

Legal Notice of Rulemaking
Nebraska Department of Transportation
Public Hearing
Friday, May 19, 2023 - 1:00 – 3:00 PM
Nebraska Department of Transportation
Central Headquarters Bldg., Rm. 103
1500 Nebraska Parkway, Lincoln, Nebraska

The Nebraska Department of Transportation (NDOT) has commenced rulemaking and will hold a public hearing concerning a proposed new regulation.

412 NAC 4, When Use of Public Private Partnerships may be Appropriate

This is a new regulation which provides criteria and guidance for when the Department of Transportation may enter into Public Private Partnerships, as authorized under the Transportation Innovation Act, via legislative bill 1016 (2022).

Interested persons are invited to attend the public hearing. Comments and recommendations may be presented orally or in writing at the hearing. They may also be mailed, faxed, or e-mailed prior to the hearing or until the close of the public comment period, May 29, 2023. Pre- and post-hearing comments should be directed in writing to NDOT's External Affairs Manager, Sarah Soula, P.O. Box 94759, Lincoln, Nebraska 68509-4759; sarah.soula@nebraska.gov; voice telephone (402) 479-4871, TDD telephone (402) 479-3834, Fax (402) 479-3989. Comments may also be posted online through the Secretary of State's website (see below).

To view or download the proposed regulation or to comment online visit: <https://www.nebraska.gov/nesos/rules-and-regs/regtrack/index.cgi> ("Agency": Transportation). To obtain a free paper copy of the proposed regulation, the Proposed Regulation Policy Pre-Review Checklist, or the Fiscal Impact Statement, contact NDOT's Government Affairs Office, PO Box 94759, Lincoln, Nebraska 68509-4759; 402-479-3791; FAX 402-479-3758; TDD# 402-479-3834; ryan.balluck@nebraska.gov. To view or pick up copies in person: Director's Office, 1500 Nebraska Parkway, Lincoln, NE.

NDOT will make every reasonable accommodation to provide an accessible meeting facility for all persons. Appropriate provisions for the hearing and visually challenged or persons with limited English proficiency (LEP) will be made if NDOT is notified by Friday, May 12, 2023. Notification should be submitted to Sarah Soula, External Affairs Manager (see contact information above).

This notice is provided pursuant to the Administrative Procedure Act.

RULE & REGULATION PRELIMINARY FISCAL IMPACT STATEMENT

AGENCY:	Nebraska Department of Transportation		
TITLE:	412	PREPARED BY:	Ryan Balluck
CHAPTER:	4	DATE PREPARED:	April 14, 2023
SUBJECT:	When Use of Public Private Partnerships may be Appropriate	TELEPHONE:	402-479-3791

TYPE OF FISCAL IMPACT :

	STATE AGENCY	POLITICAL SUBDIVISION	REGULATED PUBLIC
No Fiscal Impact	X	X	X
Increased Costs			
Decreased Costs			
Increased Revenue			
Decreased Revenue			
Indeterminable			

PROVIDE AN ESTIMATED COST AND DESCRIPTION OF IMPACT:

State Agency	No Impact
Political Subdivision	No Impact
Regulated Public	No Impact

IF INDETERMINABLE, EXPLAIN WHY:

TITLE 412, NEBRASKA ADMINISTRATIVE CODE, CHAPTER 4

NEBRASKA DEPARTMENT OF TRANSPORTATION

RIGHT OF WAY DIVISION

Rules and Regulations Concerning

When Use of Public Private Partnerships may be Appropriate

Title 412 – Nebraska Department of Transportation – Roadway Design Division

Chapter 4 – When Use of Public Private Partnerships may be Appropriate

01.01 DEFINITIONS

For purposes of this rule and regulation, the following capitalized terms have the following meanings:

01.01A “Alternative Project Delivery Method means one of the methods of contracting for public projects authorized in Neb. Rev. Stat. §§ 39-2808 et seq. including Public Private Partnerships.

01.01B “Public Private Partnership, or P3” means a project delivery method for construction or financing of capital projects or procurement of services under a written public-private partnership agreement entered into pursuant to Neb. Rev. Stat. § 39-2825 between at least one private partner and the State of Nebraska.

01.01C “Value for Money” means the process used to compare the financial impacts on the Department of use of a P3 project delivery method against other project delivery methods. This process looks to determine the ideal delivery method when considering cost, quality, time and performance.

01.02 PURPOSE.

This rule and regulation implements Neb. Rev. Stat. § 39-2825, generally relating to establishing criteria to be used in determining when a P3 Alternative Project Delivery Method should be considered for a particular Department transportation project.

