy encourages submission of unsolicited proposals for “unique offer[s] for new and innovative goods or services.” However, all proposals are submitted at the risk and expense of the proposer, and the State assumes no obligation or limitation on the use of the “ideas, proposals, or the information contained therein.” At the same time, submission of the proposal does not “diminish or waive any copyright, patent rights or trademark rights, which the offeror may have.” A proposer who believes he or she is the only source practicably available for the goods or services offered is required to include a “justification” for that claim in the proposal. A favorable evaluation of an unsolicited proposal “does not, in itself, justify awarding the contract without providing for competition.”<sup>56</sup>

Unsolicited proposals may also be received under the Public-Private Transportation Act of 1995<sup>57</sup> and the Public-Private Education Facilities and Infrastructure Act of 2002.<sup>58</sup> Under the public-private transportation program, which has been in operation about ten years, 50 unsolicited proposals have been received, of which nine have reached the contract stage. The Virginia Department of Transportation issues 400-500 bid-build procurement contracts per year.<sup>59</sup>

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<sup>55</sup> Telephone conversation by Commission staff with Ron Bell, director, Virginia Department of General Services, Division of Purchases and Supply, January 11, 2006.

<sup>56</sup> Virginia Agency Procurement and Surplus Property Manual, § 4.32.

<sup>57</sup> The exemption is stated in Va. Code § 2.2-2623 (not quoted above). The Public-Private Transportation Act of 1995 is Va. Code § 55-556 et seq.

<sup>58</sup> Va. Code § 56-575.1 et seq.

<sup>59</sup> Information on the Virginia public-private transportation program is based on telephone conversation by commission staff with Thomas Pelnik, division administrator, innovative project delivery, Virginia Department of Transportation.

## Procedural Requirements

Besides giving evaluative directives, the statute may confine itself mainly to procedural requirements to assure notice to potential competitors and an opportunity to submit an alternative proposal.

*Delaware.* A Delaware provision dealing with public-private transportation initiatives<sup>60</sup> specifically authorizes acceptance of unsolicited proposals if they satisfy criteria applicable to solicited proposals. The only provision uniquely applicable to unsolicited proposals requires the Secretary of Transportation to publish notice of the acceptance for review of the unsolicited proposal at least once a week for two consecutive weeks in a newspaper of general circulation in that State. The notice must include a detailed description of the proposal, and state that competitors have 60 days to submit proposals relating to the proposal's subject matter.<sup>61</sup>

*Florida.* A number of Florida transportation statutes authorize receipt of unsolicited proposals and leave most of the details to departmental regulation. The statute regulating public-private transportation facilities requires a public notice of an unsolicited proposal giving 60 days from the initial publication for "other proposals for the same project purpose." This notice must be mailed to each local government in the affected area.<sup>62</sup> A statute applying to contracts for provision of services on the turnpike system similarly permits the department to receive unsolicited proposals if it publishes receipt of such proposals by newspaper or electronic media and the notice advises that other proposals on the same subject will be accepted for 30 days after the date of publication.<sup>63</sup> A third Florida statute applying to public-private partnership agreements relating to facilities within the purview of the Florida Expressway Authority also includes a publication requirement for unsolicited proposals; in addition, the authority is directed to set application fees for unsolicited proposals by rule.<sup>64</sup>

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<sup>60</sup> Legislation has been enacted in 18 states providing authority for public-private partnerships for transportation infrastructure or services. Of these, the statutes in ten states expressly authorize receipt of unsolicited proposals (viz., Colorado, Delaware, Florida, Georgia, Minnesota, Nevada, Oregon, Texas, Virginia, and Washington). Nossaman, Gunther, Knox, Elliott LLP, Overview of States with Significant Transportation Public Private Partnership ("PPP") Authority (May 2005) (supplied to Commission staff by the Oregon Department of Transportation, Office of Innovative Partnerships and Alternative Funding).

Interest in public-private initiatives for transportation projects seems to have been stimulated by the enactment of the federal Transportation Infrastructure Finance and Innovation Act of 1998 (TIFIA) (Pub.L. 105-178, 23 U.S.C.A. § 181—189 (West 2002)). TIFIA provides for grants, loans, and loan guarantees for transportation projects approved federal department of transportation. TIFIA does not provide guidelines for how the projects assisted by it are to be structured, but one of the eight stated criteria for approval are "the extent to which assistance under [TIFIA] would foster innovative public-private partnerships and attract private debt or equity investment." (23 U.S.C.A. § 182(b)(2)(A)(iii))

<sup>61</sup> Del. Code tit. 2, § 2003(c)(2).

<sup>62</sup> Fla. Stat. § 334.30(6).

<sup>63</sup> Fla. Stat. § 338.235(2).

<sup>64</sup> Fla. Stat. § 348.005(9)(a), (c).

## Delegation with Guidelines

An alternative method of authorizing unsolicited proposals without mandating detailed requirements is to delegate rulemaking authority to an executive agency.

*Washington.* The delegative approach is illustrated by the following Washington statute relating to public-private transportation projects, which became effective on July 24, 2005:

### **[Wash. Rev. Code] § 47.29.170. Unsolicited proposals.**

Before accepting any unsolicited project proposals, the [transportation] commission must adopt rules to facilitate the acceptance, review, evaluation, and selection of unsolicited project proposals. These rules must include the following:

(1) Provisions that specify unsolicited proposals must meet predetermined criteria;

(2) Provisions governing procedures for the cessation of negotiations and consideration;

(3) Provisions outlining that unsolicited proposals are subject to a two-step process that begins with concept proposals and would only advance to the second step, which are fully detailed proposals, if the commission so directed;

(4) Provisions that require concept proposals to include at least the following information: Proposer's qualifications and experience; description of the proposed project and impact; proposed project financing; and known public benefits and opposition; and

(5) Provisions that specify the process to be followed if the commission is interested in the concept proposal, which must include provisions:

(a) Requiring that information regarding the potential project be published for a period of not less than 30 days, during which time entities could express interest in submitting a proposal;

(b) Specifying that if letters of interest were received during the 30 days, then an additional 60 days for submission of the fully detailed proposal would be allowed; and

(c) Procedures for what will happen if there are insufficient proposals submitted or if there are no letters of interest submitted in the appropriate time frame.

This statute delegates the unsolicited proposal issue to the Washington State Transportation Commission with a limited number of specified guidelines, further

directing that the rules provide for screening of proposals to separate the more promising ones from those that can be more quickly dismissed, and mandating a procedure permitting competitive proposals by other prospective bidders. The actual consideration of unsolicited proposals is delayed for 17 months after the effective date of the statute, presumably in order to give the commission time to draft the mandated regulations. The Washington legislature is expected to extend this deadline another six months to July 2007 in order to decide whether to appropriate additional funding for proposal review. (Washington legislative staff have contacted sources from other States, and on that basis estimate that the cost of adequately evaluating the contemplated proposals is about \$500,000 per proposal.) The Washington Department of Transportation was simultaneously directed to do a study of procurement policy, including “methods of encouraging competition for the development of transportation projects” and recommendations on “additional procedures” for “negotiating contracts in situations of a single qualified bidder, in either solicited or unsolicited proposals.”<sup>65</sup> The program must also complete a study of statewide toll financing before it can start any projects.

Besides presenting the statutory requirements, draft regulations<sup>66</sup> state that the department may select classes of eligible proposals for priority handling or automatic rejection by issuing an order to that effect. Consideration of proposals outside the priority category will likely be delayed due to “the limited resources of the department” (Wash. Admin. Code § 468-600-215 (draft)). The department disclaims any responsibility for the “preservation, confidentiality or safekeeping” of any proposal covered by an order suspending consideration of a class of proposals. Unsolicited proposals must satisfy preliminary criteria similar to those used by Georgia, which are detailed below.<sup>67</sup> If an unsolicited proposal involves another State or a local government in another State it will not be considered unless the foreign jurisdiction has agreed to permit acceptance of unsolicited proposals (Wash. Admin. Code § 468-600-220(5) (draft)).

**Oregon.** The legislation establishing the Oregon Innovative Partnerships Program<sup>68</sup> authorizes the Oregon Department of Transportation to solicit proposals and “accept unsolicited proposals or concepts” from “private entities and units of government.” (Or. Rev. Stat. § 367.803(3)(a), (b)) No other directives are given in the statute regarding unsolicited proposals; however, the regulations authorized by statute prescribe in detail the requirements related to unsolicited proposals, including the competitive evaluation of comparable proposals.<sup>69</sup>

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<sup>65</sup> Wash. Rev. Code § 47.29.260. Information on the Washington program was supplied by telephone conversation by Commission staff with Jeff Doyle, director, Transportation Innovative Partnerships, Washington State Department of Transportation, December 13, 2005.

<sup>66</sup> See Transportation Innovative Partnership Program draft rules, [http://www.wstc.wa.gov/TIP/TIP\\_DraftRules.pdf](http://www.wstc.wa.gov/TIP/TIP_DraftRules.pdf), § 468-600 et seq. Formal adoption of these rules is scheduled for April 2006.

<sup>67</sup> Compare Wash. Admin. Code § 468-600-220(4) (draft) with Ga. Code Ann. § 32-2-79(b). The independent origination and development criterion stated in Ga. Code Ann. § 32-2-79(b)(2) is not explicitly included in the Washington draft regulations.

<sup>68</sup> Or. Rev. Stat. §§ 367.800—367.826, effective September 22, 2003.

<sup>69</sup> Or. Admin. R. 731-070-0050—731-070-0190.

## Prescriptive Authorizations

Other statutes dealing with unsolicited proposals are more detailed in the requirements prescribed for the handling of unsolicited proposals.

**Georgia.** The Georgia statute<sup>70</sup> on public-private initiatives for transportation projects provides rules and procedures for many issues arising in connection with unsolicited proposal. The Georgia Department of Transportation is authorized to accept solicited proposals, competing proposals, unsolicited proposals, and comparable proposals. The department has compiled flow charts showing the approval procedure for solicited and unsolicited proposals, which are reproduced as Figure 1 and Figure 2, respectively.

