

SENATE No. 2442

Senate, July 14, 2016 – Text of amendment (30) (offered by Senator Tarr) to the Ways and Means amendment (Senate, No. 2423) to the House Bill relative to job creation, workforce development and infrastructure investment.

The Commonwealth of Massachusetts

In the One Hundred and Eighty-Ninth General Court
(2015-2016)

1 by inserting at the end thereof the following:-

2 SECTION XX. The General Laws, as appearing in the 2014 Official Edition, are hereby
3 amended by inserting after chapter 40W the following new chapter:-

4 CHAPTER 40X

5 PUBLIC PRIVATE PARTNERSHIPS

6 Section 1. Notwithstanding any general or special law to the contrary, a public agency, as
7 defined pursuant to section 44A of chapter 149, may elect to use public private partnerships
8 pursuant to section 1 to 18, inclusive.

9 Section 2. As used in section 1 to 18, inclusive, of this chapter the following words and
10 phrases when used in this chapter shall have the meanings given to them in this section unless
11 the context clearly indicates otherwise:

12 “Affected local jurisdiction.” A political subdivision in which all or a portion of an
13 eligible project is located.

14 “Eligible project.” A building or facility, including associated collection and distribution
15 infrastructure, used for public water supply or treatment, storm water treatment and disposal, or
16 waste water treatment and disposal.

17 “Material default.” A default by the operator in the performance of its duties under
18 section 11 which jeopardizes adequate service to the public from an eligible project.

19 “Offeror.” A private entity that submits a proposal under this chapter.

20 “Operator.” The private entity that is responsible for an eligible project or a portion of an
21 eligible project, including acquisition, design, construction, improvement, renovation, expansion,
22 equipping, maintenance and operation.

23 “Private entity.” An individual, corporation, limited liability company, partnership, joint
24 venture or other private business entity.

25 “Public-private partnership agreement.” An agreement between a public agency and a
26 private entity that involves the planning, financing, development, or operation, or combination
27 thereof, of an eligible project using any delivery method or agreement or combination of
28 methods or agreements that the public agency determines will address the needs of the public
29 agency and serve the public interest.

30 “Responsible offeror.” An offeror that has submitted a responsive proposal and possesses
31 the capability to fully perform the contract requirements in all respects and the integrity and
32 reliability to assure good faith performance.

33 “Revenue.” Any of the following generated by an eligible project:

34 (1) A user fee.

35 (2) A service payment.

36 “Service payment.” A performance-based payment to the operator of an eligible project
37 pursuant to a public-private partnership agreement.

38 “User fee.” The rate or other charge imposed by the operator or the public agency, as
39 applicable, for use of the eligible project.

40 Section 3. Grant of Authority

41 Notwithstanding any general or special law to the contrary, a public agency may solicit
42 proposals and enter into a public-private partnership agreement for an eligible project with that
43 responsible offeror submitting the proposal that is most advantageous to the public agency in
44 accordance with this chapter; provided, however, that the public-private partnership agreement
45 shall not be subject to section 14 to 21, inclusive, of chapter 149A and the competitive bid
46 requirements set forth in sections 44 to 57, inclusive, of chapter 7C, section 39M of chapter 30,
47 or sections 44A to 44J, inclusive, of chapter 149 of the General Laws; and provided further, that
48 each such contract shall be awarded pursuant to chapter 30B of the General Laws, except for
49 clause (3) of paragraph (b) of section 6, clause (3) of paragraph (e) of said section 6, paragraph
50 (g) of said section 6 and sections 13 and 16.

51 Section 4. Unsolicited proposals.

52 A private entity may request consideration and approval of a proposed public-private
53 partnership agreement for an eligible project. The request may be submitted to the applicable
54 public agency, and any proposal under this section shall not be approved unless the public

55 agency follows procedures outlined in section 5. A request shall be accompanied by the
56 following material and information:

57 (1) A topographic map of 1:2,000 or other appropriate scale indicating the location of the
58 eligible project.

59 (2) A description of the eligible project, including the conceptual design of the facility or
60 a conceptual plan for the provision of services and a schedule for the initiation of and completion
61 of the eligible project to include the proposed major responsibilities and timeline for activities to
62 be performed by both the public agency and private entity.

