Managing Transportation Utilities Through Public-Private Partnerships

"Crumbs Don't Do It"

A report on the Scan conducted by representatives of the Minnesota Department of Transportation to the Texas Department of Transportation, June 20 – 21, 2006

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"CRUMBS DON'T DO IT"

"Crumbs don't do it" was a comment made by a Texas State legislator, referencing the fact that an increase in the gas tax would not be sufficient to cover even the maintenance of the existing state highway system. This same person estimated that an increase in excess of $1.40 per gallon would be needed to begin to address the state needs for transportation projects.

EXECUTIVE SUMMARY

On June 20 and 21, 2006, a delegation of five senior people of the Minnesota Department of Transportation (MnDOT), along with two representatives of the Federal Highway Administration (FHWA), participated in a Scan of the Texas Department of Transportation (TxDOT). Their objective was to evaluate the procedures used by TxDOT in development of public-private partnerships (PPPs) for transportation projects. One particular area of interest was how to deal with unsolicited transportation proposals.

PPPs are a contractual agreement between the public and private sectors, whereby ownership of the asset and a significant level of control remains with the public sector. The resources of both sectors are combined to provide faster and more cost effective delivery and operation of services and infrastructure for the use of the public.

The Scan provided the following observations that may be of particular interest to MnDOT:

Texas Environment for Transportation: The state has enormous transportation needs, far in excess of the funding available by traditional means. Accordingly, there has been a long established acceptance of tolling for the development of new roads. Also, the Division office of FHWA aggressively supports and works closely with TxDOT in the development of projects using a variety of PPP models. This support is particularly useful in developing a close liaison with FHWA headquarters in support of project development and to assure compliance with the requirements of NEPA.

Political Leadership: A close working relationship exists between TxDOT and the leadership in the state legislature. This has been important in providing the statutory framework for a consistent methodology used in the TxDOT contract development process.

Texas Statutes: State statutes provide for Comprehensive Development Agreements (CDAs) that emphasizes "system financing" that incorporates private sector resources. The statutes also provide for selection on the basis of "best value" and an accelerated right-of-way process ("Quick Takes"). Most importantly, there is a requirement for a close working relationship with the state's Regional Mobility Authorities (RMAs), which each have final authority on projects in their region because funding for the project comes from their allocation of state and federal funding.

Organization of TxDOT: There is a dedicated team in the Texas Turnpike Authority that administers contract development and is responsible for working with the RMAs. This dedicated team is relatively small (with only about 30 employees), but managed the full cycle of project development – from conceptualization, preliminary design, competitive bidding, project management to final operation. An extensive network of consultants is used to augment this staff, and a clear conflict of interest policy (for both TxDOT staff and the consultants) is in place.

Policies for Implementation: The CDAs provide the framework for development of all projects, and an extensive manual has been prepared to provide guidance for these procedures. This manual is used by TxDOT, project developments and the RMAs. Proposed projects are weighed against a master schedule of all state projects. Selection of projects is done in a two step process, with the first being a preliminary evaluation of regional alternatives, and the second that provides specifics for development of both compete and non-compete projects. "Best value" and substantial risk allocation is used in the selection of awards, and consultants are used throughout the process. In the screening of proposals, the initial step is only sufficient to make a determination if there is justification to proceed to the second step, which is a more detailed proposal. The final step is an "investment grade" analysis of the proposal. Both solicited and unsolicited proposal are treated in the same manner, and experience has been that because of the clearly defined CDA process, proposers do sufficient preparations to result in a very low rejection rate (only two or three unsolicited proposal have been rejected).

Education and Communications Efforts: TxDOT has an extensive education program that keeps legislators, the RMAs and the general public informed on projects under development and the rationale used with each project's financing. Key to this program is explaining the limitations in funds available through the state and federal gas taxes.

REPORT DETAILS

OBJECTIVES OF THE SCAN

The Minnesota Department of Transportation (MnDOT) has used public-private partnerships (PPPs) for several projects throughout the state, but has not utilized this option to its fullest capabilities. In part, this has been because each project was approached without a comprehensive and systematic methodology for the use of this more complex form of procurement. While the experience with the use of PPPs in Minnesota has been positive, it was the option of senior MnDOT people that more could be learned about implementation of the process from a state Department of Transportation that has had extensive experience and use of PPPs. In particular, there was a desire to learn how unsolicited proposals can be best handled.

