

The Water/Wastewater Utility Public-Private Partnership Act

<https://www.alec.org/model-policy/the-waterwastewater-utility-public-private-partnership-act/>

January 28, 2013

Model Policy

{Title, Enacting clause, etc.}

Be it enacted by the legislature of the state of [insert state]

Section 1. Definitions

1. Governmental agency refers to any state agency, state district, city, county, city and county, including a chartered city or county, school district, community college district, public district, county board of education, joint powers authority, water or sewer district, special district, or any other public or municipal corporation.
2. Private entity refers to a person, business entity, combination of persons and business entities, or a combination of business entities.
3. Best value refers to a combination of project quality and outcomes and of price that, taken together, provide the most benefit to the taxpayers. I.e., a better project, though more costly, might be a best value relative to a lower cost, but lower quality, project.
4. Competitive negotiation refers to a process where a winner is chosen based on best value rather than strictly lowest bid.

Section 2. Findings

1. The nation's water and sewer infrastructure is deteriorating. At the same time, complying with the Safe Drinking Water Act and Clean Water Act requires extensive upgrades of many water and sewer utilities. The US EPA estimates that nearly \$300 billion dollars in infrastructure investments will be needed to ensure safe drinking water and clean waterways in our nations communities. [Insert state environmental agency findings]
2. Many local governments may not be able to borrow sufficient funds to finance needed water and sewer infrastructure expansions or upgrades due to borrowing volume caps or voter unwillingness to approve new bond issues.
3. Sufficient federal funding for state revolving funds and other grants is unlikely.
4. Infrastructure that provides user-fee based services, such as water and wastewater utilities, are particularly amenable to public-private partnerships. Compared to many government entities, private entities can often build and operate systems at lower cost, can often bring capital to provide for system upgrades when public funds may not be available, and often have better access to personnel trained in the latest technologies and environmental compliance rules. Separately or together, these capabilities can make compliance with environmental standards possible, while minimizing rate increases for essential services.
5. Without the ability to utilize private sector investment capital, some local government agencies will not be able to adequately, competently, or satisfactorily retrofit, reconstruct, repair, or replace existing infrastructure and will not be able to adequately, competently, or satisfactorily design and construct new infrastructure.

Section 3. Application

A. It is the intent of the Legislature that:

1.) Local government agencies have the authority and flexibility to utilize private investment capital and private entity services to study, plan, design, construct, develop, finance, maintain, rebuild, improve, repair, or operate, or any combination thereof, water and wastewater utilities.

2.) This [chapter/section] be construed as creating a new and independent authority for government entities to utilize private sector investment and private entity services to study, plan, design, construct, develop, finance, maintain, rebuild, improve, repair, or operate, or any combination thereof, water and wastewater utilities.

3.) This authority is independent of any existing authority. This authority may be used by government entities when they deem it appropriate in the exercise of their discretion. However, government entities that have been found consistently (more than 90 days) out of compliance with SDWA, CWA, or state environmental standards, must consider exercising this authority.

4.) This act create no new governmental entities.

B. Any government entity entering into agreements with private entities to study, plan, design, construct, develop, finance, maintain, rebuild, improve, repair, or operate, or any combination thereof, water and wastewater utilities:

1.) Shall ensure that the contractor is selected pursuant to a competitive negotiation process. The competitive negotiation process shall:

a) Utilize, as the primary selection criteria, a combination of demonstrated competence and qualifications and best value. The selection criteria shall also ensure that prices charged the users of the facility's services are either set by the contractor or are contractually established.

b) Not require selection based on low bid, but rather selection shall be based on best value.

c) Specifically prohibit practices that may result in unlawful activity including, but not limited to, rebates, kickbacks, or other unlawful considerations, and prohibit government entity employees from participating in the selection process when those employees have a relationship with private entity seeking a contract under this Act, or as proscribed by existing state or local contracting law.

2.) May select at their discretion projects proposed by private entities.

3.) May propose and select projects individually or as part of a related or larger project.

4.) Are not subject, other than as specified in this act, to the provisions of other state and local contract or procurement codes.

C. Public-private partnerships formed under this act may include the sale, lease, or joint venture, for the whole or part of any existing facility, or the planning, design, construction, or operation of the whole or any part of a new facility, or the contract for services for the whole or any part of an existing or new facility.

D. An agreement between a government entity and a private entity formed under the authority of this act shall, where relevant, include, but need not be limited to, provisions to ensure the following:

1.) Compliance with [insert relevant state environmental quality act or codes]. A facility need not be in compliance with the [state environmental acts or codes] prior to the act of selecting a proposed project or a private entity, or the execution of an agreement with a private entity. However, one of two conditions must be met before the execution of the agreement:

- a) appropriate compliance occurs before project development commences; or
 - b) the agreement establishes responsibility for compliance with the private entity, and sets a specific timeline for achieving it.
- 2.) For construction projects, reasonable security for the construction of the facility to ensure its completion.
 - 3.) Adequate financial resources of the private entity to meet the expectation of the project.
 - 4.) Authority for the government entity to impose user fees for use of the facility in an amount sufficient to protect the revenue streams necessary to protect the financing of the project.
 - 5.) Require the private entity to maintain the facility in good operating condition at all times, including, in the event of a lease or O&M contract, the time the facility reverts to the government entity or to another private entity.
 - 6.) Provision for a buyout by the government entity of the private entity in the event of termination or default before the end of the agreement.
 - 7.) Provision for appropriate indemnity promises between the government entity and the private entity.
 - 8.) Provision requiring the private entity to maintain insurance as deemed appropriate by the government entity.
- E. In order to use the authority conferred by this act to the maximum extent, a government entity may use private financing for a project under this act as the exclusive revenue source, or as a supplemental revenue source with federal, state, or local funds.

Approved ALEC Board of Directors on September, 1999.

Reapproved by the ALEC Board of Directors on January 28, 2013.