

Analysis of SB-197

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Background

Success in public-private partnerships (PPPs) for transportation projects is not measured by whether you complete a deal but rather whether that deal is good for Colorado and the public interest.

Two main factors in evaluating such PPP deals are:

1. The project itself – does it move people and goods efficiently, effectively, safely, and with the least negative impacts on the communities surrounding it?
2. The financing arrangement– what did the state need to give up to make the deal happen vs. the public benefits we received?

To ensure success for Colorado, any PPP must maximize:

1. Transparency and clear information
2. Public oversight and analysis
3. Opportunities for public feedback
4. Basic public interest protections

SB-197 takes steps forward in all of these categories. It also improves the types of projects that will be eligible for PPPs.

Therefore, Governor Hickenlooper should sign SB-197 into law.

What SB-197 Would Do

The measures in SB-197 help ensure that the High-Performance Transportation Enterprise (HPTE), which has the authority to negotiate PPPs for Colorado transportation projects, would advance good transportation projects and that any PPP arrangement would be more transparent, provide clearer information, have increased oversight and accountability, provide opportunities for public deliberation, reduces the risk of long-term deals, and limits the worst non-compete clauses that undermine local decision-making authority and put the public on the hook during emergencies and extreme weather events.

Page 3 (The first page)

Language from the original bill that declares the intent of the HPTE to:

1. Seek out innovative funding and provides examples, including PPPs
2. Seek this funding to complete surface transportation projects.

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Makes explicit that HPTE should “place a high priority on the movement of people” and not just vehicles. **This is good transportation policy.** With double digit reductions in driving in Colorado since 2004 and limited resources for transportation projects, the priority needs to be on whatever transportation moves people most efficiently. U.S. 36 is a good example. The corridor will be able to handle the growth in travel best by including a robust bus-rapid transit system anticipated to cover 20,000 passenger trips a day.

This page also restates existing law that describes the HPTE as a government-owned business, provides geographic and professional specification for HPTE Board members, and states four members are appointed by the Governor and three appointed by the HPTE Board. One change is that the number of Board of Directors goes from seven to eight.

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Adds language that requires all seven Board Members to be confirmed by the Senate in future appointments and adds the Executive Director as nonvoting board member. **This is good public policy.** The HPTE negotiates large contracts that lock Colorado into long-term arrangements regarding vital infrastructure. The Board members should have maximum oversight and accountability. Adding in Senate confirmation increases oversight and accountability.

This page also clarifies that terms are for four-years and an individual can be reappointed once.

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Starting on page 5 and running into page 6, the bill restates existing language that gives the HPTE the power to make and enter into agreements, private or public, and provides examples of some of those agreements.

Beginning on page 6 and running into page 9, the bill adds new requirements for required town hall meetings.

Page 6-9

Defines three moments when the HPTE must host town hall meetings:

1. During the visioning stage of the project.
2. Before preparing a draft Request for Proposal (RFP).
3. After preparing an initial draft but before releasing the RFP.

All three moments require the HPTE to do the following:

1. Work with local governments in hosting the events.
2. Host events in convenient locations related to the project.

3. Notify media and the legislators from the districts impacted by the project.
4. Present information and receive ideas and suggestions from the public.
5. Consider the suggestions and ideas from the public.

In addition, the bill adds language that requires the HPTE present detailed information regarding different alternatives for meeting the targeted transportation need including a financial analysis of meeting the need through public funding alone. The bill also requires the posting of the draft RFP a week before any meetings.

These public town halls and the information HPTE is required to provide are good public policy. The public should have many opportunities to interact directly with HPTE representatives on potential PPPs and the clarity around the information that will be provided and when it will be provided will improve the public's ability to watchdog the process, understand the choices facing Colorado's transportation future and improve HPTE's ability to receive the feedback they need to ensure they are making the best decisions. We would recommend even more town hall meetings including later in the process when more details are known but before a contract is signed.

