

Public Private Partnerships and the Private Finance Initiative in the United States

Product/Procurement Information

1. Terms

- a. **Public-Private Partnership (“PPP”)** – Generally, a PPP is a contractual agreement between a governmental entity and one or more private entities to fund, build, and operate a service which has been traditionally provided by the government. The term “PPP” or “P3” can encompass a number of partnership options for a new delivery system. A common feature is a public entity desiring to develop and execute an infrastructure improvement within its locale, but without providing any financial investment. Through a PPP, the private sector can participate at a greater level in the delivery of transportation projects, and the public entity will try to shift as much risk as possible to the private sector. The fundamental differences between a PPP and “outsourcing” or “privatization” are:
- i) In a PPP, the government remains an active participant (at least contractually) throughout the deal, rather than simply granting a concession to a sponsor/developer and waiting for its expiration; and
 - ii) The government is a party to the PPP transaction and ultimately, even in a default, the government is expected to provide the service, since it is necessary for the public good.
- b. **Private Finance Initiative (“PFI”)** – A concession program started and is active in the UK, and also active in Europe that applies to new construction activities. This type of concession arrangement is prevalent on new construction activities such as hospitals, prisons, and schools that only become available for operation when practical completion of the contract is achieved. This contrasts with PPPs, which allow for the services to continue around the construction. This type of construction would be common on light rail upgrades and other upgrades to existing facilities. The intent is to transform local government agencies from being the owners and operators of fixed assets, to the purchasers of services. In a PFI transaction, a private sector service provider is given responsibility for designing, building, maintaining, operating and financing assets, from which a public service is delivered. The overriding objective of the PFI is to create a structure in which value for money is optimized, through private sector innovation and management skills, through the synergies of linking design, build, and operate, through re-engineering, through the efficient allocation of risk, and through the whole life and whole service approach to service delivery.
- c. **Concessionaire** – The Special Purpose Entity (“SPE”) or Special Purpose Vehicle (“SPV”) with whom the public agency almost always enters into a concessions contract. It is a private legal entity comprised of a private firm or firms which will finance, design, build, operate and/or maintain the asset to be constructed.
- d. **Build/Operate/Transfer (“BOT”)** – A PPP arrangement whereby the private partner builds a facility to specifications agreed to by the public entity, the private partner operates the facility for a set period of time, and then the public agency takes title to the facility at the end of the operations period.
- e. **Build/Transfer/Operate (“BTO”)** – Similar to BOT, but in this PPP arrangement, the transfer of title to the public agency occurs at the time construction is completed, not at the end of the operations period.
- f. **Build/Own/Operate (“BOO”)** – In this PPP arrangement, the private sector retains ownership of the facility after the construction and operation. The public agency is not obligated to purchase or take title to the facility. The service cost tends to be higher on this type of transaction.

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- g. **Buy/Build/Operate (“BBO”)** – A PPP arrangement used primarily to rehabilitate and expand existing facilities in which the government sells its private asset to the private sector. The private partner is then responsible for making the improvements and operating the facility.
- h. **Design/Build/Operate (“DBO”)** – In this type of arrangement, a single contract is awarded for the design, construction, and operation of a capital improvement; however, the title to the facility remains with the public agency.
- i. **Lease/Develop/Operate (“LDO”) or Build/Develop/Operate (“BDO”)** – In this PPP arrangement, the private partner leases (or buys) an existing facility from the public agency and provides the capital to modernize/renovate the facility. The private entity then operates the facility upon completion of construction. This model is frequently used for municipal transit facilities.
- j. **Lease/Purchase** – In this PPP arrangement, the private partner finances and builds a new facility. After completion of construction, the private partner then leases the facility to the public agency, which makes monthly lease payments. The public agency owns the facility at the end of the lease term (or purchases it for the remaining unpaid balance of the lease). Frequently used by states to build prisons and correctional facilities.
- k. **Brownfield Projects** – This encompasses “assets sales” or concessions or infrastructure merger and acquisition activity. In simple terms, the government is leasing the operation and maintenance of an existing asset to a private sector company in exchange for financial consideration. The private sector company receives lease payments over an extended time period (25 to 99 years) for taking over the operation and maintenance of the asset. Recent examples in the U. S. include the long term lease transaction of the Chicago skyway or the Indiana toll road. Another example is the proposed, but unsuccessful “lease” of various U. S. Port operations to a Dubai-based entity.
- l. **Greenfield Projects** – New projects are designed, built, operated, and maintained by the private sector (“Concessionaire”) on behalf of the public sector through a long-term concession or lease agreement. Depending on the structure, the financing ultimately may or may not be provided by the Concessionaire. Recent examples include the proposed Port of Miami Tunnel, Dulles Greenway, various Texas toll roads, and the Oakland Alameda Connector project.
- m. **Off Balance Sheet Financing** – The concept that PPP projects allow the government to expand its borrowing capability as the “re-payments” are performance based and therefore is not the same as guaranteed bond payments.
- n. **Value for Money (“VfM”)** – The concept that drives the PPP/PFI delivery system. Instead of basing the procurement decision on the lowest initial cost of construction, the decision is based on the whole life cost of procuring the services (not the asset) for the term the government plans to operate the facility.

