

## Public Private Partnership Legislation: Kansas

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A Q&A guide to Kansas public private partnership (P3 or PPP) legislation. This Q&A discusses key provisions of P3 legislation, including bid submission, review and approval procedures, and the project delivery structures that may be used. This Q&A also discusses the rights and obligations of the government entity and the private sector party, including financing and compensation structures. Answers to questions can be compared across a number of jurisdictions (see Public Private Partnership Legislation: State Q&A Tool).

### Bid Submission and Review

#### 1. What legislation governs public private partnerships (PPPs or P3s) in your state?

Kansas does not have a broad P3 enabling statute that explicitly authorizes P3 project delivery. Only two Kansas statutes specifically address P3s:

- The first sets bond requirements for P3s exceeding \$100,000 in cost (K.S.A. 16-1909).
- The second sanctions the use of P3s on college campuses and simplifies the process (K.S.A. 76-7,125 to 76-7,133).

#### Bond Requirements: K.S.A. 16-1909

In any public private agreement exceeding \$100,000, the contractor must provide to the owner:

- A performance bond equal to the full contract amount based on the faithful performance of the contract.
- A payment bond equal to the full contract amount to protect the claimant supplying labor or materials to the contractor or subcontractors.

(K.S.A. 16-1909(a).)

The bonds must also allow for the recovery of attorneys' fees and expenses (K.S.A. 16-1909(b)). Under K.S.A. 16-1909, Kansas P3 projects are now clearly protected by legislation similar to the Kansas Little Miller Act.

#### State Educational Institution Project Delivery Construction Procurement Act: K.S.A. 76-7,125 to 76-7,133

The Kansas State Educational Institution Project Delivery Construction Procurement Act (Act) is the enabling legislation that allows any Kansas educational institution to undertake construction projects funded entirely by non-state sources. The Act exempts covered P3 projects from numerous Kansas laws governing publicly funded construction projects.

The statute covers projects on campuses of educational institutions if they are:

- Approved by the Kansas board of regents following consultation with the joint committee on state building construction.
- Inspected by the secretary of administration.

(K.S.A. 76-7,127.)

#### 2. Are there any limitations on the types of projects that can be developed or monetized under the public private partnership (PPP or P3) legislation?

There are generally no limits on the types of projects that may be structured as a public private partnership. However, a public entity's ability to transfer real property may be limited and affect certain P3 projects.



### State Educational Institution Project Delivery Construction Procurement Act: K.S.A. 76-7,125 to 76-7,133

The Kansas State Educational Institution Project Delivery Construction Procurement Act sets few limitations on the type of construction projects that can be performed under a P3 on a university campus with non-state funds (K.S.A. 76-7,125(b)).

Affected construction project services include the process of planning, acquiring, building, equipping, altering, repairing, improving, or demolishing any structure or appurtenance of the structure including facilities, utilities, or other improvements to real property, but excluding:

- Highways.
- Roads.
- Bridges.
- Dams.
- Turnpikes or related structures.
- Stand-alone parking lots.

(K.S.A. 76-7,126(h).)

#### 3. Please give a brief overview of the bidding process. In particular:

- Must the bidder be pre-qualified or meet any other submission requirements?
- What are the permitted bidding procedures, including does the legislation provide for a negotiated or fixed bidding process?
- Is a government entity permitted or required to submit a competing bid? If so, how is this bid treated and what is the standard of review?
- Are unsolicited bids permitted? If so, are there any restrictions on these bids?
- Are there any other or unique bidding procedures?

There is no legislation addressing the bidding process involved in public private agreements in general in Kansas.

### State Educational Institution Project Delivery Construction Procurement Act: K.S.A. 76-7,125 to 76-7,133

The Kansas State Educational Institution Project Delivery Construction Procurement Act (Act) provides basic

guidelines on the bidding process for construction projects that must be followed for covered projects unless an alternate project delivery process is deemed appropriate (K.S.A. 76-7,128(a), 76-7,131; see Question 8).

#### Qualification of Bidders

The Act does not set out qualifications for bidders.

#### Bidding Procedures

The Act requires that an institution solicit bids by:

- Publishing a notice once at least 10 days before the date stated in the notice for the opening of the bids in:
  - the Kansas register; or
  - a designated trade journal.(K.S.A. 76-7,128(d).)
- Sending notices by mail to prospective bidders and by posting the notice on a public bulletin board for at least ten business days before the date stated in the notice for the opening of the bids unless otherwise provided by law (K.S.A. 76-7,128(e)).

The institution may waive publication with the approval of the Kansas board of regents on a determination that a timelier procurement is in the best interest of the institution (K.S.A. 76-7,128(d), (e)).

