

SENATE No. 1913

The Commonwealth of Massachusetts

PRESENTED BY:

Bruce E. Tarr

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act providing for alternative delivery of infrastructure projects.

PETITION OF:

NAME:	DISTRICT/ADDRESS:	
<i>Bruce E. Tarr</i>	<i>First Essex and Middlesex</i>	
<i>Michael O. Moore</i>	<i>Second Worcester</i>	<i>2/1/2019</i>

SENATE No. 1913

By Mr. Tarr, a petition (accompanied by bill, Senate, No. 1913) of Bruce E. Tarr and Michael O. Moore for legislation to provide for alternative delivery of infrastructure projects. State Administration and Regulatory Oversight.

The Commonwealth of Massachusetts

**In the One Hundred and Ninety-First General Court
(2019-2020)**

An Act providing for alternative delivery of infrastructure projects.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. The General Laws are hereby amended by inserting after chapter 40W the
2 following chapter:-

3 CHAPTER 40X. Public Private Partnerships

4 Section 1. As used in this chapter the following words shall, unless the context clearly
5 indicates otherwise, have the following meanings: "Eligible project", a building or facility,
6 including associated collection and distribution infrastructure, used for public water supply or
7 treatment, storm water treatment and disposal, waste water treatment and disposal, or flood
8 control.

9 "Material default", a default by the operator in the performance of its duties under a
10 public-private partnership agreement which jeopardizes delivery of adequate service to the
11 public from an eligible project and remains unsatisfied after a reasonable period of time after the
12 operator has received written notice from the public agency of the failure, or any other default

13 that has a material adverse financial impact on the public agency or the users of the eligible
14 project as determined by the public agency pursuant to procedures set forth in the public-private
15 partnership agreement.

16 "Offeror", a private entity that submits a proposal under this chapter.

17 "Operator", a private entity that has entered into a public-private partnership agreement
18 with a public agency under this chapter.

19 "Private entity", an individual, corporation, limited liability company, general or limited
20 partnership, joint venture, business trust, public benefit corporation, non-profit entity or other
21 private business entity.

22 "Public agency", a municipality or two or more municipalities acting together, a
23 redevelopment authority, or a fire, water, sewer, or water pollution abatement district, howsoever
24 named, formed for the purpose of carrying out any of the aforementioned functions, whether
25 established under general law or special act or otherwise authorized by law.

26 "Public-private partnership agreement", an agreement between a public agency and a
27 private entity for the lease, operation and maintenance, repair or replacement, financing, design,
28 construction, modifications, or installation, or any combination thereof, of an eligible project
29 necessary to ensure adequate services and ensure the ability of the public agency to operate in
30 full compliance with all applicable requirements of federal, state and local law, as determined by
31 the public agency in its sole discretion.

32 "Responsible offeror", an offeror that has submitted a responsive proposal that conforms
33 in all material respects to the public agency's solicitation for bids, as determined by the public

34 agency in its sole discretion, and that possesses the capability to fully perform the contract
35 requirements in all respects and the integrity and reliability to assure good faith performance.

36 "Revenue", a user fee or service payment, or both, generated by an eligible project.

37 "Service payment", a performance-based payment to the operator made by a public
38 agency, pursuant to a public-private partnership agreement.

39 "User fee", a rate or other charge imposed by the operator or the public agency, as
40 applicable, pursuant to a public-private partnership agreement for use of the eligible project.

41 Section 2. Notwithstanding any general or special law to the contrary, a public agency
42 may solicit proposals and enter into a public-private partnership agreement for an eligible project
43 in accordance with this chapter; provided, however, that the public-private partnership agreement
44 shall not be subject to sections 14 to 21, inclusive, of chapter 149A and the competitive bid
45 requirements set forth in sections 44 to 57, inclusive, of chapter 7C, section 39M of chapter 30,
46 or sections 44A to 44J, inclusive, of chapter 149; and provided further, that each such public-
47 private partnership agreement shall be awarded pursuant to this chapter and chapter 30B of the
48 General Laws, except for clause (3) of paragraph (b) of section 6, clause (3) of paragraph (e) of
49 said section 6, paragraph (g) of said section 6, and sections 13 and 16 of said chapter 30B.

50 Section 3. A public agency that receives an unsolicited proposal for a public-private
51 partnership agreement may, in its sole discretion, reject the unsolicited proposal. A public agency
52 shall not approve an unsolicited proposal or enter into a public-private partnership agreement
53 with the entity submitting the unsolicited proposal, unless the public agency follows the
54 procedures set forth in sections 4 and 5 of this chapter.