The Texas Department of Transportation (TxDOT) was identified as the most appropriate agency with which to meet. The objective of the Scan was to evaluate the methodologies for use of a wide range of public-private partnerships, from simple operations and maintenance (O&M) contracts to full concessions. In particular, one of the Scan's specific objectives was to evaluate the process used by TxDOT in handling of unsolicited proposals.

SCAN PARTICIPANTS AND FORMAT OF THE MEETINGS

A total of eight (8) people made up the traveling group – five (5) senior representatives from the MnDOT, two (2) from the Minneapolis office of the Federal Highway Administration (FHWA), and one (1) representative from the Illinois Department of Transportation participated. The delegation was led by Douglas Differt, Deputy Commissioner, and included a balanced representation of functional responsibilities for the project planning and delivery process (see Appendices for the full listing of people).

Presentations were made by the appropriate senior representatives of the Texas Department of Transportation. The sessions were led by Philip Russell, Director, Texas Turnpike Authority Division and included presentations by the TxDOT Executive Director Michael Behrens and the leaders of those functions directly related to the use of public-private partnerships.

Because of the small number of people participating in each component of the sessions, discussions were highly interactive. While PowerPoint and video presentations were used throughout, the predominate methodology used was "questions and answers", providing for a clearly focused conveying of

information. Portions of these presentations are included in the Appendices of this report.

This Scan was organized and executed by the National Council for Public-Private Partnerships (NCPPP), a non-profit educational institute with membership including both the public and private sectors. The NCPPP also has organized numerous workshops on transportation partnerships, including one of which was held in Minneapolis in December of 2003.

ROLE OF PPPs

Definition of PPPs

Public-Private Partnerships (PPPs) are a contractual agreement between a public sector (government) agency and a private sector (for-profit) company. Under these agreements, the resources and risks of both sectors are shared to meet a specific public need. This contractual relationship may include non-profit groups (either non-governmental organizations or special purpose ones created by government action). In all cases, at least one for-profit entity (thus the "private" in public-private partnership) will be included. These partnerships can be for construction, operation and/or maintenance of public infrastructures – of particular here are transportation projects.

A distinction must be made between PPPs and privatization. While the term "privatization" is frequently used for utilizing private sector capabilities in a project or service, there is a significant distinction – under privatization, the asset is conveyed to the private sector, with minimal (if any) control by the public sector. In a PPP, the public sector retains a significant level of control to assure that the best interest of the public are met. In this way, the general public's true interests can be maintained. However, for a partnership to be successful this control must be exercised with an understanding of the limitations and objectives of the private sector partners (including the need for a reasonable return on their investment) – otherwise, the partnership will fail.

Keys to Successful PPPs

Success in implementation requires six important factors. First is the appropriate political environment, include statutes and regulations that allow for the use of PPPs, and the political leadership to promote their use. Second is a dedicated unit within the state agency for administration of the entire process, from conceptualization of the project to preliminary design, to issuing of an RFP, through negotiation of the contract and finally management of the actual development of the project. Other factors include a detailed business plan in the form of a contract, a revenue stream for the private sector to recoup its investment, open and complete communications with all stakeholders, and a carefully designed selection process to assure that the private partner is a good match to the public agency's needs.

Each of these keys is notable in the TxDOT example, and more detailed information on these key factors can be found on the NCPPP Website (www.ncppp.org).

Application of PPPs

Public-private partnerships should be considered a useful tool, but not the answer to every transportation challenge. Projects that are most suitable for PPPs include a means of generating revenue for the private sector partner, either through tolls, long-term maintenance agreements or links to possible economic development projects impacted by the transportation facility. While design-build models are frequently incorporated as part of the PPP, not all design-build projects would be suitable for a PPP.

PPPs can be a vehicle for a number of innovative financing tools. By leveraging the available funds from federal, state and local resources, the additional funding provided by innovative financing from the private sector can make the difference as to whether or not a project can proceed. By combining the resources of both the public and private sector, an array of additional financial instruments are possible, such as Private Activity Bonds (PABs), tax increment financing (TIF), TIFIA and the economic development of underutilized public assets.