The procedure applicable to unsolicited proposals is considerably more elaborate than that for other proposals.

*Preliminary Review.* The preliminary requirements for unsolicited proposals are as follows (Ga. Code Ann. § 32-2-79(b)):

- (1) The proposal must be either unique and innovative or comparable to a project that has not been fully funded. Unique or innovative features which may be considered by the department in evaluating the proposal may include financing, construction, design, or other components as compared with other projects or as otherwise defined by department regulations.<sup>71</sup>
- (2) The proposal must be independently originated and developed by the proposer.
- (3) Detailed information in support of the proposal must be included, as prescribed by regulation, to assist in its evaluation. The submission must include an itemized, auditable listing of the costs associated with the development of the proposal.
- (4) A submission fee as prescribed by regulations must be paid.

If the proposal fails to qualify under these criteria, the department returns it to the proposer, but proprietary information in the proposal is protected from disclosure.

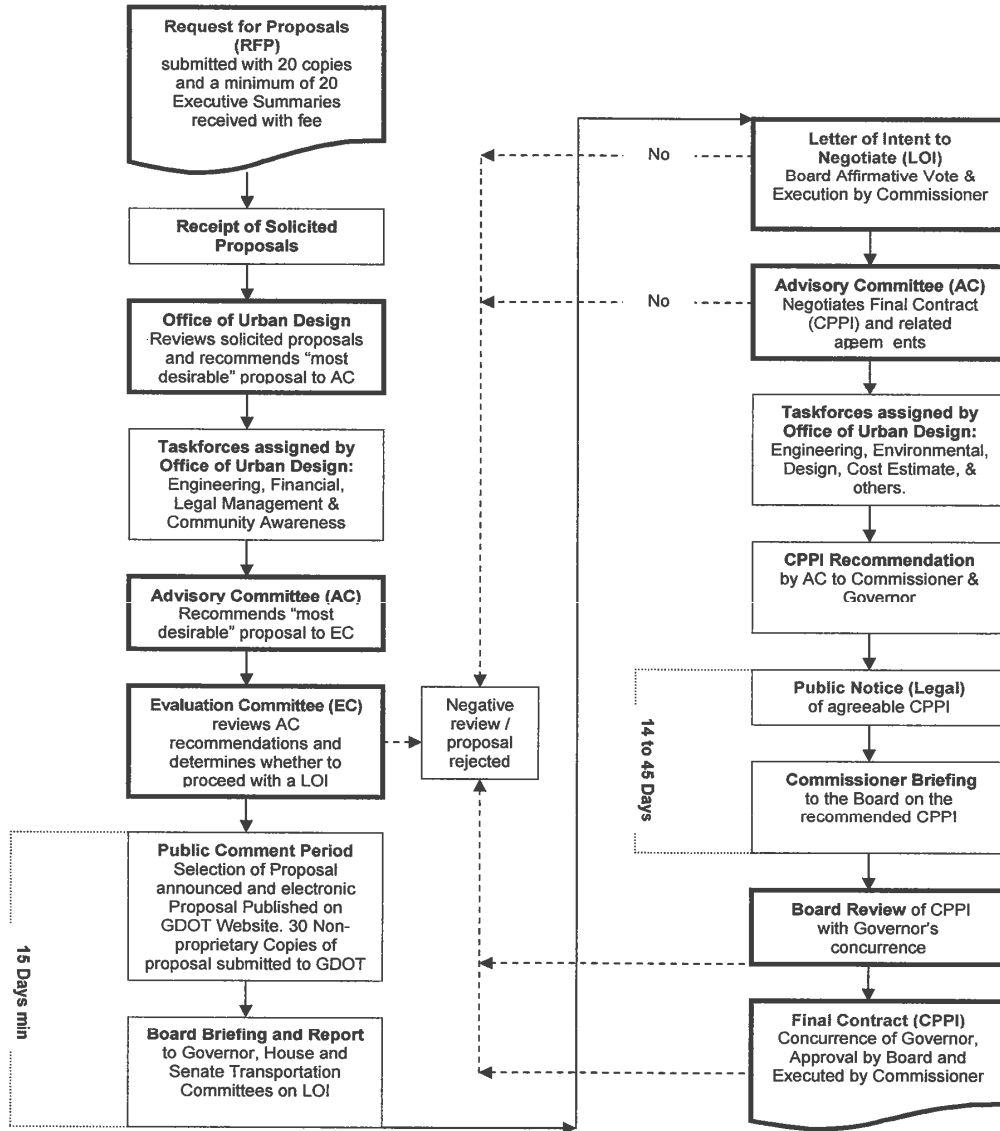
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<sup>70</sup> Ga. Code Ann. §§ 32-2-78, 32-2-79, and 32-2-80 (Westlaw 2005). The provisions are set forth in Appendix B. The prescriptive statutes borrow significant concepts and language from the Federal Acquisition Regulations (FAR) relating to unsolicited proposals. 48 C.F.R. § 15.600 et seq.

<sup>71</sup> In order to avoid unnecessary detail, this chapter will use the term “regulation” to include more informal directives, such as rules and guidelines.

**FIGURE 1**

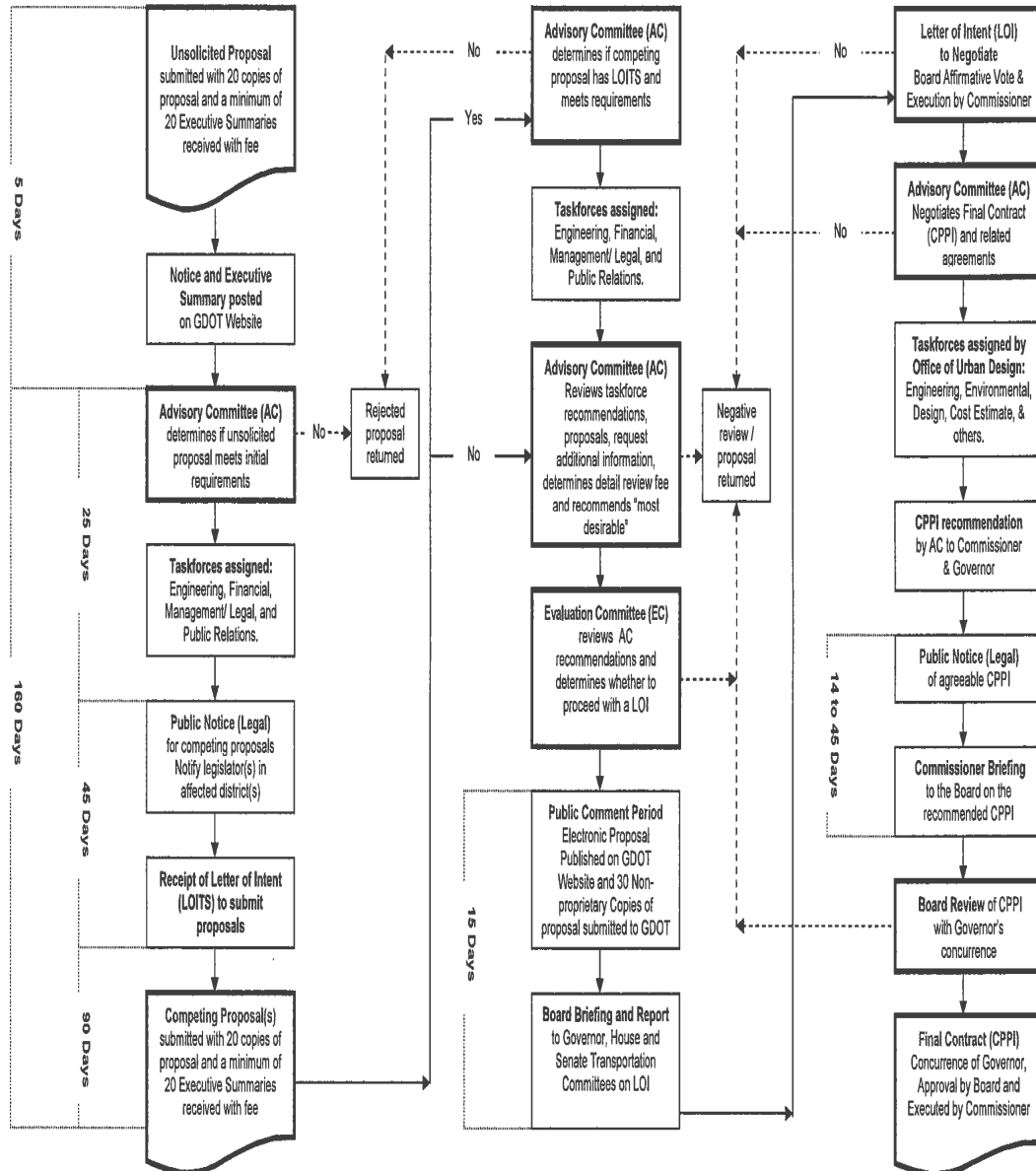
***GDOT Process for Solicited Public-Private Initiative Proposals***



*Last Updated: 9/9/05*



**FIGURE 2**



*Public Notice.* If an unsolicited proposal survives preliminary review, the department must provide public notice of the proposed project by publication in a newspaper of general circulation, an electronic website, or as otherwise provided by law. Notice must be given to persons expressing an interest in the subject matter of the proposal and to any legislator whose district would be affected by the proposal. The notice must outline the general nature and scope of the unsolicited proposal, including the location of the transportation system project and the work to be performed on the project, and specify the address to which any comparable proposal must be submitted. This provision is clearly intended to provide potential contractors with an opportunity to submit competitive bids. (Ga. Code Ann. § 32-2-79(e))

