



Partnerships in Transportation
Overcoming Legal Obstacles to PPPs

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Nossaman Infrastructure

- Law and consulting firm specializing in innovative procurement, contracting, and financing of large infrastructure projects
- Honored to work for more than 30 State DOTs and regional transportation authorities around the country
- Projects include most of the large signature projects other agencies seek to emulate
- Offices in California, Austin, TX and Arlington, VA

Comparison of Selected PPP Enabling Laws

CA: AB 680 program; just repealed few months ago

DE: Enacted in 2003; authorizes solicited proposals only

GA: Also enacted in 2003; may only accept unsolicited proposals

VA: PPTA of 1995 allows for solicited and unsolicited proposals; considered one of the most successful statutes along with TX

NC: Enacted in 2002; allows solicited proposals only; 3 initial turnpike projects authorized

Predicates for Successful PPP Implementation

- Entrepreneurial Vision
- Organizational support – commitment to innovation
- Institutional capacity to manage program
- Risk management philosophy
- ***Access to innovative finance mechanisms***
- Flexibility to respond to diverse proposals
- ***Innovative procurement of private partners***
- Positive political climate

Implementation Challenges

- Attracting well-developed proposals from financially strong entities
- Proposals meet agency policies and objectives
- Maintaining a competitive process
- Achieving transparency and public participation
- Allocating risks to each party appropriately
- Getting buy-in from public funding partners—federal, state and local
- Achieving timely environmental compliance
- Meeting federal regulatory challenges

Traditional State Law Obstacles

- Competitive bidding statutes
 - Low bid requirements
 - Limited “sole source” authority
 - No negotiations
 - No design-build contract authority
- Lack of revenue bonding authority
- Constitutional restrictions on “gift of public funds” and investment in private companies
- 100% surety bond requirements
- Open records acts
- Legislative or local government approvals

Appropriate Procurement Authority is Critical

- Permit solicited and unsolicited proposals
- Design-Build Authority
- Best Value Evaluation
- Surety bond flexibility
- Permit negotiations
- Confidentiality of proposals until completion of negotiations
- Long-term operations and maintenance

State Laws Should Provide for

- Submission of competitive proposals
 - With adequate time periods
- Appropriate evaluation factors
- Opportunity for public comment
- Authority for state grant or loan to project and contribution of federal funds
- Clear and fair selection process
- Avoidance of conflicts of interest
- Application review fees

Appropriate Financing Authority is Critical

- Tolling
- Financing vehicle - authority or 63-20
- Revenue bonding authority
- Contribution of state or federal funds to “private” project
- Stipends - Payment for Work Product to unsuccessful proposers

PPI Legislation Should Enable Innovative Financing Alternatives



- 100% project revenue financing
- “System” revenue project financing
- Project financing plus SIB contribution and State O&M
- Project financing plus TIFIA, Garvees and local bonding

Federal Legal Obstacles

- Federal Design-Build Rule
- NEPA
- Limitations on tolling interstates
- FHWA procurement process
- Other Federal requirements: Buy America, etc.

Environmental Process Can Delay/Discourage Projects

- State DOT must share early development risk
- Delays caused by environmental litigation a major cost driver
- Take advantage of environmental streamlining
- Use “tiered” environmental approach

SEP 15 Supports Private Sector Role in Pre-NEPA Project Development

- “One-stop shopping” for Title 23 waivers to implement innovative financing and contracting.
- Permit private sector involvement in early development process before final pricing.
- State DOT can issue RFPs and enter into contracts with private developers prior to ROD.
- Project developer can conduct environmental analysis and prepare NEPA documents subject to direction and oversight by the State DOT in cooperation with FHWA.
- A “tiered” environmental process can be used.

Looking to the Future: New Structures under Reauthorization

- TEA-21 Reauthorization proposes tax-exempt bonding for private highway concessions and intermodal projects
- Would permit “true” private equity participation
- Permits expanded tolling of existing and new interstates
- Financial incentives for public-private partnerships
- Technical improvements to TIFIA

Example of PPP: Dulles Corridor Metrorail Project

- Unsolicited: 23-mile extension of metrorail to Dulles Int'l. Airport
- \$3.5 billion project (11 new stations + rail yard)
- Parties: DRPT, WMATA, Dulles Transit Partners
- Incentive payments in Comprehensive Agreement
- 1st transit project under Virginia's PPTA

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