

State of Minnesota  
HOUSE OF REPRESENTATIVES

EIGHTY-NINTH SESSION

H. F. No. 1723

03/10/2015 Authored by Sanders and Koznick

The bill was read for the first time and referred to the Committee on Government Operations and Elections Policy

1.1 A bill for an act  
1.2 relating to state government; adopting public-private partnership agreements  
1.3 concerning public buildings and public infrastructure; authorizing rulemaking;  
1.4 proposing coding for new law in Minnesota Statutes, chapter 446.

1.5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

1.6 Section 1. **PUBLIC PURPOSE.**

1.7 The legislature makes the following findings:

1.8 (1) It is important for the economic, social, and environmental well-being of the  
1.9 state that the people of the state have adequate access to quality public buildings and  
1.10 public infrastructure. Providing for private sector entities to enter into traditional as  
1.11 well as innovative agreements with the public sector to undertake the study, planning,  
1.12 design, construction, reconstruction, renovation, improvement, financing, operation, and  
1.13 maintenance of public buildings and infrastructure, including but not limited to facilities  
1.14 and improvements related to transportation, water, wastewater, and appurtenances thereto,  
1.15 will enhance the ability of the state to achieve these objectives.

1.16 (2) The authorization of public-private agreements will:

1.17 (i) provide the public sector with increased access to private sector efficiencies  
1.18 and expertise;

1.19 (ii) facilitate collaboration and cooperation between the public and private sectors;

1.20 (iii) allow the sharing of costs and risks associated with public building and public  
1.21 infrastructure projects currently authorized by law;

1.22 (iv) bring the innovative strengths of the private sector to bear on public building  
1.23 and public infrastructure needs within the state;

(v) reduce the public costs of project design, delivery, operation, or maintenance for eligible facilities;

(vi) accelerate the delivery of eligible facilities already authorized for the public sector to design, build, operate, and maintain;

(vii) encourage life cycle efficiencies in public building and public infrastructure projects;

(viii) foster flexibility in procurement methods to ensure the best value to the public;

(ix) create jobs; and

(x) allow for better use and leverage of public resources, thereby increasing private investment in public buildings and public infrastructure and enhancing capital formation for large projects, ultimately providing savings to taxpayers.

Sec. 2. **[446.11] DEFINITIONS.**

Subdivision 1. **Application.** The definitions in this section apply to sections 446.11 to 446.19.

Subd. 2. **Develop or development.** "Develop" or "development" means (1) delivery, design, construction, reconstruction, improvement, acquisition, installation, financing, operation, or maintenance, and may include any other services related to any of the foregoing; or (2) studying or planning for any of the activities described in clause (1).

Subd. 3. **Eligible facility.** "Eligible facility" means a public building or public infrastructure authorized elsewhere in state law for a public sponsor to deliver, design, construct, reconstruct, improve, acquire, install, finance, operate, or maintain.

Subd. 4. **Private partner.** "Private partner" means a person, entity, or organization that is not the state or federal government or any other public sponsor or any two or more of the foregoing working together to develop one or more eligible facilities.

Subd. 5. **Public building.** "Public building" means any publicly owned existing, enhanced, upgraded, or new structure or building, available for the general public or a public sponsor, or a portion of such a structure or building, authorized elsewhere in law for a public sponsor to deliver, design, construct, reconstruct, improve, acquire, install, finance, operate, or maintain, and developed or to be developed in accordance with sections 446.11 to 446.19, including but not limited to schools, hospitals, courthouses, universities, research facilities, city halls, civic or convention centers, government service facilities, police stations, correctional facilities, sports facilities, and housing facilities, and buildings or structures relating to public infrastructure, together with all appurtenances thereto. The appurtenances include but are not limited to associated equipment and parking structures. Nothing in this definition shall extend a public sponsor's authority

to deliver, design, construct, reconstruct, improve, acquire, install, finance, operate, or maintain a structure, building, or appurtenance not otherwise authorized by law.

**Subd. 6. Public infrastructure.** "Public infrastructure" means infrastructure that is publicly owned and available for the general public or a public sponsor, including, but not limited to, transportation infrastructure, energy infrastructure, water and wastewater infrastructure, and appurtenances thereto. Nothing in this definition shall extend a public sponsor's authority to deliver, design, construct, reconstruct, improve, acquire, install, finance, operate, or maintain any infrastructure not otherwise authorized by law.

**Subd. 7. Public-private agreement.** "Public-private agreement" means an agreement between a public sponsor and a private partner for the development of one or more eligible facilities in accordance with sections 446.11 to 446.19.

**Subd. 8. Public sponsor.** "Public sponsor" means the state, any department or agency of the state, counties, home rule charter or statutory cities, towns, school districts, any authority established by a home rule charter or statutory city or county, any public corporation established under state law, joint powers entity, any other political subdivision of the state, or any two or more of the foregoing working together to develop one or more eligible facilities.