All bids are to be sealed when received and opened in public when stated in the notice (K.S.A. 76-7,128(d), (e)).

If the general contractor intends to subcontract its electrical and mechanical work, a general contractor must submit its bid with the names and addresses of those subcontractors, including the name and address of any other subcontractors. If alternate choices of subcontractors are considered and the bid varies depending on the alternates chosen, the general contractor must submit multiple bids representing each combination of alternates. (K.S.A. 76-7,128(d).)

The Act's standard contracting process does not provide for negotiated bids, but change orders are negotiated with the contractor performing the work (K.S.A. 76-7,130).

#### Competing Government Bids

The Act does not provide guidance on competing government bids.

#### Unsolicited Bids

The Act does not provide guidance on handling unsolicited bids.

### Other Procedures

The Act permits the administrative head of an institution to make improvements when an improvement can be made using:

- Institutional labor.
- Material manufactured by the institution.

(K.S.A. 76-7,128.)

#### 4. Please give a brief overview of the bid review process for a public private partnership (PPP or P3). In particular:

- Does the legislation set out criteria for evaluating a successful bid?
- Must the bidder post a deposit or security, or pay an application fee?
- Is there a dedicated office or PPP unit that must review the bids? If so, what is the scope of its authority?
- Does the legislation provide a schedule for reviewing bids?
- Is any government entity required or permitted to reimburse unsuccessful bidders for costs they incur in preparing and submitting the bid?

No P3 legislation in Kansas in general currently addresses:

- The criteria for evaluating bids.
- Deposits and other fees.
- The existence of a dedicated PPP unit.
- A bid review schedule.
- Reimbursement of a losing bidder's costs.

### State Educational Institution Project Delivery Construction Procurement Act: K.S.A. 76-7,125 to 76-7,133

#### Criteria for Evaluating Bids

The Kansas State Educational Institution Project Delivery Construction Procurement Act (Act) requires that all contracts for construction projects and construction project services be awarded to the lowest bidder based on plans and specifications prepared for the project that received previous approval by both:

- The Kansas board of regents.
- The secretary of administration.

(K.S.A. 76-7,128(b).)

The institution's purchasing department may avoid awarding a project to the lowest bidder, if that bidder:

- Is in arrears on taxes due in Kansas.
- Is not properly registered to collect and remit taxes due in Kansas.
- Has failed to perform satisfactorily on a previous contract with Kansas.

(K.S.A. 76-7,128(g).)

If the dollar amount of the bid received from the lowest responsible bidder from within Kansas is identical to the dollar amount of the bid received from the lowest responsible bidder from outside Kansas, the contract must be awarded to the bidder from Kansas (K.S.A. 76-7,128(g)).

#### Deposits and Other Fees

The Act does not require the submission of a deposit or other fees.

#### Dedicated PPP Unit

The Act is administered by the Kansas board of regents (K.S.A. 76-7,126(s)).

#### Bid Review Schedule

The Act does not address a bid review schedule.

#### Reimbursement of Losing Bidders' Costs

The Act does not provide for the reimbursement of a losing bidders' costs.

#### 5. Is executive or legislative authorization or approval required before either:

- A request for proposals may be issued or the bidding process may be initiated?
- A bid can be approved?

There are currently no provisions addressing legislative authorization or approval of request for proposals or bid approvals involving public private agreements in general in Kansas.

### State Educational Institution Project Delivery Construction Procurement Act: K.S.A. 76-7,125 to 76-7,133

Projects covered by the Kansas Project Delivery Construction Procurement Act do not require legislative authorization or approval of request for proposals or bid approvals.

### 6. Are public hearings required during the bidding and review process?

There is currently no legislation addressing public hearings involving public private agreements in general in Kansas.

### State Educational Institution Project Delivery Construction Procurement Act: K.S.A. 76-7,125 to 76-7,133

Under the Kansas State Educational Institution Project Delivery Construction Procurement Act, when an alternative project delivery process is desired, a public hearing must be held. Notice must be published at least 15 days before the hearing in the *Kansas Register* to announce to the active general contractor industry associations in Kansas that the procurement committee is holding a public hearing with the opportunity for comment on request (K.S.A. 76-7,131; see Question 8).

### 7. Can an approved bidder perform work before the public private partnership (PPP or P3) agreement is executed? If so:

- What type of preliminary work can be performed?
- Will the bidder be compensated for this work if the parties cannot agree on the PPP agreement?
- Who has title to any work produced during this period?

Neither Kansas's State Educational Institution Project Delivery Construction Procurement Act nor any other statute currently expressly addresses:

- Performance of preliminary work.
- Compensation for preliminary work.
- Title to preliminary work.