55 Section 4. (a) No public agency shall enter into a public-private partnership agreement for
56 an eligible project without first soliciting proposals as set forth in this section. The request for
57 proposals for an eligible project shall specify the method for comparing proposals to determine
58 which offerors are responsible offerors and which proposal from a responsible offeror best meets
59 the factors listed in subsection (a) of section 5. If the public agency awards the public-private
60 partnership agreement to a responsible offeror who did not submit the proposal with the lowest
61 overall cost, including but not limited to all capital financing, operating and maintenance and
62 life-cycle costs, the public agency shall explain the reason for the award in writing as provided in
63 paragraph (h) of section 6 of chapter 30B. The request for proposals shall set forth mandatory
64 performance guarantees, which the selected responsible offeror will be required to meet in
65 operating the eligible project as constructed or improved. The public-private partnership
66 agreement that is negotiated with the selected offeror based on the request for proposals shall
67 obligate the selected responsible offeror to meet such mandatory performance guarantees, in
68 addition to any other terms required by section 6, and shall set forth the minimum design
69 requirements for such construction or improvements and the acceptance tests to be conducted
70 upon the completion of the construction or improvements in order to demonstrate that the
71 eligible project is capable of meeting the performance guarantees.

72 (b) The chief procurement officer or other designated official of the public agency shall
73 solicit proposals through a request for proposals which shall include, at a minimum, the items in
74 subsection (a) of section 4 of this chapter, the items in paragraphs (1) and (2) of subsection (b) of
75 section 6 of chapter 30B, and the proposed key contractual terms and conditions for the public-
76 private partnership agreement, some of which may be mandatory or non-negotiable. The request
77 for proposals may also request proposals to address other contractual terms and other matters as

78 may be determined by the public agency. The request for proposals shall provide for the
79 submission of a separate price proposals and shall indicate when and how the offerors shall
80 submit the price proposal.

81 (c) A public agency may establish procedures for the distribution of a request for
82 proposals, and may charge a reasonable fee to cover the costs of processing, reviewing and
83 evaluating the proposal, including reasonable attorney fees and fees for financial and other
84 reasonably necessary advisers or consultants.

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

89 Section 5. (a) A public agency shall evaluate each proposal to make a preliminary
90 determination as to which one, if any, is the most advantageous proposal for the public agency.

91 In making this determination, a public agency may consider any of the following:

92 (1) price;

93 (2) estimated life-cycle costs;

94 (3) lower user charges proposed over the term of the agreement;

95 (4) form and reliability of the performance guarantee proposed;

96 (5) financial commitment;

97 (6) innovative financing;

- 98 (7) bonding capacity;
- 99 (8) technical, scientific, technological or socioeconomic merit and innovation;
- 100 (9) proposed design, operation and feasibility of the eligible project;
- 101 (10) public reputation, qualifications, industry experience, and financial strength of the
102 private entity;
- 103 (11) compatibility of the proposal with existing and future land use plans of the public
104 agency;
- 105 (12) compatibility of the proposal with applicable statutory, regulatory, and planning
106 requirements; and
- 107 (13) any other factors deemed appropriate by the public agency and identified in the
108 request for proposals.

109 (b) The relative importance of each evaluation factor shall be ranked prior to issuing the
110 request for proposals.

111 (c) The request for proposals shall provide an opportunity for the public agency to engage
112 in negotiations with responsible offerors for the purpose of clarifying bid responses and
113 obtaining best and final offers. Responsible offerors shall be accorded fair and equal treatment
114 with respect to any opportunity for negotiation and revision of proposals. In conducting such
115 negotiations, the public agency shall not disclose any information derived from proposals
116 submitted by competing offerors.

117 (d) The responsible offeror whose proposal is preliminarily determined under subsection

118 (a) to be the most advantageous for the public agency, taking into consideration all
119 relevant evaluation factors, shall be selected for negotiation of the public-private partnership
120 agreement.

121 The public agency may negotiate all terms of the agreement not deemed mandatory or
122 non- negotiable with such offeror. If after negotiation with such offeror, the public agency
123 determines that it is in the best interests of the public agency, the public agency may determine
124 the proposal which is the next most advantageous proposal from a responsible offeror taking into
125 consideration the evaluation criteria set forth in the request for proposals, and initiate
126 negotiations regarding the terms of a public-private partnership agreement with such offeror. The
127 public agency shall award the contract to the most advantageous proposal from a responsible
128 offeror taking into consideration price, the evaluation criteria set forth in the request for
129 proposals, and the terms of the negotiated contract.

130 (e) A request for proposals may be canceled or modified when it is in the best interests of
131 the public agency, as determined by the agency at its sole discretion, at any time prior to the time
132 a public private partnership agreement is executed by all parties. Subject to the provisions of
133 subsection (c), the public agency may also terminate negotiations with any offeror over the terms
134 of a public-private partnership agreement, at any time prior to execution of such agreement.