63 (3) A statement setting forth the method by which the private entity proposes to secure
64 the necessary property interests required for the eligible project. The statement shall include the
65 following:

66 (i) The names and addresses, if known, of the current owners of the property needed for
67 the eligible project.

68 (ii) The nature of the property interests to be acquired.

69 (4) Information relating to the current plans, if any, for development of facilities to be
70 used by a public agency that are similar to the eligible project being proposed by the private
71 entity.

72 (5) A list of all permits and approvals required for the eligible project from federal, state
73 or political subdivisions and a projected schedule for obtaining the permits and approvals.

74 (6) A list of any utility facilities known to the private entity that may be crossed or
75 affected by the eligible project and a statement of the plans of the operator to accommodate the
76 crossings or affected facilities.

77 (7) A statement setting forth the private entity's general plans for financing the eligible
78 project, including the sources of the private entity's funds.

79 (8) The names and addresses of the persons who may be contacted for further
80 information concerning the request.

81 (9) User fees and other service payments proposed in the public-private partnership
82 agreement, including frequency of assessments and the methodology and circumstances for
83 changes to the user fees or other service payments.

84 (10) Any additional material and information as the public agency may reasonably
85 request.

86 Section 5. Solicitation of proposals

87 (a) The request for proposals for an eligible project shall specify the method for
88 comparing proposals to determine the proposal offering the lowest overall cost to the public
89 agency, including, but not limited to, all capital financing, operating and maintenance and life-
90 cycle costs. If the public agency awards the contract to an offeror who did not submit the
91 proposal with the lowest overall cost, the public agency shall explain the reason for the award in
92 writing. The request for proposals shall set forth performance guarantees, which the selected
93 offeror will be required to meet in operating the eligible project as constructed or improved. The

94 public-private partnership agreement that is negotiated with the selected offeror based on the
95 request for proposals shall, shall contain the terms required in section 7.

96 (b) The chief procurement officer of the public agency shall solicit proposals through a
97 request for proposals which shall include those items in subsection of (a) of this section 5 and
98 those items in clauses (1) and (2) of paragraph (b) of section 6 of chapter 30B of the General
99 Laws and the proposed key contractual terms and conditions for the public-private partnership
100 agreement, some of which may be mandatory or non-negotiable. The request for proposals may
101 also request proposals or offer options for fulfillment of other contractual terms and other matters
102 as may be determined by the public agency. The request for proposals shall provide for the
103 submission of separate price proposal and shall indicate when and how the offerors shall submit
104 the price proposal.

105 (c) Copies of a request for proposals shall be made available to any interested person
106 residing within the affected local jurisdiction upon request to the public agency. A public agency
107 may establish procedures for the distribution of a request for proposals, including the imposition
108 of a fee to reimburse the public agency for the costs of photocopying and mailing.

109 (d) Offerors shall submit their sealed proposals to ensure that they are received prior to
110 the time and date established for receipt of the proposals. Sealed proposals shall be submitted in
111 the format required by the public agency. All sealed proposals shall be opened at the time, date
112 and place designated in the request for proposals.

113 (e) The public agency may charge a reasonable fee to cover the costs of processing,
114 reviewing and evaluating the proposal, including reasonable attorney fees and fees for financial
115 and other necessary advisers or consultants.

116 Section 6. Evaluation of proposals.

117 (a) Evaluation criteria. A public agency shall evaluate each proposal to determine which
118 one, if any, has the best value for and is in the best interest of the public agency. In making this
119 determination, a public agency may consider any of the following:

120 (1) Price.

121 (2) Financial commitment.

122 (3) Innovative financing.

123 (4) Bonding Capacity.

124 (5) Technical, scientific, technological or socioeconomic merit and innovation.

125 (6) Design, operation and feasibility of the eligible project.

126 (7) Public reputation, qualifications, industry experience, and financial capacity of the
127 private entity.

128 (8) The compatibility of the proposal with existing and future land use plans of the
129 affected local jurisdictions.

130 (9) The compatibility of the proposal with existing statutory, regulatory, and planning
131 requirements of the affected local jurisdictions as well as regional, state, and federal entities

132 (10) Other factors deemed appropriate by the public agency.