*Submission of Comparable Proposals.* Anyone wishing to submit a competing proposal for the proposed project to the department must submit a letter of intent to do so within 45 days of the department's initial publication of the notice accompanied by the fee prescribed by regulation. The competing proposal pursuant to the letter must be submitted to the department within 135 days after the department's first public notice (90 days after the expiration of the letter of intent period) in order to be considered. (§ 32-2-79(f))

*Evaluation of Unsolicited and Comparable Proposals.* Proposals submitted in response to the public notice section must meet the requirements listed above under "Preliminary Review." The department must determine whether any submitted proposal so qualifying is comparable in nature and scope to the original proposal and whether it warrants further evaluation. It must then evaluate the original unsolicited proposal and any comparable proposals and make a recommendation to the evaluation committee<sup>72</sup> on whether to issue a letter of intent to negotiate. The department must also conduct good faith discussions and, if necessary, negotiations concerning each qualified proposal. (§ 32-2-79(g))

The criteria for the department's evaluation of the original and comparable proposals are:

- (1) Unique and innovative methods, approaches, or concepts demonstrated by the proposal;
- (2) Scientific, technical, or socioeconomic merits of the proposal;
- (3) Potential contribution of the proposal to the department's mission;
- (4) Capabilities, related experience, facilities, or techniques of the proposer as described in the proposal or unique combinations of these qualities that are integral factors for achieving the proposal objectives;

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<sup>72</sup> The evaluation committee consists of a designee of the Governor, a designee with a background in finance to be named by the Governor, the commissioner of the Department of Transportation, the director of the State Road and Tollway Authority, and the director of the Georgia Regional Transportation Authority. More than one evaluation committee may be established. The committee is authorized to employ experts as necessary and may charge its expenses to the special funds set up to finance the transportation projects.

(5) Qualifications, capabilities, and experience of the proposed principal investigator, team leader, or key personnel who are critical in achieving the proposal objectives; and

(6) Any other factors appropriate to a particular proposal. (§ 32-2-79(h))

Once the department has concluded its evaluation of the proposals relating to a project (including solicited proposals), the department transmits its findings and research to the evaluation committee for further review. (§ 32-2-79(i))

*Negotiation of Contract.* If the committee makes a recommendation to the department, the department may execute a letter of intent to negotiate with the entity submitting the most desirable proposal as determined by the department's evaluation process. At least two weeks prior to approval of any project, the department must present to the Governor and the House and Senate transportation committees a report with respect to the proposed letter of intent. The department may execute a letter of intent to negotiate relating to a proposal only if:

(1) The proposal receives a favorable evaluation by the department and the Evaluation Committee;

(2) The department makes a written factually-based determination that the proposal is an acceptable basis for an agreement to obtain services from the entity making the proposal; and

(3) The specific letter of intent to negotiate is specifically approved by affirmative vote of the State transportation board.

The letter of intent to negotiate must indicate the department's willingness to undertake a public-private initiative if, after public comment, the department determines that the project is financially feasible and in the public interest, and the department and the proposer agree on the terms and conditions, including price of the project. (§ 32-2-79(i), (j)) (Since there has already been a formal determination that the proposal is an "acceptable basis for an agreement to obtain services," it is not entirely clear why further negotiations are necessary.)

*Public Notice.* After the execution of the letter of intent to negotiate but before execution of the final contract, the department must provide an opportunity for public comment, and may hold one or more public meetings for that purpose. The notice requirements for public comment are similar to those applicable to the notice inviting comparable proposals. (§ 32-2-79(l))

*Protection of Proprietary Information.* Whether a proposal is accepted for evaluation or not, the department may not disclose "the originality of the research" included therein or any proprietary information associated with the proposal. Proposals are not deemed public records subject to disclosure until all proposals relevant to a project are received and the competitive interviews have been completed. Thereafter, trade secrets and proprietary information that are specifically claimed by the proposer

remain under protection from disclosure, but otherwise all proposals become public records. The department makes the final determination as to whether materials requested by the public are disclosable under the State's Open Records Law, but it must attempt to provide advance notice to a proposer of any election to disclose. (§ 32-2-79(b), (l), (m))

*Reimbursement for Proposal Costs.* If the department does not accept an unsolicited proposal, but within a period of two years following the submission of the proposal the department contracts for a substantially similar project, the department must reimburse the proposer of the unsolicited proposal for the auditable costs associated with the preparation and development of the proposal upon a request for reimbursement to the department. However, this reimbursement is not paid if the department accepts a conforming comparable proposal through the procedures outlined above. (§ 32-2-79(p)) Reimbursement for costs of developing a proposal is not available for solicited proposals. (§ 32-2-80(c))

*Execution of Contract.* Upon compliance with the above requirements, the contract for the public private initiative must obtain further approval by affirmative vote of the State transportation board with the concurrence of the Governor. Upon completion of the public comment period, the department may execute the contract with the chosen proposer without a public bid. (§ 32-2-80(a)) The department, in its sole discretion, may reject any unsolicited or solicited proposal at any time until a contract is signed with the proposer.

*Eminent Domain.* The statute bars delegation of the power of eminent domain to any private entity in connection with any project to which it may apply. (§ 32-2-79(n))

*Funding Authority.* Any agreement executed under this statute may authorize funding to include tolls, fares, or other user fees and tax increments for use of the proposed transportation facility. The department may execute contracts or otherwise act to obtain federal, State, or local assistance for an approved project. Funds received from the State or federal government are subject to appropriation under applicable law. The department may authorize payment of all or part of a qualifying project from the proceeds of a federal State or local government grant or loan or make grants or loans to the operator from amounts received from the federal, State, or local government. (§ 32-2-80(b))

*Legislative History.* The statute summarized here was first enacted in 2003 and amended effective May 2, 2005. The amendment applied the same review procedures to solicited, comparable and unsolicited proposals; added the review by the evaluation committee; and required the Governor to approve the final contract, among other changes.<sup>73</sup>

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<sup>73</sup> 2005 Act 214, §§ 1—3.

*Practical Impact.* Since the legislation was originally enacted, the department has received three unsolicited proposals for highway projects, one of which has advanced to the letter of intent to negotiate stage.<sup>74</sup>

*Colorado.* Colorado's statute<sup>75</sup> on unsolicited and comparable proposals for public-private initiatives for transportation infrastructure projects is in most respects similar to Georgia's, although somewhat less detailed.

The preliminary criteria add to Georgia's a prohibition on accepting proposals "for a known department requirement that can be required by competitive methods" unless the department has not established a timetable for satisfying the requirement in the state plan or the proposal is likely to substantially shorten the relevant timetable. Otherwise the Georgia and Colorado statutes are very similar in this respect.<sup>76</sup> Under both laws, proposals that fail to meet the initial criteria are returned to the proposer, while those that comply with the criteria may be further evaluated (Colo. Rev. Stat. § 43-1-1203(3); Ga. Code Ann. 32-2-79(d)). The criteria for further evaluation of unsolicited and comparable proposals are exactly alike (Colo. Rev. Stat. § 43-1-1203(4); Ga. Code Ann. 32-2-79(h)).<sup>77</sup> The procedural requirements for acceptance of an unsolicited proposal differ in that Georgia requires approval of an evaluation committee, while Colorado permits the department to approve the proposal on its own.

Both statutes require public notice upon preliminary approval of the unsolicited proposal, though Colorado does not require the notice if the contract is not reasonably expected to require an expenditure greater than \$50,000 in any fiscal year. The notice in Colorado must state that the department will consider comparable proposals. The timing of the notice in Colorado seems to give competitors less of an opportunity to submit proposals than in Georgia, as the notice is published at least 14 days prior to opening of the date set forth in the notice for opening of proposals and use of newspapers of general circulation is permitted but not required (Colo. Rev. Stat. § 43-1-1203(6)(a)(I)). The notice must include "the terms of any private contributions offered and public benefits requested concerning the project" (Colo. Rev. Stat. § 43-1-1203(6)(a)(III)) and must request the proposer to supply information concerning its experience and qualifications (Colo. Rev. Stat. § 43-1-1203(6)(a)(IV)). The public notice requirement does not apply in Colorado if the department determines such notice "would improperly disclose either the originality of the research or proprietary information associated with the research proposal" (Colo. Rev. Stat. § 43-1-1203(7)).<sup>78</sup>

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<sup>74</sup> Telephone conversation by Commission staff with Vicki Gavalas, director of communications, Georgia Department of Transportation, December 14, 2005.

<sup>75</sup> Colo. Rev. Stat. § 43-1-1203.

<sup>76</sup> Cf. Colo. Rev. Stat. § 43-1-1203(2) with Ga. Code Ann. § 32-2-79(b).

<sup>77</sup> Both provisions closely follow the FAR, except that the final item in the federal regulations is "the realism of the proposed cost," while Colorado and Georgia both substitute "any other factors appropriate to a particular proposal." See 48 C.F.R. § 15-606-2.

<sup>78</sup> The Georgia notice provisions are Ga. Code Ann. § 32-2-79(e) and (k). The latter provision requires notice of the letter of intent to negotiate so as to invite public comment and has no counterpart in Colorado.

After the period for submission of comparable proposals has closed, both statutes require determination of actual comparability, evaluation of comparable proposals, and good faith discussions and negotiations, if necessary, concerning comparable proposals (Colo. Rev. Stat. § 43-1-1203(6)(b), (c), (d); Ga. Code Ann. § 32-2-79(g)).<sup>79</sup> Colorado authorizes the acceptance of a comparable proposal if it is the most advantageous to the State in comparison to an unsolicited proposal or other submitted proposals (Colo. Rev. Stat. § 43-1-1203(8)).<sup>80</sup> If the department accepts an unsolicited proposal, it is directed to “use the proposal as the basis for negotiation of an agreement” (Colo. Rev. Stat. § 43-1-1203(9)). The Georgia provision states that the letter of intent must be predicated on a written determination that the proposal is “an acceptable basis for an agreement to obtain services” from the proposer (Ga. Code Ann. § 32-2-79(j)(2)); upon final approval of the proposal, the department has “authority to contract with the proposer for a public-private initiative based on the proposal” (Ga. Code Ann. § 32-2-80(a)). Both provision designate the officers with authority to “make the determinations and take the actions required” by the provisions; in Colorado, this is the department’s procurement officer or his or her designee; in Georgia it is the department or its designee (Colo. Rev. Stat. § 43-1-1203(10); Ga. Code Ann. § 32-2-80(o)).