## Project Delivery Structures

### 8. What project delivery structures can be used to implement a public private partnership (PPP or P3)?

There is no legislation addressing the project delivery structures that may be used in public private agreements in general in Kansas.

### State Educational Institution Project Delivery Construction Procurement Act: K.S.A. 76-7,125 to 76-7,133

For projects governed by the Kansas's State Educational Institution Project Delivery Construction Procurement Act (Act), the Act provides for the use of the construction-management-at-risk project delivery process in addition to the standard project delivery process.

Under the Construction-Management-At-Risk project delivery process, proposals are requested, solicited, and evaluated in three stages:

- Phase I involves the solicitation of qualifications and prequalifying at least three and up to five construction managers or general contractors to advance to Phase II. All proposers must submit a statement of qualifications including, but not limited to:

- Experience in similar projects.
- Experience in this type of project delivery system.
- References from design professionals and owners from previous projects.
- A description of the construction manager's or general contractor's project management approach.
- Financial statements.
- Bonding capacity, including a public works bond with evidence of bonding capacity.

(K.S.A. 76-7,132(d)(1).)

- Phase II involves the solicitation of a request for proposal (RFP) for the project. Prequalified firms from Phase I are given an RFP requiring they submit:
  - a company overview;
  - experience or references, or both, relative to the project;
  - resumes of proposed project personnel;
  - an overview of preconstruction services and construction planning;
  - a proposed safety plan; and
  - proposed fees, including fees for preconstruction services, fees for general conditions, fees for overhead and profit and fees for self-performed work, if any, directly and only to the secretary of administration.

(K.S.A. 76-7,132(d)(3).)

- In Phase III a negotiating committee is formed to conduct interviews with each proposer to present their qualifications and answer questions (K.S.A. 76-7,132(d)(4)).

At the conclusion of Phase III, the negotiating committee selects the best project proposal based on identified grading criteria, if one can be identified, and attempts to negotiate a contract under Kan. Stat. 76-7,132(4).

### Rights and Obligations of the Government Entity

#### 9. What rights, if any, does the government entity have to ensure proper management and maintenance of the public private partnership (PPP or P3) project? In particular:

- Are there any repairs, maintenance, or other operational issues that require the approval of a government entity?
- What inspection or auditing rights does the government entity have?
- Under what circumstances can the government take over the project?

In Kansas, neither the Kansas State Educational Institution Project Delivery Construction Procurement Act nor any other statutes address:

- Required maintenance and repair.
- Auditing and inspection rights.
- Step-in rights.

### Private Sector Party Compensation

#### 10. How is the private sector party compensated for performing its obligations under the public private partnership (PPP or P3) agreement?

Neither the Kansas State Educational Institution Project Delivery Construction Procurement Act nor any other Kansas statutes address compensation.

#### 11. If availability payments or shadow tolls are permitted, how will the government entity's obligations be met?

Neither the Kansas's State Educational Institution Project Delivery Construction Procurement Act nor any other Kansas statutes address the use of availability payments or shadow tolls.

#### 12. If user fees are permitted:

- Can the private sector party increase the fees?
- Must the executive or legislative branch approve the fees?
- Are price increases subject to public hearings?

Neither Kansas's State Educational Institution Project Delivery Construction Procurement Act nor any other Kansas statutes address user fees or an ability of a private sector party to raise prices.

### Government Entity Compensation and Use of Funds

#### 13. Please describe the government entity's compensation structure including any lump sum and profit-sharing agreements.

Neither Kansas's State Educational Institution Project Delivery Construction Procurement Act nor any other Kansas statutes address user fees or an ability of a private sector party to raise prices.

#### 14. Are there any limitations or restrictions on the government entity's use of any funds it receives under the public private partnership (PPP or P3) agreement?

Neither Kansas's State Educational Institution Project Delivery Construction Procurement Act nor any other Kansas statutes address limitations on the government entity's use of funds it receives under the P3 agreement.

### Term, Renewal, and Early Termination

#### 15. Does the legislation:

- Include a maximum term for any public private partnership (PPP or P3) agreement (including any renewals)?
- Allow the PPP agreement to be renewed? If so, what are the conditions under which this renewal can occur?
- Allow the private sector party or the government entity to terminate the PPP agreement before the expiration date?

Neither Kansas's State Educational Institution Project Delivery Construction Procurement Act nor any other Kansas statutes address:

- Limits on the terms of P3 projects.
- Renewals.
- Termination before the expiration date.

### 16. What are the parties' rights on termination of the public private partnership (PPP or P3) agreement?

Neither Kansas's State Educational Institution Project Delivery Construction Procurement Act nor any other Kansas statutes address the parties' rights on the termination of P3 agreements.