133 (b) Weighted consideration. The relative importance of each evaluation factor shall be
134 fixed prior to opening the proposals.

135 (c) Discussion with responsible offerors and revision of proposals. As provided in the
136 request for proposals, discussions and negotiations may be conducted with responsible offerors
137 for the purpose of clarification and of obtaining best and final offers. Responsible offerors shall
138 be accorded fair and equal treatment with respect to any opportunity for discussion and revision
139 of proposals. In conducting discussions, there shall be no disclosure of any information derived
140 from proposals submitted by competing offerors.

141 (d) Selection for negotiation. The responsible offeror whose proposal is determined in
142 writing to be the best value for and in the best interests of the public agency, taking into
143 consideration all evaluation factors, shall be selected for contract negotiation.

144 (e) Cancellation. A request for proposals may be canceled at any time prior to the time a
145 public private partnership agreement is executed by all parties when it is in the best interests of
146 the public agency.

147 (f) Award. Upon reaching an agreement with a responsible offeror, the public agency
148 shall enter into a public-private partnership agreement with the responsible offeror. The public-
149 private partnership agreement shall be consistent with the requirements of this chapter. If
150 agreement cannot be reached with the responsible offeror, then negotiations shall be formally
151 terminated with the responsible offeror. If proposals were submitted by one or more other
152 responsible offerors, negotiations may be conducted with the other responsible offeror or
153 offerors in the order of their respective qualification ranking. The contract may be awarded to the
154 responsible offeror whose proposal is then ranked as providing the best value.

155 Section 7. Implementation

156 (a) Contracts. Prior to acquiring, financing, designing, constructing, improving,
157 renovating, expanding, equipping, maintaining or operating the eligible project, the private entity
158 shall enter into a comprehensive partnership contract detailing the public-private partnership
159 agreement with the public agency. The contract shall provide for all of the following:

160 (1) Delivery of maintenance, performance and payment bonds or letters of credit in
161 connection with the acquisition, design, construction, improvement, renovation, expansion,
162 equipping, maintenance or operation of the eligible project, in the forms and amounts
163 satisfactory to the public agency.

164 (2) Review of plans and specifications for the eligible project by the public agency and
165 approval by the public agency if the plans and specifications conform to standards acceptable to
166 the public agency. This paragraph may not require the private entity to complete design of an
167 eligible project prior to the execution of a contract.

168 (3) Inspection of the eligible project by the public agency to ensure that the operator's
169 activities are acceptable to the public agency in accordance with the public-private partnership
170 agreement.

171 (4) Maintenance of policies of liability insurance, copies of which shall be filed with the
172 public agency accompanied by proofs of coverage, self-insurance, in form and amount
173 satisfactory to the public agency and reasonably sufficient to insure coverage of tort liability to
174 the public and employees and to enable the continued operation of the eligible project.

175 (5) Monitoring of the practices of the operator by the public agency to ensure that the
176 eligible project is properly maintained.

177 (6) Reimbursement to be paid to the public agency for services provided by the public
178 agency.

179 (7) Filing of appropriate financial statements on a periodic basis.

180 (8) Policies and procedures governing the rights and responsibilities of the public agency
181 and the operator in the event the contract is terminated or there is a material default by the
182 operator. The policies and procedures shall include conditions governing assumption of the
183 duties and responsibilities of the operator by the public agency and the transfer or purchase of
184 property or other interests of the operator by the public agency.

185 (b) Fees. The contract may provide for a user fee or service payment, or both. A copy of
186 a service contract must be filed with the public agency. When negotiating a user fee under this
187 section, the parties shall establish payments or fees that are the same for a person using the
188 facility under like conditions and that will not materially discourage use of the eligible project.
189 The execution of the contract or an amendment to the contract constitutes conclusive evidence
190 that the user fee or service payment provided for complies with this chapter. A user fee
191 established in the contract as a source of revenue may be in addition to or in lieu of a service
192 payment.

193 (c) Grants or loans. In the contract, the public agency may agree to make a grant, if the
194 terms of the grant allow, or loan to the operator from an amount received from the Federal or
195 State government or a political subdivision or from one of their agencies or instrumentalities.