2. **Background**

- a. PFI was developed in the 1990s by the UK government in response to lack of sufficient tax-generated funds to develop and maintain infrastructure, especially in transport, education, prison, and health sectors. This tax shortfall combined with the government’s need to comply with the European Union financing objectives related to public debt levels led to concession-based contracting. This type of structure does not recognize the resulting financial debt on the Public Sector Balance Sheet.
- b. The UK government can mandate PPP programs due to its centralized system. It is not as simple in the U. S. with state and local government structures in play.
- c. It has delivered a number of projects on time and within budget. However, there is some concern over:
 - i) The accumulation of long term legacy payments under PPP.
 - ii) The projects are extremely difficult and expensive to bid without any corresponding off-setting stipend.

- iii) Sponsors are changing from “contractor-owned” to “financial institution” driven. The investment is becoming more important than the actual service.
- d. In addition to the UK, Australia, much of Europe, Canada, and parts of South and Central America are now procuring work under PPP programs.
- e. The U. S. historically has had forms of PPP, but it has been called something else. Examples include:
 - i) Municipal Bond financing and Industrial Revenue Bonds bring private investors into projects through reduced taxes;
 - ii) Concessions and franchises are granted to many industries such as cable, power, other utilities and transportation (such as railroads);
 - iii) Non-essential government services are outsourced to the private sector in such areas as military housing and food services;
 - iv) “National Laboratories” are operated by major universities.

3. The PPP Process

How is a PPP process procured in the U. S. marketplace? The process could take as much as three to five years to reach financial close. It is an expensive and long-term undertaking. An outline of the process is as follows:

- a. The initial idea comes in two alternatives: a) A government entity advertises a project for bid; or b) A “Proposer” makes an unsolicited offer to a government entity to perform a specific project.
- b. A Request for Qualifications (RFQ) and/or Instructions to Proposers are then issued by the government entity. This provides the guidelines for any interested Proposers to submit a Statement of Qualification (SOQ) for the project. At this point, a surety pre-qualification letter is often specified. The letter is typically only provided on behalf of the Design-Build contractor and the scope of work should be limited to the design and build portion of the project only.
 - i) The SOQs are submitted and evaluated and a short list is generated limiting the proposal to three or four Proposers. This is critical because the cost to make one of these proposals can range from \$5-\$15 million and is largely not reimbursable, other than a small stipend.
 - ii) The Concession RFP is then issued for comment with the qualified bidders negotiating terms, conditions, and risk allocation among all the parties. The Concessionaire also contracts with Design-Build, Operation, and Maintenance contractors to handle the various portions of its contract. It also has to develop and secure financing for the project.
 - iii) Contractors must be heavily involved in the negotiation of the Concession contract as respects the Design-Build construction exposures, because the Concessionaire will almost certainly pass these exposures down to the Design-Build contractor through a “back-to-back” contract. A great deal of time is spent on risk allocation between the various parties, especially in the U.S. where multiple states and municipalities will almost certainly have unique requirements for each project, and require tremendous due diligence on the contractor’s part.
 - iv) In addition, careful review will have to be done of the Design-Build contract between the Design-Build Contractor and the Concessionaire entity.
 - v) Bonding requirements must be reviewed carefully against the state’s statutes and the bonding requirements in the contract.