### Sec. 3. **[446.12] GENERAL AUTHORIZATIONS.**

Pursuant to sections 446.11 to 446.19, a public sponsor is authorized to:

(1) consider and compare various methods to develop eligible facilities, including methods that are alternatives to methods traditionally used by the public sponsor;

(2) enter into public-private agreements to develop one or more eligible facilities with such durations or terms as determined in the public sponsor's discretion;

(3) enter into any agreements ancillary to public-private agreements, including:

(i) agreements with financial, legal, and other consultants and experts inside and outside the public sector to (A) assist in the study, planning, design, procurement, evaluation, and negotiation of public-private agreements, or (B) assist in the administration of public-private agreements and the operation or maintenance of eligible facilities; and

(ii) agreements between the public sponsor and (A) the private partner, or (B) the private partner's lenders;

(4) work together and contract with other public sponsors to develop eligible facilities through public-private agreements;

(5) bundle two or more eligible facilities for delivery pursuant to one or more public-private agreements;

4.1 (6) procure services, award agreements, administer revenues, appropriate funds, and  
4.2 take such other action as may be required in connection with the development of eligible  
4.3 facilities through public-private agreements; and

4.4 (7) adopt rules, regulations, or guidelines to implement and exercise the authority  
4.5 granted to the public sponsor under sections 446.11 to 446.19.

4.6 Sec. 4. **[446.13] FUNDING AND FINANCING.**

4.7 Subdivision 1. **Authority.** Any lawful source of existing public funding and  
4.8 financing authority, or combination thereof, may be utilized for the development of an  
4.9 eligible facility under sections 446.11 to 446.19.

4.10 Subd. 2. **Financing.** A public-private agreement may require the private partner  
4.11 to arrange for all or a portion of the financing required for the eligible facility. Public  
4.12 sponsors may elect in their discretion to participate with the private partner in any gains  
4.13 realized through the refinancing of the eligible facility as determined by the public sponsor  
4.14 in its discretion.

4.15 Subd. 3. **Accepting funds.** The public sponsor may accept from the United States,  
4.16 any state, any of their respective agencies, or any regional or local governmental entity,  
4.17 such funds or credit assistance as are available to it for carrying out the purposes of  
4.18 sections 446.11 to 446.19, whether the funds are made available by grant, loan, guaranty,  
4.19 line of credit, or other financing agreement. The public sponsor may enter into agreements  
4.20 and other agreements with the United States, any state, any of their respective agencies, or  
4.21 any regional or local governmental entity that may be necessary, proper, and convenient  
4.22 for carrying out the purposes of sections 446.11 to 446.19.

4.23 Subd. 4. **Accepting donations.** The public sponsor may accept from any source any  
4.24 grant, donation, gift, or other form of conveyance of land, money, other real or personal  
4.25 property, services, or other things of value made to the public sponsor for carrying out  
4.26 the purposes of sections 446.11 to 446.19.

4.27 Subd. 5. **Imposing fees.** Public sponsors may:

4.28 (1) impose, collect, increase, and enforce user fees, consumption charges, rents, or  
4.29 similar charges from users of eligible facilities only as otherwise provided by law; and

4.30 (2) authorize a private partner or another public entity to impose, collect, increase,  
4.31 and enforce fees, rents, and charges to the same extent available to the public sponsor. The  
4.32 use, application, and sharing of collected fees, rents, and charges by the public sponsor or  
4.33 the private partner shall be determined by the public sponsor.

4.34 Sec. 5. **[446.14] AD VALOREM AND PROPERTY TAXES.**

Public buildings and public infrastructure developed, held by, or transferred to a private partner under a public-private agreement shall be exempt from any and all state and local ad valorem and property taxes that otherwise might be applicable. This section does not apply to leases by the public sponsor to individuals or families for residential use.

Sec. 6. **[446.15] PROCUREMENT PROCESS.**

Subdivision 1. **Procurement methods.** Notwithstanding sections 16B.31, 16B.33, 16C.06, 16C.08, 16C.087, 16C.16 to 16C.20, 16C.251 to 16C.35, and 471.345, the public sponsor may use any procurement methods and processes that the public sponsor determines are appropriate to solicit private parties and award public-private agreements pursuant to sections 446.11 to 446.19, including, but not limited to, any of the following or combination of the following:

(1) calls for project proposals, whereby the public sponsor describes the eligible facilities that private parties are invited to submit proposals to develop; and

(2) competitive solicitations using requests for qualifications, short-listing of qualified proposers, requests for proposals, preproposal meetings with individual short-listed proposers, and revised proposals.