196 (d) Debt. A public agency may issue and sell bonds or notes for the purpose of
197 providing funds to carry out this chapter with respect to the development, financing or operation
198 of an eligible project or the refunding of any bonds or notes, together with any costs associated

199 with the transaction. For the purpose of financing an eligible project, the department and
200 operator may apply for, obtain, issue and use private activity bonds available under any Federal
201 law or program. Any bonds, debt, other securities or other financing issued for the purposes of
202 this chapter shall not be considered a debt of the commonwealth or a pledge of the faith and
203 credit of the commonwealth.

204 (e) Duties. The contract shall incorporate the duties of the operator under this chapter
205 and may contain other terms and conditions that the public agency determines serve the public
206 purpose under section 6. The contract may contain any of the following:

207 (1) Provisions under which the public agency agrees to provide notice of default and
208 right to cure for the benefit of the operator and the persons specified in the notice as providing
209 financing for the eligible project.

210 (2) Other lawful terms and conditions to which the operator and the public agency
211 mutually agree, including provisions regarding unavoidable delays or provisions providing for a
212 loan of public funds to the operator to acquire, design, construct, improve, renovate, expand,
213 equip, maintain or operate one or more eligible projects.

214 (3) Provisions under which the authority and duties of the operator under this chapter
215 shall cease and the eligible project is dedicated to the public agency or, if the eligible project was
216 initially dedicated by an affected local jurisdiction, to the affected local jurisdiction for public
217 use.

218 (4) Provisions for activities, as necessary, to carry out the purposes authorized in this
219 chapter including, but not limited to, financing, equipment installation and replacement,
220 performance testing and operation, studies, design and engineering work, construction work,

221 ordinary repairs and maintenance and the furnishing of all related materials, supplies and
222 services required for the eligible project and the management, operation, maintenance and repair
223 of the eligible project.

224 (f) Amendments. Change in the terms of the contract, as may be agreed upon by the
225 parties, shall be added by written amendment.

226 (g) Date. In connection with its approval of the eligible project, the public agency shall
227 establish a date for the commencement of activities related to the eligible project. The public
228 agency may extend the date.

229 (h) Public access. Any documents created by or provided to a public agency under this
230 chapter shall be subject to inspection and copying only to the extent required under section 10 of
231 chapter 66 of the general laws pertaining to access to public records.

232 (i) Debt capacity. A contract entered into under this chapter shall not enlarge, diminish
233 or affect the authority otherwise possessed by the public agency to take action that would impact
234 the debt capacity of the Commonwealth or any of its political subdivisions.

235 (j) If, after negotiation with the offeror, the chief procurement officer determines that it
236 is in the public agency's best interests, the chief procurement officer may initiate negotiations
237 with the next most advantageous proposal from a responsible offeror, taking into consideration
238 price, estimated life-cycle costs and the other evaluation criteria set forth in the request for
239 proposals. The chief procurement officer shall award the public-private partnership agreement to
240 the most advantageous proposal from a responsible offeror. Subject to the approval of the public
241 agency, the chief procurement officer shall award the public private partnership agreement by

242 written notice to the selected offeror. The parties may extend the time for acceptance by mutual
243 agreement.

244 (k) Any public-private partnership agreement awarded under this act shall be subject to
245 the terms and conditions as the public agency shall determine to be in the best interests of the
246 public agency. The execution of a public-private partnership agreement under this chapter shall
247 be contingent upon, the selected offeror furnishing to the public agency performance bonds,
248 payment bonds, and liability insurance in the form and in amounts satisfactory to the public
249 agency.

250 Section 8. Term of agreement.

251 (a) Notwithstanding any general or special law to the contrary, public-private partnership
252 agreements awarded under this chapter may provide for a term, not exceeding 20 years, and an
253 option for renewal or extension of operations and maintenance services for 1 additional term, not
254 exceeding 10 years. The renewal or extension shall be at the sole discretion of the public agency
255 in accordance with the original contract terms and conditions or with contract terms and
256 conditions which are more favorable to and acceptable to the public agency.