## Financing the Project

### 17. Is the government entity permitted or required to provide any portion of the financing? If so:

- Can it issue bonds or notes to meet its financing obligations?
- Is there a cap on the amount of financing it can provide or the amount of debt it can incur?
- Can Transportation Infrastructure Finance and Innovation Act (TIFIA) loans or other federal funding be used?
- Is the debt backed by the full faith and credit of the state?

## Government Entity Financing

Neither Kansas's State Educational Institution Project Delivery Construction Procurement Act (Act) nor any other Kansas statutes address government-entity financing. However, the Act does require that all covered projects be completed without government funds (K.S.A. 76-7,125(b)).

## Financing Cap

Neither the Act nor any other Kansas statutes address financing caps on qualifying projects. However, the Act does require that all covered projects be

completed without government funds (K.S.A. 76-7,125(b)).

## TIFIA and Other Federal Financing

TIFIA is available for P3 projects, subject to federal rules and regulations (K.S.A. 76-7,126(n)). Neither the Kansas P3 statute nor KPDCPA contain financing caps on qualifying projects where the financing is obtained from non-state sources (K.S.A. 76-7,125(b)).

## Full Faith and Credit of the State

Kansas's full faith and credit can back debt, but to do so requires additional public sector authorization.

## Non-Compete

### 18. Does the public private partnership (PPP or P3) legislation allow the government entity to build or develop a competing project? If so:

- What constitutes a competing project?
- What is the term of the non-compete provision?
- What rights and remedies does the private sector party have if the government breaches the non-compete?
- Which government entities are bound by the non-compete?
- Are there any other material terms?

Neither Kansas's State Educational Institution Project Delivery Construction Procurement Act nor any other Kansas statutes address competing projects and non-compete provisions.

### 19. What incentives, if any, does the public private partnership (PPP or P3) legislation authorize to attract bids, including:

- Tax breaks?
- Contributions in kind, including assets, property, or services?
- Labor incentives?
- Any other incentives?

### Tax Breaks

Neither Kansas's State Educational Institution Project Delivery Construction Procurement Act (Act) nor any other Kansas statutes address tax breaks for public private partnerships. Therefore, there is nothing preventing public entities from providing tax breaks.

### Contributions in Kind

Neither the Act nor any other Kansas statutes address contributions in kind for public private partnerships. Therefore, there is nothing preventing public entities from providing contributions in kind.

### Labor Incentives

Neither the Act nor any other Kansas statutes address labor incentives for public private partnerships. Therefore, there is nothing preventing public entities from providing labor incentives.

### Other Incentives

Kansas statutes do not address incentives involving public private partnerships in general. However, construction projects governed by the Act are not subject to:

- Building permit or building code requirements of any county, township, district, city or other political subdivision of Kansas or fees charged for those permits.
- Inspections or requirements to obtain any permit, license, or other instrument of approval imposed by any county, township, district, city, or other political subdivision of Kansas, with the exception of reasonable inspections to allow members of the police, fire departments, and other public emergency services personnel to become familiar with the project.
- Payment of fees relating to local zoning ordinances and resolutions. The state reimburses political subdivisions for any related publication expenses incurred by the political subdivision.

(K.S.A. 76-7,130.)

## Completed or Pending PPP Projects

### 20. Please describe any completed or pending public private partnership (PPP or P3) projects.

The University of Kansas Central District Development Project in Lawrence has been completed ahead of schedule. The public-private partnership between the University of Kansas and Edgemoor Infrastructure and Real Estate allowed the \$350 million project to be completed much more quickly than was possible using a traditional method of procurement. The Central District now contains:

- A new integrated science building with 280,000 square feet of space for teaching and research.
- Student housing, parking, and a student union.
- A new utility plant for the campus.

Kansas used a P3 to update over-crowded and aged facilities at Lansing Correctional Facility. The project was completed in 21 months, providing new facilities with more than 2,000 beds.

## Other Issues

### 21. Please identify any other material provisions of the public private partnership (PPP or P3) legislation.

There are no other material provisions in Kansas's P3 legislation.

Kansas is a limited home rule state and Dillon's Rule does not apply to cities and counties. Local governments may pass legislation to enable government and lands to function properly, including authorizing P3 projects under charters, codes, or ordinances. Local laws are subject to state and local procurement laws and must be approved by the governing body.

Besides the Kansas State Educational Institution Project Delivery Construction Procurement Act for state

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universities, there are no other laws authorizing P3 projects. Therefore, local governments must approve the projects.

**22. If your jurisdiction does not have public private partnership (PPP or P3) enacting legislation but still engages in PPP activity, please describe the authority, basis, and process for doing so.**

Kansas has public private partnership enacting legislation (see Question 1).

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