Subd. 2. **Unsolicited proposals.** The public sponsor may also receive unsolicited proposals; however, if the public sponsor determines there is sufficient merit to pursue any unsolicited proposal, reasonable opportunity for other entities to submit competing proposals for consideration and possible contract award must be provided. The public sponsor may negotiate with private proposers prior to award.

Subd. 3. **Factors.** For any procurement in which the public sponsor issues a request for qualifications, request for proposals, or similar solicitation document, the request shall set forth the factors that the public sponsor will evaluate when reviewing the submittals. The public sponsor may determine which factors to consider and the relative weight of such factors in the evaluation process to obtain the best value for the public sponsor.

Subd. 4. **Payments.** The public sponsor is authorized to pay stipends or payments for work product on terms and conditions and in amounts determined by the public sponsor in any circumstances that the public sponsor determines to be appropriate, including, but not limited to, the following circumstances: (1) to one or more short-listed proposers if the public sponsor cancels the procurement prior to the due date for proposals in the request for proposals; (2) to one or more unsuccessful proposers that submit a proposal provided that the public sponsor determines that the proposal is responsive to the public sponsor's request for proposals and meets all requirements established by the

public sponsor for the project; or (3) to the selected proposer if the public sponsor cancels the project after selection of the proposer.

**Subd. 5. Work product in exchange for payment.** (a) In exchange for a stipend or payment for work product under subdivision 4, the public sponsor may require the proposer to grant to the public sponsor the right to use any work product contained in the proposer's proposal.

(b) For purposes of this subdivision, "work product" means any technical or financial concepts: (1) included in a proposer's proposal or any portion of the proposal; (2) submitted by the proposer for review by the public sponsor in accordance with the public sponsor's request for proposals; or (3) raised by the proposer at one-on-one meetings or alternative technical or financial concept meetings with the public sponsor prior to the due date for proposals. "Work product" also includes any alternative technical or financial concepts, ideas, innovation, technology, techniques, methods, processes, unique uses of commercial items, design concepts, solutions, construction means and methods, project execution approach, drawings, reports, plans and specifications, information, and submittals that constitute intellectual property of the proposer.

**Subd. 6. Deviations from technical specifications.** The public sponsor may identify in a request for qualifications, request for proposals, or other solicitation document a process whereby proposers may request and receive authorization to deviate from technical specifications on making a showing satisfactory to the public sponsor.

**Subd. 7. Data practices.** Proposals, submissions, qualifications, and other communications submitted to a public sponsor in connection with a potential public-private agreement shall be treated as data submitted to a government entity pursuant to section 13.591.

**Subd. 8. Other rights of public sponsor.** Notwithstanding any other provision of law, the public sponsor may, in its requests for qualifications, requests for proposals, or similar solicitation documents: (1) provide exclusive protest remedies; (2) limit the rights of private parties responding to such solicitation documents to protest matters arising in connection with the procurement; and (3) require that private parties responding to such solicitation documents expressly waive all other rights and remedies that may be available under applicable law.

## Sec. 7. **[446.16] PUBLIC-PRIVATE AGREEMENT.**

**Subdivision 1. Permissible provisions.** The public sponsor may include in a public-private agreement any provision that the public sponsor determines is necessary or appropriate, including, but not limited to, the provisions listed in subdivisions 2 to 17.

7.1        Subd. 2. **Allocation of risks.** The public sponsor may include provisions  
7.2 addressing the allocation and management of project risks including design, construction,  
7.3 geotechnical, delay, permitting, governmental approvals, change of law, change in utility  
7.4 costs, operations and maintenance, force majeure, inflation, and financing risks.

7.5        Subd. 3. **Payments and adjustments.** The public sponsor may include provisions  
7.6 providing that: (1) the public sponsor may pay the private partner for the development  
7.7 services provided by the private partner by making periodic payments to the private  
7.8 partner through the term of the public-private agreement or any portion of the term; (2)  
7.9 the public sponsor's payments to the private partner may include milestone, progress,  
7.10 substantial completion, or final acceptance payments; (3) the payments described in  
7.11 clauses (1) and (2) may include compensation to the private partner for design costs,  
7.12 construction costs, financing costs, operating costs, maintenance costs, the cost of utilities,  
7.13 land acquisition costs, and any other project development costs, and may include a  
7.14 rate of return on the private partner's investment determined to be appropriate by the  
7.15 public sponsor, in its discretion; and (4) the payments described in clauses (1) and (2)  
7.16 may be subject to adjustments where the private partner fails to achieve performance  
7.17 specifications or standards or otherwise fails to comply with its obligations under the  
7.18 public-private agreement. Notwithstanding anything in this subdivision to the contrary,  
7.19 sections 446.11 to 446.19 do not authorize the public sponsor to impose or collect any user  
7.20 fee, consumption charge, rent, or similar charge not otherwise authorized by law.