In legislative hearings for SB-197, a number of legislators have expressed frustration that the public does not participate in these public processes and therefore they have questioned the value of requiring them. These town halls are valuable because:

1. Whether people come or not, it is good public policy to host these events.
2. Clarifying the process in state statute increases the likelihood of participation because individuals and watchdog groups can better plan to participate.
3. Requiring HPTE to be more directly involved with the public will increase the likelihood the public participates because an individual is more likely to attend a meeting with the actual decision makers than attend a city council meeting where the city is acting as a go-between for HPTE, which is how many felt the U.S.36 process played out.
4. The incredible outpouring of involvement in the final days of the U.S.36 deal provides clear evidence that Coloradans are now quite aware of PPPs and will likely raise their voice around future proposals so we should provide those opportunities.

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Specifies that after entering into a PPP, the HPTE will post the terms online and present the terms to the Legislature. **This is good public policy.** All terms of PPPs should be open for public view. We would recommend that terms should also be made available before final signing of the contract so that the public can have a chance to provide input before the final deal is done.

Page 9-10

Beginning in the middle of page 9 and continuing through page 10, new language details three provisions that cannot be in a RFP or a subsequent PPP deal unless the Legislature approves the inclusion via the enactment of a joint resolution. Those three provisions are:

1. A term that exceeds 35 years.

2. Non-compete clauses that limit the state's ability to make transportation modifications outside of the footprint of the actual PPP project.
3. Some non-compete clauses that require the public to compensate the private company if tolls are lost because a toll lane was shut down due to an emergency or extreme weather.

The legislation clearly applies only to PPPs entered into by the HPTe, not by other entities such as RTD, a Public Highway Authority or a Regional Highway Authority. In addition, these three clauses do not apply if the HPTe partners with a Public Highway Authority or Regional Transportation Authority, and these entities are a party to the PPP, if that authority bears substantial responsibility in the project.

This is good public policy.

Limiting deals to 35 years – Bad deals get worse over time. Risks grow exponentially over time as do the problems associated with unanticipated restrictions that might arise from a PPP. And even the best crafted contract cannot anticipate changing circumstances to assure that the public interest is adequately protected many decades into the future. **It is good public policy to require an extra level of oversight and analysis for longer deals to ensure we avoid the worst deals.** That is what this provision requires – additional oversight from the Legislature. In practice, the provision will require the HPTe to make a compelling argument to the Legislature that they believe they need the ability to negotiate a deal longer than 35 years. Granting that ability will not guarantee that a PPP will go over 35 years. The HPTe will negotiate and will not be forced to enter into a PPP of more than 35 years unless they deem it to be a good deal for Colorado. This extra step for multi-generational PPPs signed by the HPTe will have a greater level of public confidence and feelings of public betrayal such as occurred with U.S. 36 will be better avoided.

35 years is a good line to trigger a higher level of oversight for the following reasons:

1. The public has clearly demonstrated they are uncomfortable with deals over 30 years. It makes sense. A common loan for the public is a 30-year housing loan. Looking back at the feedback from the U.S. 36 PPP process, it is clear that the number one concern was the length of the term – 50 years. A 35-year trigger will build confidence with the public by demonstrating transportation officials understand the concerns of the public and will treat projects above 35 years with added scrutiny.
2. Many other transportation financing are in the 30-40 year range. A maximum TIFIA loan is 35 years.
3. Transportation policy shifts as Coloradans age. 40 years from now, an 18-year old who just got their license could be retiring. Beyond 30 years, future generations are increasingly locked into their grandparent's transportation system. Committing future generations to arrangements made today should be approached with special deliberation and care.
4. There are many examples of PPPs across the country that are 35-year or less including the Port of Miami Tunnel in Floridaⁱ, I-595 in Floridaⁱⁱ, the South Bay Expresswayⁱⁱⁱ and SR-91 projects in Southern California.^{iv} By far the most active region in the world for infrastructure PPPs has been Europe and EU countries generally limit PPPs to maximum terms between 21 and 35 years.