257 (b) Upon the end of the term of the public-private partnership agreement or in the event of
258 termination of the public-private partnership agreement, the duties of the parties thereto shall
259 cease, except for any duties and obligations that extend beyond the termination as provided in the
260 public-private partnership agreement, and all the rights, title and interest in such eligible project
261 shall revert to the public agency and shall be dedicated to the public agency for public use.

262 (c) A public-private partnership agreement entered into under this chapter may provide
263 that the public agency shall not be exempt from liability for payment of the costs to finance,

264 permit, design and construct modifications or install new equipment and systems at the eligible
265 project necessary to ensure the ability of the eligible project to operate in full compliance with all
266 applicable requirements of federal, state and local law; provided, that the costs shall be amortized
267 over a period that is no longer than the useful life of the modifications, equipment and systems.
268 The public agency's payment obligations for all operations and maintenance services shall be
269 conditioned on the contractor's performance of the services in accordance with all contractual
270 terms.

271 Section 9. Affected local jurisdictions.

272 (a) Notification. Prior to entering into a public-private partnership agreement with a
273 responsible offeror in accordance with this chapter, the public agency shall notify each affected
274 local jurisdiction by furnishing a copy of the proposal to each affected local jurisdiction. The
275 responsible offeror shall reimburse the public agency for costs incurred by the agency in
276 furnishing a copy of the proposal to each affected local jurisdiction.

277 (b) Comments. Each affected local jurisdiction that is not the applicable public agency
278 for the respective eligible project shall, within 30 days after receiving the notice, submit any
279 comments it may have in writing on the proposed eligible project to the applicable public agency
280 and indicate whether the facility is compatible with the local ordinance requirements and other
281 local requirements. The comments shall be given consideration by the public agency prior to
282 entering a public-private partnership agreement with a private entity.

283 Section 10. Powers and duties of operator.

284 (a) Powers. The operator shall have the power to acquire, design, construct, improve,
285 renovate, maintain, expand, equip or operate the eligible project and impose and collect a user
286 fee or enter into a service contract in connection with the use of its power.

287 (b) Right. The operator may own, lease or acquire any other right to use or operate the
288 eligible project.

289 (c) Financing.

290 (1) Notwithstanding paragraph (2), any financing of the eligible project may be in an
291 amount and upon terms and conditions as may be determined by the operator.

292 (2) The operator may issue debt, equity or other securities or obligations, enter into sale
293 and leaseback transactions and secure any financing with a pledge of, security interest in or lien
294 on any or all of its property, including all of its property interests in the eligible project.

295 (d) Operation. In operating the eligible project, the operator may do all of the following:

296 (1) Make classifications according to reasonable categories for assessment of user fees.

297 (2) With the consent of the public agency, make and enforce reasonable rules to the same
298 extent that the public agency may make and enforce rules with respect to similar facilities.

299 (e) Duties. The operator shall do the following:

300 (1) Acquire, design, construct, improve, renovate, expand, equip, maintain or operate the
301 eligible project in accordance with the public-private partnership agreement.

302 (2) Keep the eligible project open for use by members of the public as appropriate based
303 upon the use of the facility after its initial opening upon payment of the applicable user fee or

304 service payment. The eligible project may be temporarily closed because of emergencies or with
305 the consent of the public agency, to protect the safety of the public or for reasonable construction
306 or maintenance procedures as set forth under the public-private partnership agreement.

307 (3) Maintain or provide by contract for the maintenance of the eligible project, if
308 required by the public-private partnership agreement.

309 (4) Cooperate with the public agency in making best efforts to establish any
310 interconnection with the eligible project requested by the public agency.

311 (5) Comply with the public private-partnership agreement and any service contract.

312 (f) Additional services. This section does not prohibit an operator of an eligible project
313 from providing additional services for the eligible project to private entities or local agencies,
314 other than the public agency that is party to the public-private partnership agreement, if the
315 provision of additional service does not impair the operator's ability to meet its commitments to
316 the public agency under the public-private partnership agreement.

317 Section 11. Federal, state and local assistance.

318 The public agency may obtain assistance from the Federal or State government or one of
319 its political subdivisions for an eligible project in accordance with the purposes under section 6)
320 and may enter into a contract in order to receive the assistance. The public agency may pay a
321 portion of the costs of an eligible project directly or indirectly from the proceeds of a grant or
322 loan made by the Federal or State government or one of its political subdivisions.