The Colorado statute does not include several provisions that appear in the Georgia statute. Colorado does not prescribe successive periods for responding to the notice and submitting the comparable proposal (cf. Ga. Code Ann. § 32-2-79(f)). As mentioned, Colorado does not prescribe an evaluation committee. Nor does Colorado require a report on the project to the Governor and the House and Senate transportation committees; public comment prior to preliminary approval (cf. § 32-2-79(i)); preliminary approval of the proposal by the State transportation board (cf. § 32-2-79(j)(3)); further notice and opportunity for comment prior to execution of the contract (cf. § 32-2-79(k)(1)); public hearings at this stage (cf. § 32-2-79(k)(2)); or approval of the final contract by the Governor and the State transportation board (cf. § 32-2-80(a)).

The Georgia provisions summarized above under the headings Protection of Proprietary Information, Reimbursement for Proposal Costs, Eminent Domain, and Funding Authority do not appear in the Colorado statute.

*Practical Impact.* Three PPP contracts have been let, all arising from unsolicited proposals. The staff contact commented that the statute described above was “minimally used.”<sup>81</sup>

**Maryland.** Maryland has enacted a statute regulating unsolicited proposals for three different types of public contracts. This provision became effective July 1, 2005, and is slated to sunset on September 30, 2008.

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<sup>79</sup> The Georgia language directs discussions and negotiations concerning “each qualified proposal,” thereby including unsolicited proposals, while the corresponding Colorado language is limited to “comparable” proposals, thereby arguably excluding unsolicited proposals.

<sup>80</sup> This appears to be implied by Ga. Code Ann. § 32-2-80(a).

<sup>81</sup> Telephone conversation by Commission staff with Commission Herman Stockinger, legislative liaison, Colorado Department of Transportation, March 16, 2006.

*Scope.* Unsolicited proposals may be considered if they relate to business and economic development services, educational services and health or social services.<sup>82</sup> Educational services are limited to those “procured to provide or assist in providing training to third-party clients. Health or social services are those “procured to provide or assist in providing support, care, or shelter to third-party clients.” (Md. Code, State Fin. & Proc. § 13-107.1(a))

*Review.* An interagency panel determines whether the proposal falls into one of the three categories eligible for consideration under this provision. The interagency panel consists of representatives appointed by Governor from the department of health and mental hygiene; the department of human resources; the department of labor, licensing, and regulation; the department of juvenile services; the department of disabilities; the department of aging; the department of business and economic development; and the council on management and productivity. The panel makes its determination by majority vote, and its approval is required for the award of a contract. The panel must make its determination within 30 days of receiving the proposal from the procurement officer, or the proposal is deemed rejected. (§ 13-107.1(a), (c))

If the interagency panel determines the proposal is within the scope of this provision, the procurement officer may consider the proposal under the statutory criteria: whether it either contains a “novel or innovative application, approach, or method which, to the knowledge of the procurement officer, is not used by or available to another unit” or “demonstrate[s] a novel capability of the offeror.” The proposal must meet a need or be otherwise advantageous to the unit. Furthermore, the proposal must be in writing and may not have been previously submitted to the unit by another person. (Md. Code, State Fin. & Proc. § 13-107.1(b)) The procurement officer of the relevant unit determines as to whether it meets these criteria set forth above.

The procurement officer must obtain approval of the proposal by the head of the unit in order and all approvals otherwise required by law in order to award the contract. (§ 13-107.1(d))

*Contract Provisions.* The offeror need not be the only source of services awarded pursuant to a contract. (§ 13-107.1(d)) The contract is limited to a term of no more than two years (including extensions) and State expenditures under the contract may not exceed \$ 1 million annually. (§ 13-107.1(f) and (g))

*Confidentiality.* The procurement officer is required to treat information in an unsolicited proposal as confidential and “not subject to disclosure under any other State or local law.” Once a contract is awarded, disclosure of the unsolicited proposal is governed by the Public Information Act.<sup>83</sup> (§ 13-107.1(h))

*Public Notice.* The contracting unit is required to give public notice of its intent to award a contract based on an unsolicited proposal at least 30 days before the execution

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<sup>82</sup> Md. Code, State Fin. & Proc. § 13-107.1.

<sup>83</sup> Md. Code, State Gov’t § 10-630 et seq.

of the contract. During the 30-day period, the contract may be contested by a petition to the interagency panel to reverse its determination. Upon receipt of the petition, the panel is required to reconsider its determination and make written findings affirming or reversing its prior approval. Note that no provision is made for submission of a comparable proposal. Another public notice is required of the award of the contract within 30 days after it takes place. The public notice provisions include detailed directives as to where the notice must be published and the fee to be charged to support the web-based publisher of these notices. (§ 13-107.1(i), (j), and (k))

*Educational Outreach.* The agencies represented on the interagency panel (except for the council on management and productivity) are directed to implement an educational outreach program on the availability of the unsolicited proposal method of procurement. (§ 13-107.1(l))

*Practical Impact.* The statute detailed above is currently in its fourth year of operation. In that time no contracts have been awarded under its provisions, and only about seven proposals have been received. A Maryland official contacted by commission staff observed that the reason few vendors have taken advantage of the statute is that vendors had no guarantee that they would benefit from bringing the idea to the State's attention. The procurement law governing contracts other than those covered by the statute has been interpreted to permit consideration of unsolicited proposals. While these are not separately counted, the official observed that few are received and very few eventuate in a state contract.<sup>84</sup>

*Texas.* Statutory authority for reception of unsolicited proposals primarily deal with public-private partnerships for state highway turnpike projects<sup>85</sup> and regional mobility authorities,<sup>86</sup> which authorize receipt of unsolicited proposals and their consideration under a competitive negotiation procedure that is described in detail in the statute. Authority is provided for acceptance of unsolicited proposals "regarding real estate transactions involving real property that would be of significant benefit to the state." (Tex. Nat. Res. Code § 31.157(i)) Several agencies have procedures for receiving unsolicited proposals without specific statutory guidelines.<sup>87</sup>

With respect to the public-private partnerships, the provisions relating to unsolicited proposals require that the proposal describe the nature of the project, the

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<sup>84</sup> Telephone conversation by Commission staff with Mary Naramore, director of procurement and policy administration, Maryland Department of Budget and Management, October 31, 2005.

<sup>85</sup> Tex. Transp. Code Ch. 361 (relating to comprehensive development agreements for highway projects). The provisions relating to procurement, including the handling of unsolicited proposals are §§ 361.3022 and 361.3023. The provisions on state highway projects also apply to the Trans-Texas Corridor. (Tex. Transp. Code § 227.023)

<sup>86</sup> Tex. Transp. Code Ch. 370. The provisions relating to procurement, including the handling of unsolicited proposals are §§ 370.306 and 370.307, which are virtually identical to the corresponding sections of chapter 361. Regional mobility authorities are created by the Texas Transportation Commission at the request of one or more counties for the purpose of constructing, maintaining, and operating transportation facilities in the region. (Tex. Transp. Code § 370.031)

<sup>87</sup> Telephone conversation by Commission staff with Christy Ennen, special projects coordinator, Texas Building and Procurement Commission, October 31, 2005.



qualifications of the proposer, and the financial plan. If the Texas Department of Transportation authorizes further evaluation of an unsolicited proposal or decides to issue a request for qualifications for a proposed project on its own initiative, it must publish a request for competing proposals in the Texas Register, including the evaluation methodology and the deadline for submission. The evaluation is in two stages; ordinarily at least two prospective proposers must be invited to submit a detailed proposal. Unsolicited proposals may need to be accompanied by a nonrefundable fee. The contracts under the PPP provisions are exempt from otherwise applicable provisions relating to competitive bids and professional and consulting services.

Unsuccessful proposers who have submitted a detailed proposal are paid a stipulated amount to defray the cost of preparing the proposal, which may not exceed the value of any work product that is determined by the department to be useful to it. Upon payment of the amount, the department obtains the joint right to use the work product, including all techniques and information contained in the product design. Either the department or the proposer may use the work product, and neither is liable for the use of that work product by the other. (Tex. Transp. Code § 361.3022(m))

Certain information included in proposals under these chapters is exempt from the statute on public information and is not subject to disclosure, discovery, or subpoena until a final contract is executed. Protected information includes the financial plan included in an unsolicited proposal supplemental information submitted in connection with any proposal, and information created or collected by or for the department during consideration of any proposal. The final rankings of the detailed proposals are not confidential. (Tex. Transp. Code § 361.3023)

The number of unsolicited proposals received under the PPP program has been variable; volume was relatively high just after the passage of the enabling act, but unsolicited proposals are now infrequent.<sup>88</sup>

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<sup>88</sup> Telephone conversation by Commission staff with Glenn Hagler, director of purchasing, Texas Department of Transportation, November 1, 2005.



## **CHAPTER 4**

### **POLICY OPTIONS**

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This chapter describes three options that may respond to the issues raised by unsolicited proposals. First the chapter will examine the mandatory assessment proposed in two bills currently under consideration by the General Assembly. The remainder of the chapter will present a screening and evaluation system developed jointly by Commission staff and DGS staff. This general approach is embodied first in a proposed addition to the DGS *Field Procurement Handbook* (its collection of policy statements) and in a somewhat modified form as a proposed amendment to the Commonwealth Procurement Code.

The threshold issue is whether unsolicited proposals raise issues substantial enough to require any response at all. Currently, procurement officials respond to unsolicited proposals without any official guidance. Analysis of whether this situation needs to be changed is difficult because DGS and PennDOT do not segment out unsolicited proposals in their data collection procedures. The General Assembly could direct DGS, PennDOT, and other agencies who do substantial procurement to collect such data as part of the legislative oversight process. Such data could help determine whether the Commonwealth is missing substantial opportunities for improved performance.

