

“SEP-15” For Transit?

What Transit Needs Now Is Its Own Special Experimental Project to Demonstrate the Public Benefits of PPPs in Public Transit¹

If you ask anyone in the public sector about transportation infrastructure, you will hear some version of the following: “We need more transportation infrastructure, we need it faster, we need it to be reliable and we really do not have enough money to pay for it.” This situation will not change in the foreseeable future, so there is a huge role for private equity and public-private partnerships (“PPPs”) in the development and financing of transportation infrastructure projects.

As in other industries, the project sponsor’s rationale for public transit PPPs has many facets. A PPP should allow opportunities to reduce or at least better allocate project risks. There should be significant opportunities to accelerate project delivery. Public transit PPPs should allow for the improved reliability of cost and benefit forecasts, or at least less Federal Transit Administration (“FTA”) oversight of cost and benefit forecasting. PPPs should enhance the ultimate project performance and in many cases will provide another source of project finance.

Not all PPP benefits will be possible in all transit projects. However, every public transit PPP should be able to benefit from accelerated project delivery and most should be able to generate some amount of private debt or equity financing. Over the past several years, the FTA has made substantial strides toward accelerated project delivery first with its “Interim Guidance” on design-build projects and, more recently, with Penta-P.² This is particularly true with respect

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² Public-Private Partnership Pilot Program, 72 Fed. Reg. 2583 (January 19, 2007).

“SEP-15” For Transit?

May 30, 2008

to resolving the tension between accelerated project delivery and compliance with the National Environmental Policy Act (“NEPA”). However, transit projects involving PPP structures are still relatively rare³ and there have not been any large federally-funded transit infrastructure projects with a private finance element.⁴ The primary reason there has been more rich and varied activity in the U.S. on highway projects than on transit projects is that the highway program has a much longer tradition of facilitating innovative procurement. What transit needs now is its own authority to undertake innovative procurement through a program like the highly-successful SEP-14 and SEP-15 initiatives of the Federal Highway Administration (“FHWA”).⁵

Project Delivery and NEPA

As noted above, the FTA has been very successful in facilitating accelerated project delivery even without broad special project authority like that of FHWA. This is particularly true with respect to resolving the tension between accelerated project delivery and compliance with NEPA. The potential benefit of accelerated project delivery is the PPP benefit most at risk in the face of NEPA environmental review issues. A PPP team would like to get established and then involved early in the design phase of the project. This allows the team to bring its

³ Since the late 1990s, six federally-funded transit infrastructure projects using any form of PPP have been completed, all of which were either design-build or design-build-operate-maintain projects: The Portland MAX Airport Extension; the Denver RTD Southeast Corridor LRT; the Tri-Rail commuter rail upgrades; the Minneapolis Hiawatha LRT Line; the BART San Francisco Airport Extension; and the Washington Metro Largo Metrorail Extension.

⁴ Obviously, this could change if either of the BART Oakland Airport Extension or the Denver RTD East Corridor and Gold Line Corridor Extensions in Penta-P are procured according to current plans.

⁵ APTA’s task force on public-private partnerships recommends that FTA develop a program like FHWA’s SEP-15 initiative. Public-Private Partnerships in Public Transportation: Policy and Principles for the Transit Industry, APTA Task Force of Public Private Partnerships, Jonathan Davis and Michael Schneider, Co-Chairs, at 7.

“SEP-15” For Transit?

May 30, 2008

construction expertise to bear on design issues and presents an opportunity to “increase the constructability” of the design.⁶ A PPP team would like to work concurrently on design issues while engaged in the early phases of construction, because this has potential timesaving benefits. A PPP team would like to eliminate the bidding process between the design and the construction phases. It is not easy to do these things before completion of the environmental review process and the receipt of a Record of Decision (“ROD”). The Council on Environmental Quality (“CEQ”) regulations implementing NEPA provide, among other things, that “no action concerning the proposal shall be taken which would...limit the choice of reasonable alternatives” before the issuance of a ROD.⁷ This would seem to prohibit a wide range of design and planning activities that could do the most to accelerate project delivery prior to completion of the NEPA process.

Seven years ago, the FTA issued “Interim Guidance” on design-build projects.⁸ The Interim Guidance said FTA would allow project sponsors to prequalify bidders, but would not permit the issuance of an RFP until environmental review had been completed. However, almost immediately after the issuance of the Interim Guidance, FTA began to allow further variances on a case-by-case basis. Generally, FTA allowed project sponsors to negotiate and award design-build contracts when the contracts did not allow: (i) final design or construction or anything else that would commit the project sponsor to a particular alternative prior to the completion of the

⁶ See 72 Fed. Reg. at 2584.

⁷ 40 C.F.R. § 1506.1(a). The CEQ regulations also provide that the government may not undertake “any major Federal action” if the Agency action would tend to “determine subsequent development or limit alternatives while it is preparing the Environmental Impact Statement.” 40 C.F.R. § 1506.1(c).

⁸ http://www.fta.gov/printer_friendly_leg_reg_4191.html.

“SEP-15” For Transit?

May 30, 2008

environmental review; or (ii) parties with a financial interest in the outcome of the environmental review to perform the environmental review.