323 Section 12. Material default and remedies.

324 (a) General rule. If there is a material default by the operator of an eligible project, the
325 public agency may assume the responsibilities and duties of the operator, in which case it shall
326 succeed to any right, title and interest in the eligible project, subject to any liens on revenue
327 previously granted by the operator to any person providing financing.

328 (b) Condemnation. A public agency which is a party to a partnership contract, and which
329 has the power of condemnation under State law, may exercise the power of condemnation to
330 acquire the eligible project in the event of a material default by the operator. A person who has
331 provided financing for the eligible project, and the operator to the extent of its capital
332 investment, may participate in the condemnation proceedings with the standing of a property
333 owner.

334 (c) Termination. For cause shown, the public agency may terminate the public-private
335 partnership agreement and exercise any other rights and remedies that may be available at law or
336 in equity.

337 (d) Claims. The public agency may make or cause to be made any appropriate claims
338 under maintenance, performance or payment bonds or lines of credit required under this chapter.

339 (e) Procedure after takeover. If a public agency takes over an eligible project pursuant to
340 (a), it may acquire, design, construct, improve, renovate, operate, expand, equip or maintain the
341 eligible project, impose user fees, and comply with service contracts as if it were the operator.
342 Revenue subject to a lien shall be collected for the benefit of and paid to secured parties, as their
343 interests may appear, to the extent necessary to satisfy the operator's obligations to secured
344 parties, including the maintenance of reserves. Liens shall be correspondingly reduced and
345 released when they are paid off. Before a payment to or for the benefit of secured parties, the

346 public agency may use revenue to pay current operation and maintenance costs of the eligible
347 project, including compensation to the responsible public agency for its services in operating and
348 maintaining the eligible project. The right to receive payment, if any, is just compensation for the
349 eligible project. The full faith and credit of the public agency may not be pledged to secure any
350 financing of the operator by the election to take over the eligible project. Assumption of
351 operation of the eligible project may not obligate the public agency to pay an obligation of the
352 operator from sources other than revenue.

353 Section 13. Utility Crossings.

354 Notwithstanding any other provision of law, the following shall apply:

355 (1) The operator and each public utility, railroad and cable television provider whose
356 facilities are to be crossed or affected by an eligible project shall cooperate fully in planning and
357 arranging the manner of the crossing or relocation of the facilities.

358 (2) All costs incurred by the public utility, railroad or cable television provider in
359 relocating, constructing or reconstructing its facilities, including temporary facilities, shall be
360 paid by the operator.

361 (3) If the operator and a public utility, railroad or cable television provider are unable to
362 agree upon costs to be paid by the operator under paragraph (2), the department of public utilities
363 of the Commonwealth shall determine the amount of the payment to be made by the operator.

364 Section 14. Governmental immunity.

365 This chapter shall not be construed or deemed to constitute a waiver of the governmental
366 immunity of a public agency or an affected local jurisdiction with respect to participation in or

367 approval of an eligible project or its operation, including interconnection of the eligible project
368 with another infrastructure or project. An affected local jurisdiction has governmental immunity
369 with respect to an eligible project's design, construction and operation.

370 Section 15. Special approval.

371 A public agency may enter into a private-partnership agreement under this chapter only
372 with the approval of its governing body.

373 Section 16. Exclusivity.

374 The provisions of this chapter shall constitute the exclusive method of procurement for
375 agreements entered into under this chapter, notwithstanding any other law. In the event of a
376 conflict with another statute or regulation, the provisions of this chapter shall govern.

377 Section 17. Use of intellectual property.

378 Unless otherwise agreed and except to the extent not transferable by law, the public
379 agency shall have the right to use all or a portion of a submitted proposal, including the
380 technologies, techniques, methods, processes and information contained in the proposal. Notice
381 of nontransferability by law shall be given to the public agency in response to the request for
382 proposals.

383 Section 18. Regulations.

384 The Office of the Inspector General shall, within 12 months of the effective date of this
385 section, promulgate proposed regulations which are necessary to implement the provisions of
386 this chapter.