As mentioned in Chapter 3, much of the legislative activity in other States has been connected with public-private partnerships to build transportation infrastructure. The issue of participation in such a program would be primarily determined based on how effectively such a program would address transportation needs and is therefore outside the scope of this report.

### **Mandatory Formal Assessment**

Legislation currently under consideration<sup>89</sup> proposes that DGS respond with a formal assessment to every unsolicited proposal received by any Commonwealth agency, with the assessment to include a cost-benefit analysis, an employment estimate, and a responsive bid solicitation or RFP. The results of the analysis would be provided to the party that submits the unsolicited proposal and be published in the Pennsylvania Bulletin.

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<sup>89</sup> Senate Bill 62 (PN 774) and House Bill 2440 (PN 3509). SB 62 as introduced and passed by the Senate dealt only with electronic bidding by local government units; the language set forth in the text was amended into SB 62 by the House on third consideration. The bill as so amended was passed by the House on July 1, 2005. The same day it was referred to the Senate Rules and Executive Nominations Committee, where it remains as of this writing. HB 2440 was introduced and referred to the House State Government Committee on February 7, 2006, where it remains as of this writing.

This proposal seems to substantially increase DGS's responsibilities in reviewing proposals in a manner that should be carefully reviewed before the measure is adopted into the statutory law.

The legislation amends 62 Pa.C.S. § 321 (renumbered § 321(a)) to add the following power and duty to DGS:

(7) Receive, assess and respond to all Commonwealth purchase proposals, submitted by any person, for the procurement of supplies, services or construction under this part. The department shall provide notification to the person who submitted the proposal within 60 days of receiving the proposal. The notification shall indicate that the department is in receipt of the Commonwealth purchase proposal and that the department will provide a written assessment of the merits of the proposal within 90 days of the notice. The department shall provide the following in its assessment of the Commonwealth purchase proposal:

(i) A cost benefit analysis of the proposal, including but not limited to, an estimation of the number of jobs created by the proposal.

(ii) The anticipated requirements of the proposal.

(iii) A proposed invitation for bids or requests for proposals relating to the proposal.

The legislation adds the following subsections (b) and (c), which formally apply to all powers and duties under § 321, but would appear to have a practical impact only on the duty stated in paragraph (7):

**(b) Publication of assessments.**—The department shall publish any assessment prepared under this section in the Pennsylvania Bulletin.

**(c) Definition.**—As used in this section, the term “Commonwealth purchase proposal” means a suggestion made to the Department of General Services, which includes a recommendation that the Commonwealth procure a specific supply, service, or construction.

Except in paragraph (7), no assessment is mentioned in § 321, nor is there any other reference in that section to “Commonwealth purchase proposal.”

The House Appropriations Committee drafted a fiscal note to accompany SB 62. The note concludes that there would be neither costs nor savings associated with adopting the unsolicited proposal provisions, based on the assumption that DGS has adequate staff to conduct the mandated cost-benefit analyses. One of the concerns of DGS is that a policy that permits the submission of unsolicited proposals would increase the number of proposals received. DGS would need to reassign existing personnel or hire additional staff to process proposals if an appreciable number of unsolicited proposals were processed under this legislation and if the analysis were to be performed to professional standards.

The legislation mandates DGS to draft an assessment of every “Commonwealth purchase proposal” within 150 days of receiving it from “any person.” The proposals triggering this duty include any “suggestion” recommending a specific procurement of any kind authorized by the Commonwealth Procurement Code itself, no matter how meager the Commonwealth’s interest in procuring the things offered or how unpromising the proposal is otherwise.

Cost-benefit analysis, a common tool used to evaluate policy alternatives, means the process of weighing the total expected benefits against the total expected costs of each alternative. Benefits and costs are typically expressed as dollar amounts. For each alternative, the total benefit of a policy alternative is divided by its total cost. The alternative that scores the highest ratio of benefit to cost, if the ratio is greater than one, would be preferred and presumably selected.

The analysis can be a back-of-the-envelope calculation or an elaborate and exhaustive study. In the rudimentary instance, an experienced procurement manager could quickly assign dollar values to the proposal’s costs and benefits and determine whether or not it is worth accepting based on his knowledge of the department’s current capabilities and the Commonwealth’s needs at the time. In a more elaborate and formal analysis, the procurement manager would spend more time identifying expected benefits and costs and assigning quantitative values to each. In the case of unsolicited proposals, procurement managers could compare the cost-benefit ratio of the unsolicited proposal to the cost-benefit ratio of existing procurement contracts.

A job creation forecast as contemplated by paragraph (7)(i) requires a different thought process from cost-benefit analysis, and conflating the two may hinder decision-making. If job creation estimates were required, the procurement manager might need to consult with the Commonwealth’s economic development programs to gather pertinent information. The creation of jobs might provide benefits by reducing unemployment and expenses associated with public assistance and health care. The Commonwealth might benefit by an increase in tax revenue if the unsolicited proposal results in higher employment. On the other hand, if job creation were to become a major criterion for contract selection, higher cost contracts would often be preferred.

The proposed legislation further requires that the assessment include “a proposed invitation for bids or requests [sic] for proposals relating to the proposal.” This clause seems to require DGS to draft a bid solicitation or RFP to accommodate every proposal, solely on the grounds that it is unsolicited, again regardless of how unpromising or even far-fetched the proposal may be.

## **Screening and Evaluation**

The proposed administrative policy and the salutatory amendment presented in this part are both designed to create a fair and orderly framework for consideration of proposals and to provide some guidance as to how such proposals should be handled. A

two-stage process is used, so that less promising proposals can be quickly dismissed. Both approaches assume that unsolicited proposals are fundamentally no different from other procurement proposals, and existing law regulating competitive bidding, sole source, emergency, and small procurement should apply.

The policy and the amendment encourage basic communication between procurement officials and proposers. Proposers should be notified of whether the proposal is rejected or is being considered for disposition under one of the statutory procurement processes. There appears to be no need for a separate procedure specifically applicable to unsolicited proposals for ordinary goods, supplies, and construction. Provisions unique to unsolicited proposals are needed only to structure the determination of whether a proposal should be eligible for award under existing procurement procedures. A special procedure may be appropriate, however, for procurements that have a visible effect on the public such that the public may expect an opportunity to comment—for example, road and bridge construction under a public-private partnership.

## **Administrative Policy**

As noted above, DGS considers legislative action unnecessary. The handling of unsolicited proposals can be standardized by internal policy. DGS proposes adding the provisions set forth below to its collection of official policies, called the *Field Procurement Handbook*.<sup>90</sup> For DGS, proposed updates to the *Handbook* are drafted by the Bureau of Procurement or the Office of Chief Counsel with input from program personnel. The Bureau then enters the proposed update into the system and submits it to the deputy chief counsel, the chief procurement officer, and the directives manager system of the Governor's Office of Administration (OA). If approved, the update becomes effective upon publication on the respective websites of DGS and OA. The approval process is typically completed within one week.<sup>91</sup>

A statement of administrative policy has a different legal standing from a regulation, although the courts admit they have struggled with making a clear distinction between them—not to mention the relationship of each to such similar categories as “standards” and “guidelines.” Policies are not required to comply with the procedure prescribed for approval of regulations.

Since such statements set forth the formal policy of the agency, agency personnel can be disciplined for failure to comply with them. With respect to outside vendors in adjudications or court cases, a statement of policy constitutes an announcement of the policy the agency intends to pursue in an upcoming rulemaking or future adjudications. Unlike a regulation, a statement of policy does not have the force of law. While the policy embodied in a regulation is “not generally subject to challenge before the agency”

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<sup>90</sup> The *Field Procurement Handbook* is available at <http://www.dgs.state.pa.us/dgs/lib/dgs/procurement/handbook/m215-3.pdf>.

<sup>91</sup> E-mails to Commission staff from Will Danowski, assistant deputy secretary, Office of the Governor, Office of Legislative Affairs and John Paul Jones, legislative liaison, DGS, March 10, 2006.

the agency must be prepared to support the policy embodied in a statement in agency adjudications as if the policy statement had never been issued.<sup>92</sup>

The alternative to formalizing a policy is promulgating a regulation. A regulation has the force of law if it is authorized by the statute. As stated in *Rushton Mining*, the policy judgments of the agency supporting a regulation are rebuttably presumed correct. The greater legal force of a regulation comes at some cost in administrative flexibility. In order to be valid, a regulation or any amendment thereto must undergo review under an elaborate procedure prescribed by the Commonwealth Documents Law,<sup>93</sup> the Commonwealth Attorneys Act,<sup>94</sup> and the Regulatory Review Act.<sup>95</sup> Currently, the regulatory review process takes from four to 20 months, depending largely on the agency involved, and a regulation must be withdrawn if it is not approved within two years of introduction.<sup>96</sup> DGS does not wish to promulgate a regulation on unsolicited proposals because of the real or perceived inflexibility of the approval procedure and because the great bulk of the operational guidance on the procedure for awarding contracts is currently embodied in policies rather than regulations.<sup>97</sup>

The proposed change to the DGS *Field Procurement Handbook* sets up a structured evaluation procedure for unsolicited proposals. The agency that will use the supply, service, or construction offered in the proposal decides whether it wishes to purchase the product and forwards that determination to the purchasing agency (which in most cases will be DGS). If the using agency does not wish to procure the product, the purchasing agency advises the proposer that the proposal is rejected, noting that the Commonwealth is not interested in pursuing it.

If the using agency is interested in the product, the purchasing agency further evaluates the proposal under four criteria: it is innovative and unique (or shows a novel capability of the proposer in the case of a service); the proposer has developed the proposal independently; the product is not available without restriction from another source; and the product does not resemble any existing or pending product that could be substituted. If the proposal fails this review, the proposer is advised of the rejection and of the criteria the proposal failed to meet.