- vi) Finally, the Proposers make their submission for a specified time period, not to exceed 180 days typically. After this period, the government entity will select a preferred proponent for the Concession contract and then enter final negotiations to try to agree to all the terms and reach financial close in time to start the project. There typically is a forfeiture obligation (ILOC or bid bond) given to secure these negotiations.
- vii) At financial close, the performance and/or payment bonds are obtained from the Design Build Contractor by the Concessionaire and/or the government entity named as a dual obligee, and the concession is started.

4. Financing PPP Projects

Where does the money come from to fund these projects? It all stems from the government's willingness to grant monopoly status to projects such as toll roads, electric utilities, rail, airports, ports, etc. The monopoly term for the asset must be extended to the Concessionaire for a long enough period to make the cash flow valuations work. If the state also has passed legislation to support PPP work, then a viable PPP market exists for state and/or local governments to consider as options to meet its infrastructure and other service needs. In addition, the federal government has created tax incentives to make PPP similar to those associated with municipal bonding costs. Programs and allocations such as TIFIA and private activity bonds ("PABS") pursuant to SAFETEA-LU¹ are spurring further investment in these projects.

a. Concessionaire/Special Purpose Entity

Concessionaires are almost always structured as SPE/SPV entities. Private entities are only interested in investing in these types of projects if they can establish a fixed, committed equity structure that they put at risk. It would be too risky to provide any type of full parental guarantee for these types of projects. The debt the SPE then obtains to fund the project is also provided on a non-recourse/project specific basis. Each PPP or PFI transaction must stand on its own merits and in the event of project failure, the assets revert back to the government entity and/or project lenders, while the SPE/SPV can only lose its fixed investment.

To acquire a project in the U.S., an SPE/SPV almost always submits a proposal to the government entity to pay for the right to operate this monopoly for an extended time period (30 to 99 years). The government entity then repays the SPE/SPV over the life of the lease. There are three common models explained below:

i) Tolling

In this model, the toll charge for use of the asset by the consumer is the sole reimbursement option for the Concessionaire. It is rarely used as the sole funding source anymore, as it is simply too risky, especially on Greenfield Projects.

ii) Availability

In this model, the Concessionaire is reimbursed for the services provided, based on the availability of the asset. For example, on a road, the government entity makes payments to the developer based on the amount of time the lanes are available for use and other qualitative factors. As long as the Concessionaire provides an operating asset, there is very little risk that it will not receive the payment stream which will ultimately service the debt. This is the most common model.

iii) Combination – Combines features of both tolling and availability payments.

Since the Availability payment model greatly reduces the risk to investors, banks (and government entities) do not require a significant portion of the project to be funded with up front equity. Typically, an equity investment in the 5-10% range is generally sufficient to qualify for the project. The remainder is funded by debt provided by banks and outside investment houses. Even with the minimal equity

¹ See Attachment 2 (Legal Background)

requirements, the capital investment is still substantial as PPP projects are often very large. Initially, European contractors were the primary investors in these projects. As the number of projects has aggregated over the years, however, the limited financial resources of the private contractors are becoming strained, and the equity investment is now gravitating to infrastructure funds managed by investment houses and/or insurance companies. Some of the significant players include:

- (1) Contractors – Balfour Beatty, Bilfinger Berger, Skanska, Ferrovial, FCC, ACS (Dragados), Odebrecht, Babcock & Brown, and growing interest from some U.S. design firms and contractors.
- (2) Infrastructure Funds – Macquarie Funds of Australia is the leader with other investment houses getting involved, including Morgan Stanley, Merrill Lynch, JP Morgan Asset Management, Goldman Sachs, GE Capital/Credit Suisse, and AMB Infra Fund.
- (3) Insurance Companies – AIG, Manulife/John Hancock, and ING.
- (4) Pension Funds – Canadian and European Pension Funds looking at investment opportunities.

