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Docket Management Facility
U.S. Department of Transportation
400 Seventh Street, SW
Nassif Building, PL-401
Washington, DC 20590

RE: Docket Number FTA-2006-23697

Comments on the Public-Private Partnerships Pilot Program

Dear Docket Clerk:

The National Council for Public-Private Partnerships (NCP PP) is a non-profit, 501(c)3 educational institute with membership representing both the public and private sectors. NCP PP promotes the use of public-private partnerships (PPPs) where appropriate and use of their best practices. The NCP PP's interest in PPPs includes a wide range of infrastructures, and specifically transportation projects, operation and maintenance. Within the NCP PP is a specific group of members organized as the Transportation Institute, which has conducted numerous workshops for the USDOT/FHWA on the use of PPPs for transportation projects. It is on behalf of this group that these comments are being submitted.

We recognize that the US Department of Transportation has been supportive of the appropriate use of PPPs. This has been illustrated by the December 2004 publication of its **Report to Congress on Public-Private Partnerships** [Publication No. FHWA-CC-05-001], which thoroughly discusses the cost and delivery advantages of PPPs for both highway and transit projects. Equally important, this report noted federal and state/local impediments to implementing PPP projects and provided recommendations to correct these problems. In addition, U.S. DOT/Federal Highway Administration (FHWA) released its **Design-Build Effectiveness Study** in January 2006, illustrating some of the benefits of using the design-build method for transportation projects.

It is with this background that we suggest that the Public-Private Partnerships Pilot Program can focus on project delivery. This can be done by:

- identifying areas where the federal approval process and the PPP process are not consistent;
- developing ways in which U.S. DOT/FTA can respond to these problem areas; and
- demonstrating that these U.S. DOT/FTA actions can enhance and expedite the federal approval process for projects selected to participate.

PPPs are contractual agreements between a private, for-profit entity and a public agency, and are usually based on qualifications and performance criteria instead of design criteria (as is often common in other forms of government contracting). Through a PPP, the strengths and resources of each sector partner can be combined for the benefit of the general public. The contracts include performance responsibilities, risk allocation, and sharing of potential rewards for both parties.

One of the advantages of PPPs is the proven pattern of schedule acceleration. This results in saving time and money (by avoiding cost escalation through inflation). However, traditional public sector (and New Starts) procurement is linear and sequential, requiring that each stage be completed before proceeding to the next – this can include National Environmental Policy Act (NEPA) studies, preliminary engineering (PE), final design, and finally construction. As illustrated by the USDOT/FHWA's SEP 15 process, under a PPP a number of these activities are done in parallel. This can result in project delivery in a fraction of the normal time required with the more traditional procurement methods, and result in significant savings for the public. Unfortunately, this advantage is potentially lost in the New Starts program because of the linear decision process.

An important advantage of PPPs is that private partners are able to establish a fixed-price for project delivery. This can be done often because of the experience of the private sector with design-build based on a lower level of preliminary engineering completion, while still satisfying project requirements. Cost overruns can thereby be avoided, while maintaining the appropriate level of transparency in project pricing. This is important in meeting the due diligence requirements of the public agency and taxpayers.

Another advantage of a PPP can be the completing of tasks with a single private sector partner, thereby costly and time-consuming multiple procurement cycles are avoided. This also mitigates procurement risk to both the public and private sectors by reducing the number of interrelationships, while still allows the use of local firms through subcontracting.

Many of these advantages can be lost in the linear decision process of the New Starts program. Under a PPP approach, the overall project execution schedule can be streamlined by completing NEPA, Clean Air Act Amendments and other key planning requirements simultaneously with the development effort. Simultaneously, the private sector partner can continue with developing financing for the project and design efforts. This does not undermine the NEPA, in that final project approval is still dependent on NEPA.

Approaches to be considered for this program should include:

- allowing simultaneous submission and approval for Final Design (FD) and Full Funding Grant Agreement requests (FFGA);
- utilizing the design-build authority allowed for in **SAFETEA-LU** Section 1503 under “normal” circumstances or if the projects are granted a Categorical Exclusion for reasons of “hardship” or “protective purposes”;
- not reopening the NEPA process or amending a Record of Decision (ROD) to review a new impact that does not meet NEPA requirements or Council on Environmental Quality (CEQ) policies; and,

- permitting New Start activities – especially FD and FFGA efforts – to simultaneously move forward should there be a new but minimal environmental issue warranting further NEPA review.

An additional consideration should be that under many PPP arrangements, the private sector makes an investment during the development phase of the project, when the risk of project cancellation or deferral is the highest. This investment can come in different forms: deferral of payment for development services, discounted pricing of development services, sharing of development costs, cash contributions, or land in the form of right-of-way (ROW) contributions. Providing federal grant funding for participants in this Program is recommended for development purposes (defined in U.S.C. Title 23 Section 181) whether or not concession financing for capital construction or operations is a part of the funding mix. With additional federal monies available during the most vulnerable stages of a project, an incentive would be provided for states and local authorities that have enabling authority to continue this path while encouraging more states and localities to choose PPPs.

Increasingly PPP projects are linked to local economic development, which provides opportunities for these beneficiaries to contribute to the funding of a given project. Numerous examples exist whereby the expenditure of public funds have been greatly reduced through Tax Increment Financing, dedicated tax districts or similar vehicles – PPPs provide an extremely viable means for facilitating this process. Building upon FTA's Joint Development Program and more readily applying the common grant rule for participants in this Program would be beneficial.

SAFETEA-LU makes important changes to the Transportation Infrastructure Financing and Innovation Act (TIFIA) that will help better support the PPP project delivery approach. Additional TIFIA elements that would be beneficial for projects in this Program include:

- allowing TIFIA financing to be approved prior to an FFGA submission but making TIFIA funding subject to FFGA execution;
- permitting TIFIA funding to be used as bridge financing for delays or shortfalls in other project funding, potentially including delays in anticipated annual FFGA appropriation; and
- not requiring the prepayment of a TIFIA loan or accelerating loan repayment if the projects generate better than expected revenues.

SAFETEA-LU also extends the use of Private Activity Bonds (PABs) to qualified highway and surface freight transfer facilities and provides \$15 billion of issuance volume (falling outside the current state volume gaps). This is another positive step in helping to support the PPP project delivery approach, especially for multi-modal projects. In this Program, PABs are a financing tool worth considering for projects that are truly multi-modal or corridor projects where funding is coming from a variety of public and private sources. Such a project could include a New Starts project with a qualified highway, freight transfer facility and/or rail project.

Thank you for your consideration of these comments.

Sincerely,



Richard B. Norment
Executive Director