Limiting non-compete clauses that limit local decision-making authority – As stated earlier, to avoid bad PPPs, there should be a set of basic protections that the HPTE includes in any PPP negotiation. To protect the public interest, a PPP should not undermine local decision-making authority to maintain and improve transportation infrastructure surrounding a PPP. SB-197 only allows non-compete clauses that limit additional, competing transportation infrastructure above and below the PPP project.

Limiting unreasonable non-compete clauses – The public should not have to compensate a private company if a toll lane is shut down due to unforeseen weather events and emergencies. SB-197 does not allow non-compete clauses that penalize the public during a road closure due to weather or an emergency event unless those events happen often enough that you can actually forecast them.

If, in the unforeseen situation that any of the above non-compete clauses are absolutely necessary for a PPP and the HPTE can articulate how these clauses are somehow needed, the Legislature can waive these through a joint resolution just like they can waive the 35-year expectation.

There have been some concern about whether a vote by the Legislature to allow the HPTE to waive one of the three provisions above in an upcoming RFP or PPP agreement, will unnecessarily delay a PPP and drive up costs, especially since the State Legislature mainly meets January to May every year. There does not appear to be evidence to support this concern. SB-197 only gives the Legislature the authority to allow the HPTE to consider these three provisions in a deal. There is no requirement that the Legislature actually approves those specific pieces of the deal or a required timeline of when HPTE can or cannot propose a waiver. Using U.S. 36 as an example, the Request for Qualifications went out in February of 2012 and a final Request for Proposals was released in August 2012 – a six-month period. However, the RFQ was not developed overnight. As has been stated by advocates of the U.S. 36 PPP, that deal was years in the making. Therefore it is reasonable to expect that leading up to February 2012, HPTE staff had done extensive analysis and research and would have been able to determine that they anticipated needing the option to include non-compete clauses and a term of over 35 years and therefore would have had time to develop a proposal to the Legislature that an exception be made.

Page 10-11

Requires the HPTE to provide notice if they change HOV policy for HOV lanes. **This is good public policy to notify the public of HOV changes.**

In addition, this page also specifies that the HPTE must consider bus service when developing a PPP for HOV or managed lanes, it can spend user fee dollars on transit, HOV ridership programs and first/final-mile connections, and it requires that a minimum of 10% of any net money shared back to Colorado from the PPP go to support transit in the corridor. **This is good public policy.** It ensures that HPTE is truly considering all alternatives for transporting people as efficiently as possible and that a minimal amount of funds is being used to support transit.

Page 12-14

Requires the HPTE submit a detailed report to the House and Senate Transportation committees on its work including:

1. An update on its work and projects
2. An update on expenses and revenues
3. A description of each project including upcoming decisions and expenses
4. A summary of a lot of different provisions in current and future HPTE projects including non-compete clauses, transit, carpooling, toll rates, performance guarantees, and project costs.
5. Differences in initial solicitations for PPPs and what actually was signed,

This is good public policy. It increases transparency around the HPTE by providing one time and place where information will be presented and a clear format that will give Legislators and the public an ability to examine and evaluate the work of the HPTE.

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Adds the HPTE to the list of authorities that the legislative audit committee can initiate an audit of. **This is good public policy.** The HPTE should be under the same level of scrutiny as other public highway authorities.

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Applies SB-197 to all future deals.

ⁱ Florida Department of Transportation, *Summary of Public-Private Partnerships*, May 2014.
<http://www.dot.state.fl.us/officeofcomptroller/PFO/P3%20Summary.pdf>

ⁱⁱ Florida Department of Transportation, *Summary of Public-Private Partnerships*, May 2014.
<http://www.dot.state.fl.us/officeofcomptroller/PFO/P3%20Summary.pdf>

ⁱⁱⁱ Federal Highway Administration, Project Profiles- South Bay Expressway,
http://www.fhwa.dot.gov/ipd/project_profiles/ca_southbay.aspx

^{iv} California Department of Transportation, State Rout 91, <http://www.dot.ca.gov/hq/paffairs/about/toll/rt91.htm>