PPPs can accelerate the delivery of a project, in part because of the timely availability of funding for the project, as well as the project management tools of the private sector. TxDOT's Director of the Texas Turnpike Authority Division Phil Russell frequently says, "I can deliver a project in 20 years using the traditional project development methods, or give it to you in 5 years if we use a public-private partnership."

FINDINGS – THE TXDOT EXPERIENCE

The Texas Environment for Transportation

TxDOT Executive Director Mike Behrens described the challenges that Texas has faced in meeting the state's transportation needs. Accordingly, Texas transportation officials took a close look at what other states (including Minnesota and Virginia) and European countries were doing in the area of PPPs and concessions. The TxDOT program has built on these examples and further refined and expanded the process on the basis of their experience with the innovative tools.

Fortunately, a number of local highway projects have incorporated tolling as a means of providing some of the financing, and have created an atmosphere in this option is more widely accepted in the state. Even with this, it was noted that there must be an on-going educational effort that illustrates the need for a specific project and develops a consensus in support of that project (*see Education and Communications Efforts, page 9*).

Federal Highway Administration Role: The FHWA's division office has aggressively supported the TxDOT PPP process, and has served as a critical link with the Washington headquarters. In particular, they have aided in providing support by the Transportation Infrastructure Finance and Innovation Act (TIFIA) financing program, and Special Experimental Program (SEP) 15. Also it was noted that there is a continuing need for strong leadership from the federal level in support of public-private partnerships, tolling and innovative financing.

In addition to the financial oversight role, the FHWA office has also been effective in assisting with "environmental streamlining activities" and assuring that environmental protection and compliance obligations of NEPA are initiated early and carried out throughout the process.

Financial environment: While Texas experiences a favorable financial condition, the demands of their rapidly expanding population create serious problems of highway congestion. The state gas tax and federal funding provide only a fraction of the necessary financing to meet these expanding needs – fifty percent (50%) of the total budget and all of the gas tax revenues are need to address maintenance of their aging highway infrastructure.

The Texas Mobility Fund generates $4 billion per year for transportation projects. However, when federal and state funding are combined, this still falls over $86 billion short of all the "blue sky" projects.

Political environment: Mike Krusee, Chairman of the Texas House Transportation Committee described the current political climate and how the state arrived at this point. He noted the experience in the Austin area of losing 10,000 jobs when Dell decided on an out-of-state location for their distribution center, because of the limitation and congestion of the Texas transportation systems. He and other political leaders rapidly realized that the gas tax wasn't enough to meet the state's needs, and the majority opposed any increase in this tax. As a result, the state set in place a process for utilizing the private sector's resources (noted that Texas chose to do this before any actual procurements, versus the approach taken by Indiana which had the procurement first and then had to provide the statutory authority).

Krusee and a key group of legislators led an effort to develop the statutes on the basis of the state's need to find an alternative to the gas tax, which is negatively impacted by the increased efficiency of vehicles, the lack of an inflation adjustment, inflating costs of projects because of increased costs for construction materials, land, etc.. Krusee argues that states should "treat roads like utilities", i.e. that appropriate fees should be charged, as is the case with water and electricity. In this way, projections of use of a given project can provide the basis for bonding or private sector market based financing. He added that "there is no road fairy", noting the need for strong leadership in the political arena.

In crafting the legislation, Krusee and other key legislators relied on a "kitchen cabinet" of experts from both the public and private sectors. The other

legislators deferred the complex decisions to this legislative leadership group, which was able to “counter demagoguery with facts.” One component of their analysis concluded that TxDOT should “hire the best consultants”, since they prove being worth the expense.

Texas Statutes

State statutes provide for Comprehensive Development Agreements (CDAs) to be administered by TxDOT. Also, a portion of state revenues (including the gas tax) is distributed to the local level, where a major portion of the decision process for a given project is made. The process defined in the statutes emphasizes “system financing,” which spreads the impact of the limited existing state funds. The concern over confidentiality of information in proposals is balanced by an open process to avoid the impression of “secret deals” and the state has a limited waiver of sovereign immunity. The legislation also authorizes the use of “best value” instead of lowest bid, and allows for design-build to be incorporated in proposals. Also included is a “Quick Take” provision for right-of-way acquisition – this is an accelerated process, but with full and proper notification to the property holder. Provision for “no-compete” bidding is included, but on a limited basis.