If the proposal passes the second-stage review, the purchasing agency processes the proposal as a small, sole source, or emergency procurement, whichever applies. If

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<sup>92</sup> *Department of Environmental Resources v. Rushton Mining Co.*, 591 A.2d 1168, 1171-73 (Pa. Commw. Ct. 1991)

<sup>93</sup> Act of July 31, 1968 (P.L.769, No.240); 45 P.S. §§ 1201—1208.

<sup>94</sup> Act of October 15, 1980 (P.L.950, No.164); 71 P.S. § 732-101—732-506.

<sup>95</sup> Act of June 25, 1982 (P.L.433, No.181); 71 P.S. § 745.1—745.15. The process is described in a “The Regulatory Review Process in Pennsylvania,” prepared by the Independent Regulatory Review Commission and available at <http://www.irrc.state.pa.us/soon.pdf>.

<sup>96</sup> Telephone conversation by Commission staff with Mary S. Wyatte, chief counsel, Independent Regulatory Review Commission, March 7, 2006.

<sup>97</sup> 4 Pa. Code Ch. 69 (method of awarding contracts) consists of nine sections and takes up six pages. The *Field Procurement Handbook* is 311 pages long.

none of those three applies, the purchasing agency may use any other method that can be justified and must inform the proposer of the method to be used.

The complete language of the proposed addition is as follows:

## **PROPOSED ADDITIONS TO DGS FIELD PROCUREMENT HANDBOOK**

### **PART I**

#### **CHAPTER 2. DEFINITIONS**

**Unsolicited proposal.** A written proposal submitted not in response to a request for proposals or other solicitation for proposals or bids, but on the initiative of the person who submitted the proposal, for the purpose of obtaining a contract with the Commonwealth, and clearly identified by the person who submitted the proposal as an “unsolicited proposal”.

#### **CHAPTER 27. UNSOLICITED PROPOSALS**

**A. Definition.** An unsolicited proposal is a written proposal submitted not in response to a request for proposals or other solicitation for proposals or bids, but on the initiative of the person who submitted the proposal, for the purpose of obtaining a contract with the Commonwealth, and clearly identified by the person who submitted the proposal as an “unsolicited proposal”.

**B. Requirements.**

1. When a Commonwealth agency receives an unsolicited proposal, it shall immediately forward the unsolicited proposal to the purchasing agency and advise the purchasing agency whether the Commonwealth agency is interested in pursuing the proposal.

2. The purchasing agency shall review and respond in writing to all unsolicited proposals.

**C. Procedures.** The following procedures shall apply when a Commonwealth agency receives any unsolicited proposal:

1. If the unsolicited proposal is for a supply, service or construction that the Commonwealth agency does not wish to procure, the purchasing agency shall return the unsolicited proposal to the person who submitted the unsolicited proposal without further action, noting that there is no Commonwealth interest in pursuing the proposal.



2. If the unsolicited proposal is for a supply, service or construction that the Commonwealth agency does wish to procure, the purchasing agency shall review the unsolicited proposal to determine whether it meets the following requirements:

a. The unsolicited proposal is innovative and unique or, in the case of a service, demonstrates a novel capability of the person who submitted the unsolicited proposal;

b. The person who submitted the unsolicited proposal has independently originated and developed the unsolicited proposal;

c. The product or service is not available without restriction from any other source; and

d. The product or service does not closely resemble any similar procurement available or pending in the industry.

3. If an unsolicited proposal does not meet all requirements contained in subparagraph 2 of this Section C, the purchasing agency shall return the unsolicited proposal to the person who submitted the proposal without further action, identifying which of the Section C requirements it does not meet.

4. If the purchasing agency finds that an unsolicited proposal meets all requirements contained in subparagraph 2 of this subsection C, the purchasing agency may, in its sole discretion and as determined by the contracting officer, procure the supply, service or construction from the person who submitted the proposal pursuant to one of the following methods of awarding contracts, if applicable:

a. Small procurements;

b. Sole source procurement; or

c. Emergency procurement.

If none of the above three methods can be justified, then the purchasing agency may procure the supply, service or construction using one of the other methods of awarding contracts that can be justified and shall inform the person who submitted the proposal of the proposed method of procurement.

### **Procurement Code Amendment**

The draft statute set forth below was developed in consultation with the staff of DGS, who in turn consulted with staff of the Governor's Office of Legislative Affairs. The draft is intended to provide a model for a statute should the General Assembly wish to enact legislation dealing with the issues raised by unsolicited proposals. Language from the draft statute could be included in a statement of policy or regulation if deemed suitable.

Like the statement of policy above, the statute sets up a screening stage and an evaluation stage before proposals are processed under the existing provisions for

competitive sealed proposals, sole source, emergency, or small procurement. The statute includes additional criteria for evaluation at the second stage beyond those in the policy statement. Provisions are included dovetailing the unsolicited proposal provisions with existing law relating to trade secrets, bid rigging, and adverse interests; since these provisions limit the applicability of existing law, they can only be supplied by statute.

While the draft statute should encourage unsolicited proposals, it also includes strong provisions to discourage litigation arising from rejection of the proposals. The proposer stands in a similar position to an advertiser who mails a flyer to an ordinary consumer. Such a prospective seller has no legal rights against a consumer who simply ignores the offer. The Procurement Code appears to afford the proposer ample remedies if the proposal is bid out and the proposer's bid is refused for an improper reason. However, the draft statute recognizes the proposer's legitimate interest in being advised of the status of the proposal.

The complete text of the draft statute follows, along with comments:

### **AN ACT**

Amending Title 62 (Procurement) of the Pennsylvania Consolidated Statutes, providing for consideration of unsolicited proposals by Commonwealth agencies.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 103 of Title 62 of the Pennsylvania Consolidated Statutes is amended to read:

#### **§ 103. Definitions.**

Subject to additional definitions contained in subsequent provisions of this part which are applicable to specific provisions of this part, the following words and phrases when used in this part shall have the meanings given to them in this section unless the context clearly indicates otherwise:

\* \* \*

“Unsolicited proposal.” A proposal submitted on the initiative of a proposer for the purpose of obtaining a contract designating the proposer as a contractor. The term does not include a proposal submitted in response to a request for proposals or an invitation for bids.

\* \* \*

Section 2. Section 106(b) of Title 62 is amended by adding a paragraph to read:

**§ 106. Public access to procurement information.**

\* \* \*

**(b) Exceptions.—**

\* \* \*

(3) Trade secrets, as defined in 12 Pa.C.S. § 5302 (relating to definitions) which are contained in proposals or bids for public contracts are not subject to disclosure under the act of June 21, 1957 (P.L. 390, No. 212), referred to as the Right-to-Know Law.

**Comment:** The exclusion applies generally, not only to trade secrets included in unsolicited proposals, as it would be anomalous to give trade secrets in unsolicited proposals greater protection from disclosure than they are afforded in bids or other proposals.

Section 3. Title 62 is amended by adding a section to read:

**§ 536. Unsolicited proposals.**

(a) Receipt of proposal.—If a purchasing agency receives an unsolicited proposal it shall respond to the proposal as provided in this section. If a Commonwealth

agency customarily procures the supply, service or construction offered in the proposal through a purchasing agency, the using agency shall forward the proposal to the purchasing agency and shall advise the purchasing agency whether the using agency desires to procure the supply, services or construction.

**(b) Identification.**—An unsolicited proposal must be in writing and must be clearly identified as such. If it is not, a Commonwealth agency need not respond to it as otherwise required by this section.

**Comment:** This subsection is intended to make clear that the agency has no duty to respond to casual communications, such as phone calls, informal faxes, and promotional flyers and brochures.

**(c) Initial consideration.**—If the using or the purchasing agency does not wish to procure the supply, service or construction offered by the proposal, or if the purchasing agency does not wish to consider the proposal for any other reason, the purchasing agency shall return the unsolicited proposal to the proposer, advising the proposer in writing of its rejection of the proposal.

**Comment:** This provision assures that rejected proposals that are formalized in accordance with subsection (b) will receive a written response from the purchasing agency, while not requiring the agency to respond in burdensome detail.

**(d) Criteria for review.**—If the proposal is not rejected under subsection (c), the contracting officer of the purchasing agency shall review the proposal to determine whether it sufficiently meets the following criteria:

(1) The proposal is innovative and unique. In determining whether this criterion is met, the purchasing agency may consider any relevant factors, including the following:

(A) Whether the proposer has independently originated and developed the proposal.

(B) Whether the product or service offered by the proposal is unavailable without restriction from any other source.

(C) Whether the product or service offered by the proposal is distinct from the products or services available or pending in the industry.

(D) In the case of a service, whether the proposal demonstrates a novel capability of the proposer.

(2) The proposal includes sufficient detail to permit a determination as to whether it would be advantageous to the Commonwealth.

(3) The professional or other qualifications and capabilities of the proposer and the staff of the proposer to be assigned to the proposal are sufficient to ensure competent performance.

(4) The technical, scientific and economic or other merits of the proposal support further consideration.

**Comment:** To give the purchasing agency maximum discretion at the proposal stage, the initial evaluation is stated in terms of criteria rather than requirements that must all be met. This subsection also puts prospective proposers on notice as to what proposals are likely to have a realistic chance to eventuate in a

contract. Proposals described by paragraph (1) will most likely be treated as sole source procurements.

(e) **Review.**—The purchasing agency may contact the proposer to obtain additional information as necessary to its consideration of the proposal. If the contracting officer of the purchasing agency determines that the proposal does not sufficiently meet the criteria of subsection (d), the purchasing agency shall return the proposal to the proposer and advise the proposer in writing that the proposal is rejected.

**Comment:** This subsection is intended to permit informational contact between the agency and the proposer. Consistently with subsection (c), the agency is required to advise the proposer if the proposal is rejected after preliminary consideration.

(f) **Grounds for rejection.**—The purchasing agency may advise the proposer of the grounds for rejection.