7.21        Subd. 4. **Performance and payment security.** The public sponsor may include  
7.22 provisions requiring that the private partner or one or more of its prime contractors  
7.23 provides performance and payment security. Notwithstanding any other provision of state  
7.24 law, the penal sum or amount of this security may be less than the contract price involved,  
7.25 based on the public sponsor's determination on a project-by-project basis of what is  
7.26 required or desirable to adequately protect the public interest and adequately assure  
7.27 payment of persons and amounts provided for in sections 446.11 to 446.19. Performance  
7.28 and payment security, if required, may be in the form of bonds, guarantees, letters of  
7.29 credit, or any other type of financial instrument, or any combination of the foregoing, as  
7.30 determined by the public sponsor.

7.31        Subd. 5. **Lands.** The public sponsor may include provisions requiring that either the  
7.32 public sponsor or the private partner acquire the lands and other property interests required  
7.33 for the development of the eligible facility, and either the public sponsor or the private  
7.34 partner hold title to, or lease or lease back, the lands and the eligible facility through  
7.35 the term of the public-private agreement.

8.1        Subd. 6. **Utilities.** The public sponsor may include provisions requiring that either  
8.2        the public sponsor or the private partner provide the utilities required during construction  
8.3        and operation of the eligible facility, subject to Minnesota Rules, part 7819.3100, subparts  
8.4        1 and 2.

8.5        Subd. 7. **Dispute resolution.** The public sponsor may include provisions requiring  
8.6        the use of arbitration or other alternative dispute resolution procedures to resolve disputes  
8.7        between the public sponsor and the private partner. Such alternative dispute resolution  
8.8        procedures may include but are not limited to binding or nonbinding process, arbitration  
8.9        or mediation, the establishment of a board to hear disputes, or a court proceeding.

8.10       Subd. 8. **Occupancy readiness.** The public sponsor may include provisions  
8.11       establishing criteria for commissioning the eligible facility and determining occupancy  
8.12       readiness.

8.13       Subd. 9. **Use of eligible facility.** The public sponsor may include provisions  
8.14       addressing the public sponsor's requirements for programming, operations, use and change  
8.15       in use of the eligible facility, and flexibility to expand the eligible facility.

8.16       Subd. 10. **Facilities management services.** The public sponsor may include  
8.17       provisions addressing the facilities management services, including maintenance and  
8.18       renewal, to be provided by the private partner, the public sponsor, or third parties.

8.19       Subd. 11. **End of agreement.** The public sponsor may include provisions  
8.20       addressing responsibility for maintenance and rehabilitation in order for an eligible facility  
8.21       to meet the standards determined by the public sponsor, in its discretion, at the end of  
8.22       the term of the public-private agreement.

8.23       Subd. 12. **Termination payments.** The public sponsor may include provisions  
8.24       providing for compensation of the private partner upon early termination of the  
8.25       public-private agreement, including, but not limited to, termination by the public sponsor  
8.26       for its convenience, or termination by default of either the public sponsor or the private  
8.27       partner. If provisions as described in this subdivision are included in the public-private  
8.28       agreement, compensation on termination amounts and formulas shall be determined by  
8.29       the public sponsor.

8.30       Subd. 13. **Defaults and remedies.** The public sponsor may include provisions  
8.31       specifying events of default and remedies available to the private partner and the public  
8.32       sponsor.

8.33       Subd. 14. **Technical standards and specifications.** The public sponsor may include  
8.34       provisions setting forth the technical standards and specifications with which the private  
8.35       partner must comply, including but not limited to performance standards and output



9.1 specifications, together with provisions allowing the public sponsor to enforce, amend, or  
9.2 waive such technical standards and specifications.

9.3 Subd. 15. **Insurance.** The public sponsor may include provisions requiring that  
9.4 the private partner obtain and maintain insurance with coverage and deductibles that the  
9.5 public sponsor determines are appropriate.

9.6 Subd. 16. **Indemnification.** The public sponsor may include provisions providing  
9.7 indemnification to the public sponsor.

9.8 Subd. 17. **Books and records.** The public sponsor may include provisions regarding  
9.9 the maintenance and auditing of the private partner's books and records.

9.10 Sec. 8. **[446.17] EXISTING AUTHORITY.**

9.11 The authority granted under sections 446.11 to 446.19 supplements and is  
9.12 independent of any existing authority. It does not limit or detract from existing authority  
9.13 and does not affect application of environmental, health, safety, labor, or land use laws.

9.14 Sec. 9. **[446.18] BUSINESS SUBSIDIES.**

9.15 Any consideration received by a private partner pursuant to sections 446.11 to  
9.16 446.19 is not a business subsidy under section 116J.993.

9.17 Sec. 10. **[446.19] SEVERABILITY.**

9.18 If any provision of sections 446.11 to 446.19, or the application thereof to any  
9.19 person or circumstance, is found to be invalid, the remaining sections are valid.