Another component of the Texas system is creation of Regional Mobility Authorities (RMAs). Although these RMAs have a high degree of autonomy, the state retains oversight to assure that the state revenues go into transportation systems. An RMA can independently develop a project, with no TxDOT oversight, if no state or federal funds are used in the project (several examples do exist, particularly in the Houston/Harris County area).

A statutes also allow for concession fees, but again there is close monitoring of where the money goes (it must stay within the transportation arena), and limit these agreements to 50 or 75 years.

All of these Texas statues and regulations are in close compliance with the appropriate federal statutes, including the provisions incorporated the most recent federal statute Safe, Accountable, Flexible, Efficient Transportation Equity Act (SAFETEA-LU) and the new USDOT rules on design-build. However, the objective of the Texas statutes is to add to the development opportunities environment.

The state’s statute and regulatory framework is found in Chapters 223 and 227 of Texas Transportation Code, Title 23, Sections 27.1-27.5 of the Texas Administrative Code, Texas HB 2702 and 3588, the US Code Title 23 and FHWA’s SEP 15. In addition, there are project specific minute orders of the Texas Transportation Commission. Information on other states and international examples can be found through resources such as National Council for Public-Private Partnerships and the International Bridge, Tunnel and Turnpike Association.

Organization of TxDOT

A Transportation Commission is the official governing body of TxDOT, which then delegates the responsibility for implementation of PPP projects to the Texas Turnpike Authority (TTA). It is this latter group which interacts with districts and the individual Regional Mobility Authorities in development of each project.

TTA has a dedicated team of about 30 people who manage the entire PPP process, from conceptualization of a project, through the issuing of RFPs and the negotiation process, all the way through to final management of the project's development. Throughout the entire process there is extensive use of external resources (legal, consulting engineers, financial consultants, project managers, etc.). All of these are overseen by a TTA internal General Counsel to assure legal compliance. This can lead to some work force issues – the state employee union for people doing design work can be a source of opposition but through attention and open discussions with them, the concern is minimized.

One challenge has been the contrast between public and private pay scales, but the TTA has managed to retain "core competencies," largely by creating a sense of "mission" within the team. The result has been a high level of retention of the most qualified people.

Conflict of Interest Policy: Because of the number of consultants used by TxDOT in all stages of the procurement process and the natural rotation of some TxDOT employees, there is concern about proprietary information for a given project development and procurement process. This has led to an expansion and clarification on the conflict of interest guidelines provided by US DOT regulations. The guidelines proscribe clear timeframes for when and when not a former consultant and/or employee may participate in a project development on which they may have worked. The complete draft of TxDOT's "Conflict of Interest Guidelines for CDA Consultant Services" may be found at ftp://ftp.dot.state.tx.us/pub/txdot-info/tta/conflict_interest.pdf

Policies for Implementation

Under Texas statutes (noted above), all transportation partnering agreements are developed under the system of Comprehensive Development Agreements (CDAs). The range of agreement models that can be used are broader than the European concession model and are used for highways, turnpikes, freight or passenger rail, and public utilities.

The statutes allow for a straightforward concession that includes environmental plans and clearance, a concession with environmental risk still there, design build, DBM, DBOM, DBFO, and pre-development agreements. Strategic business partnerships are also possible under the CDA. All of these CDA models are in full compliance with FHWA and FTA requirements, but aggressively work with the US DOT to maximize the policy options.

While CDAs are administered by TxDOT, the state-wide system of Regional Mobility Authorities (RMAs) is an integral part of the CDA process – these local groups can define a project and allocate the funding for that project. This system aids in encouraging a broader base of local support for each project. Under the Texas Metropolitan Mobility Planning, these RMAs are allowed to generate as many proposals as they wish, but are limited to what is provided in a proscribed limited budget of state and federal funds. The gas tax revenues are retained in these individual regions, but this still places a large portion of the responsibility for the process at the local, grass roots level. An individual RMA or groups of RMAs can develop a given project.