**Comment:** This subsection permits but does not require the agency to advise the proposer of the grounds for rejection. Read together with subsection (g), the proposer is not given a remedy to challenge either the failure of the agency to state the grounds or any perceived invalidity of those grounds.

(g) **Effect of rejection of proposal.**— The rejection of a proposal under this section does not constitute a determination under any provision of this title, does not give rise to any remedy under chapter 17 (relating to legal or contractual remedies) and does not constitute an adjudication under 2 Pa.C.S. § 101 (relating to definitions). Notwithstanding 2 Pa.C.S. § 701 (relating to scope of subchapter) and 42 Pa.C.S. § 933 (relating to appeals from government agencies) or any other provision of law, the

rejection of a proposal under this section does not constitute the basis for an appeal to any court.

**Comment:** This subsection is intended to make clear that proposals under this section are mere offers and proposers have no greater legal remedies than providers whose offers are rejected or not acted upon by a private consumer.

**(h) Award of contracts.—**

(1) If the contracting officer of the purchasing agency finds that an unsolicited proposal sufficiently meets the criteria of subsection (d), the purchasing agency may proceed on the proposal pursuant to section 513 (relating to competitive sealed proposals), section 514 (relating to small procurements), section 515 (relating to sole source procurements) or section 516 (relating to emergency procurement).

(2) If the contracting officer of the purchasing agency finds that an unsolicited proposal sufficiently meets the criteria of subsection (d), but none of the sections mentioned in paragraph (1) apply, the purchasing agency may proceed on the proposal pursuant to any other section of subchapter B (relating to methods of source selection) which the purchasing agency determines to be applicable to the proposal.

**Comment:** This section relies primarily on the sections cross-referenced in this subsection (or any other applicable sections of subchapter B of the Commonwealth Procurement Code) to afford remedies to the proposer and competitors of the proposer. After the preliminary consideration under subsection (d), unsolicited proposals are treated on the same basis as other proposals.

**(i) Competitive sealed proposals.—**If the purchasing agency applies section 513, it may use any of the contents of the proposal in the drafting of a solicitation or

request for proposals. Such use of the contents of the proposal does not constitute grounds for any remedy under either of the following:

(1) Chapter 45 (relating to antibid-rigging).

(2) Unless otherwise agreed between the purchasing agency and the proposer, 12 Pa.C.S. Ch. 53 (relating to trade secrets).

**Comment:** This subsection is intended to limit the applicability of provisions that may discourage fair consideration of unsolicited proposals. Modification of a standard solicitation or RFP to reflect an unsolicited proposal does not in itself constitute bid-rigging, although such modifications may be evidence of bid-rigging that, combined with other evidence, may create such a case. With regard to trade secrets, modification of a solicitation or RFP to reflect a proposal may increase the likelihood that a proposal will be accepted. Therefore, such a use should not constitute infringement of trade secrets disclosed by the solicitation or RFP, unless the proposer and the agency have agreed otherwise.

(j) Adverse interests.—The act of July 19, 1957 (P.L. 1017, No. 451), known as the State Adverse Interest Act, does not apply to acts performed pursuant to this section. However, acts performed in connection with a proposal which is submitted by any of the following are subject to the State Adverse Interest Act:

(1) an employee of a purchasing agency;

(2) a person that is a contractor at the time the proposal is submitted, including a “state consultant” as defined in section 2(a)(9) of the State Adverse Interest Act; or

(3) a person who serves as a member of an advisory board, professional licensing board or similar part of a state agency.



**Comment:** This subsection also limits the applicability of a statute that discourages equal consideration of unsolicited proposals. The submission of an unsolicited proposal and conversations about the proposal could otherwise disqualify the proposer as a “state advisor.” This subsection limits the applicability of the State Adverse Interest Act to employees; contractors; and members of advisory, professional licensure, and similar boards who are currently barred as “state advisors” under the Act. Submission of a proposal does not itself make the Act applicable to the proposer.



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**APPENDIX A**  
**2005 HOUSE RESOLUTION NO. 391**

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PRINTER'S NO. 2437

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THE GENERAL ASSEMBLY OF PENNSYLVANIA

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**HOUSE RESOLUTION**

**No. 391**      Session of  
2005

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INTRODUCED BY PERZEL AND DeWEESE, JUNE 30, 2005

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REFERRED TO COMMITTEE ON RULES, JUNE 30, 2005

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A RESOLUTION

1 Directing the Joint State Government Commission to study the  
2 ways in which the Commonwealth's procurement laws may be  
3 changed to allow citizens, businesses and public and private  
4 universities and colleges to make unsolicited proposals to  
5 Commonwealth agencies, boards and commissions.

6 WHEREAS, The economic health of this Commonwealth is a top  
7 priority; and

8 WHEREAS, The tax burden on this Commonwealth's citizens and  
9 businesses that results from the cost of government operations  
10 and administration can have a significant impact on the economic  
11 health of this Commonwealth; and

12 WHEREAS, State government has obligations to be fiscally  
13 responsible and to limit the tax burden it imposes; and

14 WHEREAS, Members of the general public, many private sector  
15 businesses, public and private colleges and universities and  
16 local governments have expertise to provide State government  
17 agencies with cost-saving and innovative ideas; and

18 WHEREAS, The current provisions of the Commonwealth  
19 Procurement Code only allow for bids on projects under the terms

1 and conditions established by the procuring agency and do not  
2 provide an opportunity for unsolicited proposals; and

3 WHEREAS, There should be a mechanism in State government  
4 under which cost-saving and innovative recommendations may be  
5 made to State government for review and response; therefore be  
6 it

7 RESOLVED, That the House of Representatives direct the Joint  
8 State Government Commission to study the ways in which the  
9 Commonwealth's procurement laws may be changed to allow  
10 citizens, businesses and public and private universities and  
11 colleges to make unsolicited proposals to Commonwealth agencies,  
12 boards and commissions; and be it further

13 RESOLVED, The commission make a report of its activities to  
14 the Governor and the General Assembly not later than November  
15 30, 2005.

**GEORGIA STATUTES ON UNSOLICITED PROPOSALS**

**§ 32-2-78. Definitions.**

As used in this chapter, the term:

(1) “Department” means the Georgia Department of Transportation.

(2) “Evaluation Committee” means the one or more committees established for the purpose of evaluating and making a recommendation with respect to unsolicited proposals, solicited proposals, competing proposals, or comparable proposals as set forth in this chapter. The Evaluation Committee shall consist of a designee of the Governor, a designee with a background in finance to be named by the Governor, the commissioner of the Department of Transportation, the director of the State Road and Tollway Authority, and the director of the Georgia Regional Transportation Authority. The Evaluation Committee shall employ such experts as needed in the performance of its duties and charge the expenses incurred by it to such funds made available to the department for such purposes.

(3) “Letter of intent to negotiate” means the written statement of mutual intent by the department and the proposer for a public-private initiative to develop and implement a course of negotiation, within a substantive framework, which if successfully completed could lead to a binding contractual agreement to accomplish a proposed transportation system project.

(4) “Private contribution” means resources supplied by a private entity to accomplish all or any part of the work on a transportation system project, including funds, financing, income, revenue, cost sharing, technology, staff, materials, equipment, expertise, data, or engineering, construction, or maintenance services, or other items of value. To the extent that this definition may conflict with any federal law or regulation, for any project utilizing federal funds, the federal definition shall supersede this paragraph.

(5) “Public-private initiative” means a nontraditional arrangement between the department and one or more private or public entities that provides for:

(A) Acceptance of a private contribution to a transportation system project or service in exchange for a public benefit concerning that project or service;

(B) Sharing of resources and the means of providing transportation system projects or services; or

(C) Cooperation in researching, developing, and implementing transportation system projects or services.

(6) “Solicited proposal” means a written proposal for a public-private initiative that is submitted by a private entity for the purpose of entering into an agreement with the department concerning a transportation system project in response to

a formal solicitation or notification issued by the department. A solicited proposal may be made as a competing proposal or comparable proposal to an unsolicited proposal.

(7) "Transportation system" means the state transportation infrastructure and related systems, including highways, roadways and associated rights of way, bridges, tunnels, overpasses, ferries, airports, port facilities, vehicle parking facilities, park-and-ride lots, transit systems, transportation management systems, intelligent vehicle highway systems, or similar facilities used for the transportation of persons or goods, together with any other property, buildings, structures, parking areas, appurtenances, and facilities needed to operate such system, including any major transportation facility as defined by paragraph (3) of subsection (a) of Code Section 32-2-3, and any other facility for other transportation purposes as defined by paragraph (18) of Code Section 32-1-3.

(8) "Unsolicited proposal" means a written proposal for a public-private initiative that is submitted by a private entity for the purpose of entering into an agreement with the department concerning a transportation system project but that is not in response to a formal solicitation or request issued by the department.

### **§ 32-2-79. Proposals for public-private initiatives; requirements.**

(a) The department may solicit upon prior notice to the Governor, receive, consider, evaluate, and accept an unsolicited or solicited proposal for a public-private initiative only if the proposal complies with all of the requirements of this Code section.

(b) The department may consider an unsolicited proposal only if the proposal:

(1) Is unique and innovative in comparison with and is not substantially similar to other transportation system projects already in the state transportation improvement program within the department or, if it is similar to a project in the state transportation improvement program, that such project has not been fully funded by the department or any other entity as of the date the proposal is submitted. Unique or innovative features which may be considered by the department in evaluating such a proposal may include but not be limited to unique or innovative financing, construction, design, or other components as compared with other projects or as otherwise defined by department rules or regulations;

(2) Is independently originated and developed by the proposer; and

(3) Includes or is accompanied by:

(A) Such detail and information as the department may require by rule or regulation to assist in its evaluation of the proposal and to determine if the proposal benefits the public. Such information shall include a list of any proprietary information included in the proposal which the proposer considers protected trade secrets or other information exempted from disclosure under Code Section 50-18-70, et seq., except that the information shall also include an executive summary which at a minimum shall summarize the proposed transportation facility or facilities, identify their proposed location, and provide any other additional information that may be required by the rules and regulations of the department. Such executive summary shall be subject to immediate disclosure to other interested competing proposers and the public;

(B) An itemized, auditable listing of the costs associated with the development of the proposal; and



(C) Such fees as may be required by the rules and regulations of the department for submission of such proposals.