On January 19, 2007, FTA issued the Notice establishing Penta-P.⁹ FTA is requiring pilot participants to “observe environmental procedures substantially the same as FTA’s existing approach on environmental matters.”¹⁰ A pilot participant may award a design-build contract and issue a notice to proceed with preliminary engineering under that contract prior to the conclusion of the NEPA process. A pilot participant must secure FTA concurrence before issuing the design-build RFP and before awarding the design-build contract. The design-build contract must:

- Include provisions preventing the design-builder from proceeding to the final design or commencing physical construction prior to the completion of the NEPA process;
- Include provisions ensuring that no commitment is made to any alternative being evaluated in the NEPA process and that the merits of all alternatives (including no-build) will be evaluated;¹¹ and
- Include provisions ensuring that all environmental and mitigation measures identified in the NEPA document will be implemented.¹²

⁹ 72 Fed. Reg. 2583 (January 19, 2007). The Pilot Program was authorized by Section 3011(c) of the Safe Accountable Flexible Efficient Transportation Equity Act: A Legacy for Users (“SAFETEA-LU”).

¹⁰ 72 Fed. Reg. at 2587.

¹¹ Thus, the contract must include a termination provision in the event the no-build alternative is selected. In addition, the pilot participants must inform the proposers of the general status of the NEPA review and inform such proposers that no commitment will be made regarding alternatives under evaluation (and including no-build) until the completion of the NEPA process. Section 3(l)(i)(A) and (C).

¹² There are additional requirements designed to insulate the NEPA review from the influence or control of the pilot applicant’s design-builder. The design-builder may not prepare the NEPA documentation or have any decision-making responsibility with respect to the NEPA process. However, the design-builder’s work product may be considered in the NEPA analysis and included in the record. Any consultants who prepare the NEPA document must be selected and controlled by the project sponsor. However, a subconsultant on the design-builder team is not

“SEP-15” For Transit?

May 30, 2008

Anyone involved in a PPP for an FTA-funded project can take advantage of the opportunity to accelerate project delivery without running into NEPA roadblocks by consulting with FTA and using the requirements for Penta-P as their guide.

Since the issuance of the Notice, FTA has accepted three applications and filled the program: Denver RTD’s East Corridor and Gold Line Corridor Extensions; Houston Metro’s North Corridor and Southeast Corridor Transit Projects; and BART’s Oakland Airport Extension. Although all three projects have shifted at least a little bit since the submission of their respective Penta-P applications, the Denver RTD Extensions and the BART Extension both involve investment of funds by the private sector and the Houston Projects contemplate a long-term lease arrangement with a private entity to build and operate rail facilities.

“SEP-15” for Transit

In 1990, the FHWA issued Special Experimental Project No. 14 (“SEP-14”) to facilitate greater private sector investment in federally-funded highway projects through innovative project development, project finance, design, construction, maintenance and operation techniques. SEP-14 has advanced hundreds of highway projects and a number of contracting practices previously considered “experimental” have become standard fare on highway infrastructure projects.

Design-build procurement and its numerous variations have become common on FHWA-funded projects.

precluded from preparing the NEPA document if the subconsultant does not have a financial or other interest in the outcome of the process; and a pilot participant may allow a subconsultant on the NEPA document to submit a response to an RFP if the pilot participant releases the subconsultant from further responsibilities on the NEPA document. See Sections 3(1)(ii)(E) and (iii).

“SEP-15” For Transit?

May 30, 2008

About ten years ago, states and other entities began to explore highway project PPPs in which the private sector participants would assume an even greater role in project planning, development, construction, maintenance, operations and finance. These PPPs stretched the outer boundaries of SEP-14. Thus, in October of 2004, the FHWA initiated SEP-15, a new project to explore alternative and innovative approaches to project development.¹³ A key goal for SEP-15 was to encourage experimentation with respect to private sector investment in highway projects. The Notice for SEP-15 says: “SEP-15 will not be limited to contracting initiatives. It will encourage tests and experimentation in the entire project development process, specifically aimed at attracting private investment, leading to increased project management flexibility, more innovation, improved efficiency, timely project implementation, and new revenue streams.”¹⁴

Since inception of SEP-15, FHWA has entered into several Early Development Agreements. For example, the Texas Department of Transportation (“TxDOT”) and FHWA have entered into a Early Development Agreement under which TxDOT will accelerate the otherwise-applicable TIFIA loan approval process and prequalify several potential private concessionaires for several large highway projects in the state.¹⁵ By prequalifying potential concessionaires, TxDOT will be able to evaluate responses to its RFPs with the assurance that

¹³ Department of Transportation, Federal Highway Administration, New Special Experimental Project (SEP-15) to Explore Alternative and Innovative Approaches to the Overall Project Development Process; Information, 69 Fed. Reg. 59983 (October 6, 2004). SEP-15 was initiated pursuant to FHWA’s authority under 23 U.S.C. § 502(b).

¹⁴ 69 Fed. Reg. at 59984.

¹⁵ TxDOT plans to enter into Comprehensive Development Agreements for the Lyndon Johnson Freeway in Dallas-Fort Worth, the State Highway 161 Project through Irving and other highway projects. Many of the potential concessionaires expressed an interest in using Transportation Infrastructure Finance and Innovation Act funding. Accordingly, TxDOT submitted an SEP-15 application for waivers of certain TIFIA program procedures for these projects.

“SEP-15” For Transit?

May 30, 2008

the selected concessionaire will be qualified to execute TIFIA financing documents shortly after the award of a contract.¹⁶

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FTA has done well with the statutory authority it has to promote innovation in transit procurement. The broader statutory authority of the FHWA and its SEP-14 and SEP-15 initiatives have allowed broader and uniformly positive innovations. Penta-P is full. The Federal Transit Act should be amended to allow the FTA authority to make broader experimentation in transit procurement. It is highly likely that such broader authority would lead to the same kinds of positive results produced in the highway realm.

¹⁶ TxDOT and FHWA entered into an Early Development Agreement on June 9, 2006. A copy of the agreement is posted on the FHWA website:
http://www.fhwa.dot.gov/ppp/sep_15_txdot_tifia_edu.pdf.