To insure compliance the state procedures, TxDOT works with the individual regional authorities to develop their core competencies and to make sure they have updated their reference materials to conform to TxDOT's procedures. These local groups can identify projects, but must use the TxDOT business model, since TxDOT actually issues the contracts. Under this system, TxDOT acts a resource to the RMA. However, if a regional group is able to finance a project without using state or federal funds, they may proceed with the project outside of the framework of the CDAs.

"Umbrella CDAs" are used for large projects (such as Trans Texas Corridor 35, which will run from the Mexican border to Oklahoma). This type of agreement is done with a private company (under a "Facility Agreement") for both the project planning and related financial development. The total project is then segregated into smaller, more manageable size projects. This process helps to identify what are the most financially viable options for a given project.

Comprehensive Development Agreements (CDAs) Manual: The CDA Manual serves as the guidelines and template for all procurements. The objective of the CDA Manual is to develop a standardized process, including business and technical terms, and therefore provide a more uniform basis for "best value' evaluations of bids. Simultaneously, this makes the whole bidding process more manageable. With more consistency in the proposals received, this significantly reduces the time required for appropriate processing.

The CDA Manual is under constant evolution as lessons learned from recent experiences are incorporated into the CDA Manual. This programmatic approach that leads to greater efficiency, reduced developer costs and appropriate due diligence.

The complete manual consists of three substantial Notebooks. Notebook I contains a narrative introduction and an overview. Notebook 2 contains contract models, terms and provisions. Notebook 3 has other forms to manage the bidding process.

Criteria for selection: Project development is done in two steps. The preliminary (Tier I) review is an evaluation of regional alternatives, but does not authorize construction of a specific route. The Tier II review evaluates specific

local options, leading to compete or non-compete project choices. There can be an industry review prior to RFP – if an idea is incorporated in the RFP, the private company is appropriately compensated for the intellectual property.

TxDOT staggers project reviews to avoid overload – no more than two projects can be at the RFP stage at any one time and not more than one or two months of overlap during the proposal review period is allowed. The end result is moving forward one project per quarter, on average.

Selection is done on a "best value" basis, with weighting against the state's project master projects schedule. Selection is done in a two step approach. First is a Request For Qualifications (RFQ) in solicited projects or Request for Proposal and Qualifications in unsolicited proposal. If approved, this is followed by a request for a detailed proposal, with instructions to the proposers that include compliance with the CDA, technical provisions and referenced documents is required. With each award, the long-term goal is to develop a strategic partnership to maximize the private sector investment and benefit to the public.

There appears to be no problem with using ideas from one proposal that does not receive an award, since TxDOT provides compensation for Intellectual Property (IP). Stipends for losers for IP could be as high a $1million – was noted that some of the large European firms "claim they don't want it" but they do certify that TxDOT does have the right to use the IP.

There is active use of consultants throughout negotiation to match the capabilities "on the other side of the table" and to assure that TxDOT does not "leave any money on the table".

The proposal screening process includes a review of TxDOT's and business terms, technical provisions and an environmental process. Three levels of screening are used. In Level 1, less than 5% of the design has been completed, but there is sufficient information to make a decision about moving to the next step (Russell described this as "a back of the envelope" decision). In Level 2, a more detailed proposal is required, including a risk assessment. In Level 3, an "investment grade" analysis of the proposal is required – it is at this stage that TXDOT also will determine which execution model (Concession, DBFO, DB, etc.) will be used.

While not included in the CDA, there is an emphasis on minority and Small business development, with developers seen as "mentors" for these firms.

Solicited and unsolicited proposals: Both types of proposals are treated the same. For unsolicited proposals, a TxDOT team makes a risk assessment, environment, financial and a number of other – this is done at this early stage to avoid wasting efforts on a project that may not be successful. TxDOT does not receive a great number of unsolicited proposals and most are accepted (only two or three have been rejected). This is due to the clearly defined process and the preparations that the private sector must make to comply with TxDOT's CDA procedures.

All unsolicited proposals are evaluated against a screening criteria approved by the Transportation Commission. There is also a review on the basis of local priorities, and an evaluation of risks. Regional Mobility Authority input is required before proceeding (since their allocation of funds would be effected) and is part of the risk assessment. If the Commission approves the proposal, it then goes to competition.