(c) Paragraph (1) of subsection (b) of this Code section shall not be deemed to prohibit the department from encouraging the submission of unsolicited or solicited proposals that are well-developed and consistent with the department's general policy priorities by providing written or oral information to any person regarding the policy priorities or the requirements and procedures for submitting an unsolicited or solicited proposal.

(d) If the unsolicited proposal does not comply with the requirements of subsection (b) of this Code section, the department shall return the proposal without further action. In taking such action, the department shall not disclose either the originality of the research or any proprietary information associated with the proposal to any other person or entity. If the unsolicited proposal complies with all the requirements of subsection (b) of this Code section, the department may further evaluate the proposal pursuant to this Code section.

(e) Within 30 days of receipt of an unsolicited proposal that meets the requirements of subsection (b) of this Code section, the department shall provide public notice of the proposed project. This notice shall:

(1) Be published in a newspaper of general circulation which is a legal organ and upon such electronic website providing for general public access as the department may develop for such purpose or in the same manner as publications providing notice as described in Code Section 32-2-65;

(2) Be provided to any person or entity that expresses in writing to the department an interest in the subject matter of the proposal and to any member of the General Assembly whose House or Senate district would be affected by such proposal;

(3) Outline the general nature and scope of the unsolicited proposal, including the location of the transportation system project and the work to be performed on the project; and

(4) Specify the address to which any comparable proposal must be submitted.

(f) Any person or entity who elects to submit a competing proposal for the proposed qualifying project to the department shall submit a written letter of intent to do so by no later than 45 days after the department's initial publication of the notice accompanied by any fee that the department shall prescribe by guideline, rule, or regulation. Any letter of intent received by the department after the expiration of the 45 day period or without any fee required by the department shall not be valid, and any competing proposal submitted thereafter by a person or entity who has not submitted a timely letter of intent shall not be considered by the department and shall be returned to the person or entity who did not submit a letter of intent by the deadline. For those persons or entities who elect to submit a competing proposal and submit a timely letter of intent with the department, any such competing proposal shall be submitted to the department by no later than 135 days after the department's initial publication of the notice required by this Code section. Only those competing, compliant proposals submitted by such deadline shall be considered by the department.

(g) Upon receipt of a proposal properly submitted in response to the notice described in subsection (e) of this Code section which fully meets the requirements of subsection (b) of this Code section, the department shall:

(1) Determine, in its discretion, if any submitted proposal is comparable in nature and scope to the original proposal and whether it warrants further evaluation;

(2) Evaluate the original proposal and any comparable proposal and make a recommendation to the Evaluation Committee on whether to move forward with a letter of intent to negotiate; and

(3) Conduct good faith discussions and, if necessary, negotiations concerning each qualified proposal.

(h) The department shall base its evaluation of the original proposal or comparable proposals on the following factors:

(1) Unique and innovative methods, approaches, or concepts demonstrated by the proposal;

(2) Scientific, technical, or socioeconomic merits of the proposal;

(3) Potential contribution of the proposal to the department's mission;

(4) Capabilities, related experience, facilities, or techniques of the proposer as described in the proposal or unique combinations of these qualities that are integral factors for achieving the proposal objectives;

(5) Qualifications, capabilities, and experience of the proposed principal investigator, team leader, or key personnel who are critical in achieving the proposal objectives; and

(6) Any other factors appropriate to a particular proposal.

(i) Once the department has concluded its evaluation of the unsolicited proposal and any comparable proposals or a solicited proposal where applicable, the department shall transmit its findings and research to the Evaluation Committee for further review. Once the Evaluation Committee has concluded its review and makes its recommendation to the department, the department may execute a letter of intent to negotiate with the entity submitting the most desirable proposal as determined by the department's evaluation process. At least two weeks prior to approval of any project, the department shall present to the Governor and the House and Senate transportation committees a report with respect to the proposed letter of intent to negotiate. Such letter of intent to negotiate shall indicate the department's willingness to undertake a public-private initiative if, after public comment:

(1) The department determines that the project is financially feasible and in the public interest; and

(2) The department and the proposer can arrive at agreeable terms and conditions, including price of the project.

(j) The department may execute a letter of intent to negotiate relating to an unsolicited proposal or conforming comparable proposal or a solicited proposal only if:

(1) The proposal receives a favorable evaluation by the department and the Evaluation Committee;

(2) The department makes a written determination based on facts and circumstances that the proposal is an acceptable basis for an agreement to obtain services from the entity making the proposal; and

(3) The specific letter of intent to negotiate is specifically approved by affirmative vote of the State Transportation Board.

(k) Once the letter of intent to negotiate is signed by the parties, prior to final contracting for any public-private initiative from the unsolicited or conforming comparable proposal or a solicited proposal, the department:

(1) Should provide public notice that the department will receive public comment with respect to such proposal. The notice shall:

(A) Be published in a newspaper of general circulation and which is a legal organ, and upon such electronic website providing for general public access as the department may develop for such specific purpose, or in the same manner as publications providing notice as described in Code Section 32-2-65, or both, allowing at least 14 days and no more than 45 days for public comment to be submitted for consideration;

(B) Be provided to any person or entity that expresses in writing to the department an interest in the subject matter of the proposal;

(C) Outline the general nature and scope of the proposal, including the location of the transportation system project and the work to be performed on the project; and

(D) Specify the address to which any public comment or requests for an executive summary must be submitted; and

(2) In its discretion, may provide additional opportunity for public comment at a public meeting or meetings. In such event, notice of such meetings shall be provided in the same manner as described in paragraph (1) of this subsection.

(l) In taking the actions required by subsections (e) and (k) of this Code section, the department shall not disclose either the originality of the research or any proprietary information associated with the proposal as listed by the proposer required by paragraph (3) of subsection (b) of this Code section.

(m) Except as provided under subparagraph (b)(3)(A) of this Code section, the provisions of Code Sections 50-14-1 and 50-18-70 to the contrary notwithstanding, no proposal shall become a "public record" nor be subject to disclosure as such until the unsolicited proposal, any comparable proposals, or any solicited proposals have been received and any competitive interviews specified in the solicitation process have been completed. At all times thereafter, the department shall not disclose trade secret or proprietary information, or both, specifically designated by the proposer as required by paragraph (3) of subsection (b) of this Code section which meets the definition of a trade secret under Code Section 50-18-70, et seq. Subject to the foregoing, all proposals submitted to the department shall become the property of the department and are subject to the Georgia Open Records Act. Proposers should familiarize themselves with the provisions of the Act to ensure that all documents identified as confidential will not be subject to disclosure under the Open Records Act; provided, however, that the department in consultation with the Department of Law shall make the final determination of whether or not the requested materials are exempt from disclosure. In the event that the department elects to disclose the requested material, it shall attempt to provide the proposer advance notice of its intent to disclose.

(n) The power of eminent domain shall not be delegated to any private entity under any public-private initiative commenced or proposed pursuant to this chapter.

(o) The department or the department's designee has the authority to make the determination and take the actions required by this Code section.

(p) If the department rejects or declines to accept an unsolicited proposal, but within a period of two years following the submission of such proposal the department contracts for a substantially similar project, the department shall reimburse the proposer of the unsolicited proposal for the auditable costs associated with the preparation and development of the proposal upon a request for reimbursement to the department. This provision shall not apply if the department accepts a conforming comparable proposal through the procedures outlined in subsections (f) and (g) of this Code section.

### **§ 32-2-80. Acceptance of unsolicited proposal; funding; rejecting of proposal**

(a) If the department follows the evaluation criteria set forth in Code Section 32-2-79 and if an unsolicited or solicited proposal contains all the information required by that Code section and the proposal is accepted by the department as demonstrated by the execution of a letter of intent to negotiate, upon completion of the public comment period, the department shall have the authority to contract with the proposer for a public-private initiative based upon the proposal without subjecting such contract to public bid as required by Code Section 32-2-64, 32-10-68, or 50-5-72. Such contracts shall be in compliance with all other applicable federal and state laws, including, but not limited to, Code Sections 13-10-40, 13-10-60, and 32-2-70, and each specific contract shall be specifically approved by affirmative vote of the State Transportation Board and concurrence by the Governor.

(b) Any agreement entered into pursuant to this article may authorize funding to include tolls, fares, or other user fees and tax increments for use of the transportation facility that is the subject of the proposal. The department may take any action to obtain federal, state, or local assistance for a qualifying project that serves the public purpose of this chapter and may enter into any contracts required to receive such assistance. Any funds received from the state or federal government or any agency or instrumentality thereof shall be subject to appropriation as provided by the Constitution and laws of this state. The department may determine that it serves the public purpose of this chapter for all or any portion of the costs of a qualifying project to be paid, directly or indirectly, from the proceeds of a grant or loan made by the federal, state, or local government or any instrumentality thereof, including, but not limited to, the State Road and Tollway Authority and the Georgia Highway Authority. The department may agree to make grants or loans to the operator from time to time from amounts received from the federal, state, or local government or any agency or instrumentality, including, but not limited to, the State Road and Tollway Authority and the Georgia Highway Authority.

(c) The department, in its sole discretion, may reject any unsolicited or solicited proposal at any time until a contract is signed with the entity submitting the proposal. In the event that an unsolicited proposal is rejected but the department subsequently proceeds with all or part of such proposal within a period of two years, the entity submitting the proposal shall be entitled to reimbursement of the costs of developing the unsolicited proposal as indicated in subsection (p) of Code Section 32-2-79; provided, however, that the department shall not be responsible for reimbursement of the costs of developing a solicited proposal.