01.03 PUBLIC POLICY

The Department of Transportation (“The Department”) promotes and encourages the use of P3 when (a) determined to be more appropriate than the other Alternative Project Delivery Methods based on consideration of the criteria set out in 01.04, (b) found to be in the State’s best interest, and (c) its use is consistent with the limitations of the Constitution of Nebraska.

01.04 CRITERIA TO WEIGH IN ANALYZING WHEN USE OF P3 MAY BE APPROPRIATE FOR DELIVERY OF A DEPARTMENT TRANSPORTATION PROJECT

01.04A The Director of Transportation (“The Director”) or designee will make an initial determination whether any proposed project will be considered for use of an Alternative Project Delivery Method or whether the project should be developed under the traditional design-bid build method of Neb. Rev. Stat. § 39-1348 et seq. If a proposed project is selected by the Director as a candidate for an alternative project delivery method, then the following criteria shall be applied in determining whether to use P3. The Director reserves the right to reconsider the use of P3 or another alternative delivery method whenever such reconsideration is in the best interest of the Department.

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01.04B Subject to the provisions of Section 01.05, the following are qualitative considerations that the Department may evaluate when determining whether it is appropriate to use a P3 delivery method:

01.04B1 Whether a project presents complex technical requirements;

01.04B2 Whether a project affords a material opportunity to employ private sector innovations, technical concepts, or specialized knowledge/expertise;

01.04B3 Whether there is a need to accelerate completion or to contract for a date certain for project completion;

01.04B4 Whether the project affords the Department an opportunity to allocate typical public-sector risks to a private partner in exchange for the private sector meeting performance-based requirements rather than technical specifications;

01.04B5 Whether there are favorable market conditions, whether by way of greater competition for projects, a program of projects, or financial market conditions being conducive to private sector investment under a Value-for-Money analysis;

01.04B6 Whether P3 delivery may better meet the public expectations for project approach, project cost and completion;

01.04B7 Whether the project lends itself to delegating lifecycle, technology, or long-term performance responsibilities to the private partner(s);

01.04B8 Whether the project will be required to function at a high level, low failure rate, under intense use conditions;

01.04B9 Whether P3 delivery may make for more efficient use of State resources, including but not limited to human capital; and

01.04B10 Whether there is Value-for-Money in transactional/procurement costs to pursue P3 delivery rather than conventional delivery.

01.04C Subject to the provisions of 01.05, the following are capital planning, budgetary, and other monetary considerations that the Department may take into account when determining whether it is appropriate to use a P3 delivery method:

01.04C1 Whether there is need, or opportunity, in the project to predict, control, or reduce life cycle costs;

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01.04C2 Whether there is a market opportunity to involve private investment to better manage capital planning dollars relative to the need to deliver the project in the nearer term;

01.04C3 Whether the project presents an opportunity to capture savings from the economies of scale;

01.04C4 Whether there is a market opportunity to involve private investment to maximize the timing and use of State revenue; and

01.04C5 Whether the project needs to emphasize (and thus to impose) operating and maintenance discipline to diminish or eliminate unexpected or deferred maintenance, or to plan for and manage expenses relating to planned maintenance, by shifting duties to the private partner.

01.05 INTERPRETIVE INTENT; CONSTRAINTS

01.05A The Department decision whether the P3 delivery method is appropriate is both project- and situation-specific. Nothing in this rule and regulation will be construed to compel use of P3 delivery solely by virtue of the analysis of the project and situation-specific considerations against the foregoing criteria. If the Department determines by weighing the project and situation-specific considerations of a proposed project that P3 may be appropriate, the Department may nevertheless elect to deliver the project via other project delivery methods.

01.05B The foregoing list of criteria is not exclusive. The foregoing list is not presented in any order, and no single criterion is to be construed as more or less important than another based upon its placement on the list. Some criteria are overlapping. No single criterion is determinative, nor is any single criterion required, for the Department to determine when use of the P3 delivery method is appropriate for a particular project.

01.05C The foregoing criteria may be considered as criteria favoring project delivery methods other than P3 as may be authorized under Nebraska law.

01.05D Analysis as to whether P3 delivery may be appropriate, in part according to the foregoing criteria, shall consider such additional criteria, constraints, requirements, impositions, and considerations, when appropriate, including the use of federal funding, federal participation, or other basis upon which federal law imposes requirements regarding delivery method, features, procurement, requirements, risk apportionment, or other features of the project.

01.05E Nothing in this rule and regulation will be construed to limit any other provision of Nebraska law, rule, or regulation, including published procurement policies and manuals.

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01.05F The decision whether to use the P3 alternate delivery method is in the sole discretion of the Department and any such decision shall not create a right or cause of action for anyone, or the right to appeal or to contest the decision.