It is recognized that often the developer has done a lot of the preliminary work to assure that the proposal received the most favorable ruling possible. The developer is generally aware of the local interests and concerns, and the CDA procedural requirements.

The "best value" analysis is done by TxDOT internal staff and usually takes 45 to 120 days for the final competitive evaluation.

Risk Allocation: Under the CDA procurement, risks are reduced for the state. Risks are shared as follows. The developer is responsible for risks related to design, environmental (other than NEPA), existing assets, site condition, right-of-way acquisition and non-discriminatory changes related to operations and maintenance contracts. The state is responsible for related environmental risks (NEPA) and discriminatory changes related to operations and maintenance contracts.

The "Rail Challenge": Discussions also covered TxDOT's desire to address realignment of some of the freight rail lines, on the basis of concern for public safety. However, the railroad companies indicate they are satisfied with status quo. This led to introduction of legislation for a Texas Rail Plan, which would cost approximately $17 billion. There is still an effort to identify a potential funding source for this effort, with possible consideration of diesel fuel tax.

Education and Communications Efforts

TxDOT education and communications efforts are directed at a number of audiences. First and foremost, through a partnership with the leaders in the state's legislature, key leaders are kept informed on developments and progress, and they in turn decide when to bring the information to other legislators. With the recognition that public hearings are not a truly interactive proceeding and provide only limited information, this process can be critical in keeping these key individuals fully and appropriately informed.

A second critical audience is the general public, to provide the "grass roots" support for the legislative initiatives and for specific projects. It is realized that public hearings are not always the accurate way to determine the public's range of opinions. For this reason, market research is done to gain a better understanding of what people want and need. The predominant message is about tolling as a means of expanding capacities. One example given was that truck speeds can be higher if in a segregated lane and that it costs $100 – 120 per hour to operate a truck, even while sitting still.

Another key audience is internal within TxDOT, promoting the partnering process as a “career enhancer” for individuals.

With each of these audiences, the key points need to be reiterated, over and over again. These points include:

- There are limitations to the funding of the gas tax, and emphasize that tolling is not “double taxation” since the current tax system does not allow for capacity expansion.
- Understand what needs to be conveyed, which is a better understanding of what’s new in development of transportation systems.
- Remember that events take their own course and that there are no two PPPs that are identical – each is adapted to the specifics of the local conditions and needs. Be intellectually prepared – know the facts, meet critics head on and don’t back down
- Know your audience, hire outside help, use out-of-state endorsements and partner with economic development agencies/firms/people.

CONCLUSIONS

"Transportation is not an entitlement program and should be run like any other utility," said Phil Russell. He noted the parallel between power "brown outs" and highway congestion. This is a significant departure from the paradigm of the last five decades, when the Highway Trust Fund provide a substantial portion of the funding and was largely unseen by the average motorist.

The legislative and regulatory environment is crucial in establishing a uniform process for the handling of a wide range of PPP options and innovative financing. Through the use of Regional Mobility Authorities and their defined allocation of state and federal funds, the political process is taking place largely at the "grass roots" level, minimizing opposition to a given project.

A dedicated team is critical to the success of the PPP process. This one team is responsible for a project from concept to final management, and thereby assures a consistency in the application of the state's procedures and minimizes confusion and problems throughout the entire process of project development.

The unified process developed under the Comprehensive Development Agreements approach clearly outlines the language, terminology and procedures for both the agency and the private sector. This is particularly valuable with unsolicited proposals, in that they have a much higher degree of compliance with the state's objectives and needs.

"Crumbs don't do it" – this comment made during the Scan clearly summarizes the challenges facing all state Departments of Transportation. The perception that an increase in the gas tax might provide the necessary funding to meet the state's transportation needs is sorely misplaced – TxDOT estimates that an increase of $1.42 per gallon would be needed and has accordingly moved to alternate means of generating the necessary funding. With the rapid depletion Highway Trust Fund moneys, PPPs have clearly illustrated that they are an option to filling this expanding funding gap.