135 Section 6. (a) Prior to delivering applicable services for an eligible project, the selected
136 responsible offeror shall enter into a comprehensive public-private partnership agreement with
137 the public agency in accordance with this section. A public agency may enter into a private-
138 partnership agreement if authorized by a simple majority vote of its governing body and, in the
139 case of a public agency that is one or more municipalities, if authorized by a simple majority

140 vote of each municipality's governing body. The public-private partnership agreement shall
141 provide for all of the following:

142 (1) delivery of maintenance, performance and payment bonds or letters of credit, or other
143 security for the selected offeror's obligations under the public-private partnership agreement for
144 the eligible project, in the forms and amounts satisfactory to the public agency;

145 (2) obligation of the selected offeror to meet mandatory performance guarantees,
146 including the minimum design requirements for any construction or improvements and the
147 acceptance tests to be conducted upon the completion of the construction or improvements in
148 order to demonstrate that the eligible project is capable of meeting the performance guarantees;

149 (3) review of plans and specifications for the eligible project by the public agency and
150 approval by the public agency if the plans and specifications conform to standards acceptable to
151 the public agency;

152 (4) inspection and auditing of the eligible project by the public agency to ensure that the
153 operator's activities are acceptable to the public agency in accordance with the public-private
154 partnership agreement, including all performance guarantees set forth in the request for
155 proposals;

156 (5) maintenance of policies of liability insurance, copies of which shall be filed with the
157 public agency accompanied by proofs of coverage, self-insurance, in form and amount
158 satisfactory to the public agency and reasonably sufficient to insure coverage of tort liability to
159 the public and employees and to enable the continued operation of the eligible project;

160 (6) monitoring of the practices of the operator by the public agency to ensure that the
161 eligible project is properly maintained;

162 (7) reimbursement to be paid to the public agency for services provided by the public
163 agency;

164 (8) filing of appropriate financial statements on a periodic basis; and

165 (9) policies and procedures governing the rights and responsibilities of the public agency
166 and the operator in the event the public-private partnership agreement is terminated or there is a
167 material default by the operator, including conditions governing assumption of the duties and
168 responsibilities of the operator by the public agency and the transfer of property or other interests
169 of the operator by the public agency.

170 (b) The public-private partnership agreement may provide for a user fee or service
171 payment, or both. When negotiating a user fee under this section, the parties shall establish
172 payments or fees that are the same for a person using the facility under like conditions and that
173 will not materially discourage use of the eligible project. A user fee established in the public-
174 private partnership agreement as a source of revenue may be in addition to or in lieu of a service
175 payment.

176 (c) In the public-private partnership agreement, the public agency may agree to make a
177 grant or loan or otherwise direct funds to the operator from an amount received pursuant to a
178 grant or loan from the federal or state government or a political subdivision or agency thereof, if
179 the terms of the grant or loan so allow.

180 (d) For the purpose of providing funds to carry out this chapter with respect to the
181 development, financing or operation of an eligible project or the refunding of any bonds or notes,
182 together with any costs associated with the transaction: (1) a public agency may authorize, issue
183 and sell general obligations bonds or notes, to the extent and in the manner otherwise provided
184 by law; or (2) a public agency may authorize, issue and sell revenue bonds or notes in the
185 manner provided in section 4 of chapter 40Q. For the purpose of financing an eligible project, the
186 public agency may apply for, obtain, issue and use private activity bonds available under any
187 federal law or program. Any bonds, debt, other securities or other financing issued for the
188 purposes of this chapter shall not be considered a debt of the commonwealth or a pledge of the
189 full faith and credit of the commonwealth.

190 (e) The public-private partnership agreement shall incorporate the duties of the operator
191 under this chapter and may contain other terms and conditions that the public agency determines
192 serve the public purpose.

193 (f) The public agency shall establish a date for the commencement of activities under the
194 public-private partnership agreement related to the eligible project. The public agency may
195 extend the date, pursuant to the applicable provisions in the public-private partnership
196 agreement.

197 (g) A public-private partnership agreement entered into under this chapter shall not
198 enlarge, diminish or affect the authority otherwise possessed by the public agency to take action
199 that would impact the debt capacity of the commonwealth or any of its political subdivisions and
200 this chapter shall not be construed to authorize indebtedness in an amount exceeding the limits
201 established by section 10 of chapter 44.