APPENDICES

PARTICPANT LIST

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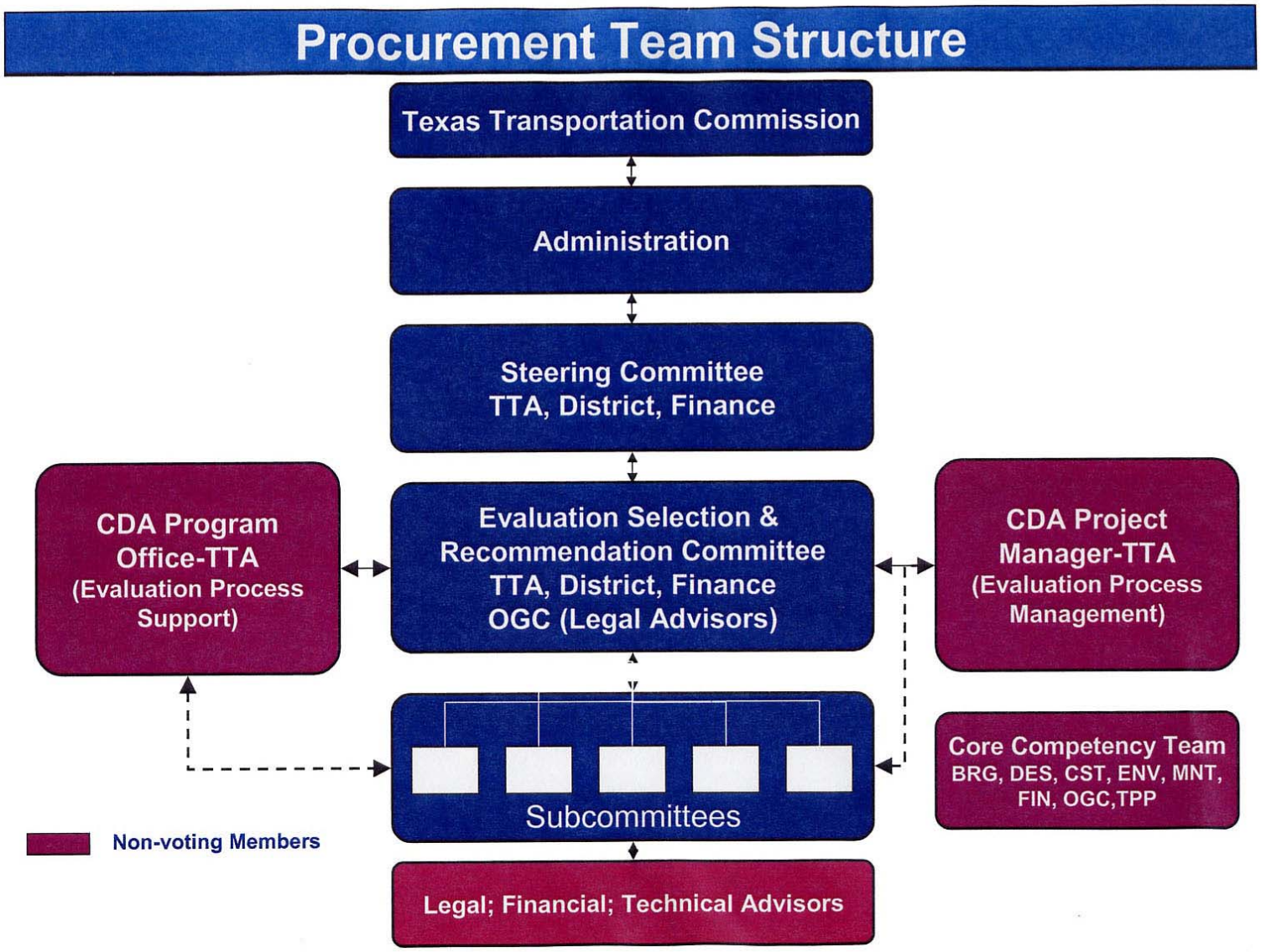
Procurement Team Structure
Texas Transportation Commission
Administration
Steering Committee
TTA, District, Finance
CDA Program Office-TTA
(Evaluation Process Support)
Evaluation Selection & Recommendation Committee
TTA, District, Finance
OGC (Legal Advisors)
CDA Project Manager-TTA
(Evaluation Process Management)
Core Competency Team
BRG, DES, CST, ENV, MNT, FIN, OGC,TPP
Subcommittees
Non-voting Members
Legal; Financial; Technical Advisors