202 Section 7. (a) Notwithstanding any general or special law to the contrary, public-private
203 partnership agreements awarded under this chapter may provide for a term, not exceeding 20
204 years, and an option for renewal or extension of operations and maintenance services for 2
205 additional terms, not exceeding 10 years each. The renewal or extension shall be at the sole
206 discretion of the public agency in accordance with the original contract terms and conditions or
207 with contract terms and conditions which are more favorable to and acceptable to the public
208 agency.

209 (b) Upon the end of the term of the public-private partnership agreement or in the event
210 of termination of the public-private partnership agreement, the duties of the parties thereto shall
211 cease, except for any duties and obligations that extend beyond the termination as provided in the
212 public-private partnership agreement, and all the rights and interests associated with such eligible
213 project shall revert to the public agency and shall be dedicated to the agency for public use.

214 Section 8. (a) The operator shall have the authority to conduct the activities identified in
215 the public-private partnership agreement and to impose and collect a user fee or a service
216 payment, or both, as set forth in such agreement.

217 (b) (1) Notwithstanding paragraph (2), any financing of the eligible project may be in an
218 amount and upon terms and conditions as may be determined by the operator consistent with the
219 public-private partnership agreement.

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

223 (c) In operating the eligible project, the operator may do any of the following, to the
224 extent permitted by the public-private partnership agreement:

225 (1) make classifications according to reasonable categories for assessment of user fees;

226 (2) with the consent of the public agency, make and enforce reasonable rules to the same
227 extent that the public agency may make and enforce rules with respect to similar facilities;

228 (d) In operating the eligible project, the operator shall:

229 (1) design, construct, improve, renovate, expand, equip, maintain, operate or finance the
230 eligible project in accordance with the public-private partnership agreement;

231 (2) keep the eligible project open for use by members of the public as appropriate based
232 upon the use of the facility after its initial opening upon payment of the applicable user fee or
233 service payment; provided, however, that the operator may temporarily close the eligible project,
234 because of emergencies or with the consent of the public agency, to protect the safety of the
235 public or for reasonable construction or maintenance procedures as set forth under the public-
236 private partnership agreement;

237 (3) maintain or provide by contract for the maintenance of the eligible project, if required
238 by the public-private partnership agreement;

239 (4) cooperate with the public agency in making best efforts to establish any
240 interconnection with the eligible project requested by the public agency; and

241 (5) comply with the public private-partnership agreement and any service contract.

242 (e) This section does not prohibit an operator of an eligible project from providing
243 additional services for the eligible project to private entities or local agencies other than the
244 public agency that is party to the public-private partnership agreement, if the provision of
245 additional service does not impair the operator's ability to meet its commitments to the public
246 agency under the public-private partnership agreement.

247 Section 9. (a) Upon the occurrence of a material default by the operator not caused by an
248 event of force majeure, the public agency may exercise all rights and remedies available to it
249 pursuant to the public private partnership agreement, including without limitation the termination
250 of the public private partnership agreement. In addition to such rights and remedies, if the public
251 agency determines that the operator has failed or will fail to provide adequate and reasonable
252 service to the persons served by the eligible project, the public agency may, by written notice to
253 the operator, temporarily assume some or all of the responsibilities and duties of the operator, at
254 the sole expense of the operator. If a public agency shall temporarily assume the responsibilities
255 of the operator pursuant to this subsection (a), the public agency may design, construct, improve,
256 renovate, operate, expand, equip or maintain the eligible project, impose user fees, collect
257 revenue and comply with service contracts as if it were the operator. Revenue subject to a pre-
258 existing lien shall be collected for the benefit of and paid to secured parties, as their interests may
259 appear, to the extent necessary to satisfy the operator's obligations to secured parties, including
260 the maintenance of reserves; provided, however, that revenue shall first be allocated to pay
261 current operation and maintenance costs of the eligible project, including compensation to the
262 public agency for its services in operating and maintaining the eligible project. Assumption of
263 operation of the eligible project shall not obligate the public agency to pay any obligation of the
264 operator from sources other than revenue from such eligible project.

265 (b) A public agency which is a party to a public-private partnership agreement, and which
266 has the power of condemnation under state law, may exercise the power of condemnation to
267 acquire the operator's rights and interests in the eligible project as may be needed to cure a
268 material default or otherwise to advance a public purpose. Upon such taking, the public entity
269 shall succeed to the operator's rights and interests in the eligible project, subject to any liens on
270 revenue previously granted by the operator to any person providing financing. The operator and
271 any person who has a lien on the revenue generated by the eligible project shall have standing to
272 intervene in the condemnation proceedings.

273 (c) The public agency may make or cause to be made, at any time, any appropriate claims
274 under maintenance, performance or payment bonds, lines of credit or other forms of security
275 required under this chapter.

276 Section 10. This chapter shall not be construed or deemed to constitute a waiver of the
277 governmental immunity of a public agency.