The remainder of the investment capital is then provided by banks and/or the sale of bonds by the investment houses mentioned above. From a banking perspective, the European banks have had the most interest. This stems from several factors, including:

- (1) Different banking relationships with operators than U.S. investors have.
- (2) Greater appetite for long term risks (30, 50, 70 years deemed acceptable) than U.S. investors.
- (3) Greater focus on “refinancing” after the initial asset acquisition. This appears to be where most of the money is being made.

Who are the market leaders from a banking perspective?

- (1) Foreign Banks – Dexia, Bol, Depfa, BNP Paribas, ABN Amro, Caylor, BBVA, Caja Madrid, SCH, KfW, BES, RBC, RBS, and Bayern LB.
- (2) Canadian Banks – CIT and CIBC.
- (3) U.S. Banks – Very few so far. Wachovia, and B of A are key players. There is also possible interest from Citi.
- (4) Pension Funds/Life Insurance Companies. – Floating Rate Private Bonds.

In summary, there is a maturing market for PPP investments. It is primarily European in structure, though Macquarie of Australia is the current market leader in establishing infrastructure funds. The market has ready capital to invest in these types of projects. Many U.S. state and municipal governments are interested in this type of investment as they are up against their debt caps, yet still have numerous capital projects that remain unfunded. In addition, the Federal Government and various states are providing financing incentives, such as private activity bonds and other programs that make tax exempt financing available to equity investors in highway and intermodal facilities.

5. Monoline Insurance – Credit Guaranty

One of the reasons strong investment interest exists for these PPP projects is that one option for the Concessionaire to pursue (other than traditional bank financing) is Capital Market Bond issues with a monoline guarantee for the individual projects from the financial guarantee industry. The four primary providers in this industry are:

- a. AMBAC Financial Group, Inc.
- b. MBIA.
- c. FGIC – Financial Guaranty Insurance Company.
- d. FSA – Financial Security Assurance, Inc.

New entrants include:

- e. XLCA.
- f. CIFG.
- g. Assured Guaranty.

Rating agencies, including Moody's, S&P, and Fitch will rate bonds issued for PPPs in the same way they rate municipal bonds. In exchange for an insurance premium, one of these carriers may choose to guarantee the "project" to the investors taking the risk. In simple terms, a lead underwriter will sell the project debt to the investors and will have a AAA guarantee of payment from the monoline carrier. This guarantee covers 100% of timely interest and principal on each scheduled payment date. It is unconditional and irrevocable. It protects against non-payment for any reason, including default by the ultimate obligor or even fraud. In order to take this risk, the monoline carrier will perform ongoing due diligence on the project. They also have pretty strong "step in" rights to protect the investment guarantee. These "step in" rights are to the "Concession Agreement" with the Government Entity, but most likely do not necessarily apply to the underlying Design-Build or construction contract. With these assurances, pension funds, life insurance funds, and similar funds can invest in this asset class with much greater certainty.

6. Risk Issues and Considerations in the U. S.

There are common risks to every PPP. These risks include permit risks, design and technology risks, construction risks, operation risks, economic/financial risks, and force majeure. Effectively allocating and managing these risks is critical. A major advantage to the public sector in utilizing a PPP is the transfer of the risk to the private partner. With the transfer of risk though, the public sector relinquishes control to the private sector. Therefore, how the Concessionaire and contractors allocate and manage the risk (and the control) between themselves is a significant consideration.

a. Risks and Consideration for Design-Builder

The risk flows downstream in a PPP arrangement with the Design-Builder (and its subcontractors) at the bottom of this flow. Since the Concessionaire is almost always a SPE/SPV with few assets other than the initial capital investment, it likes to structure contracts "back to back" with the Design-Builder, fully passing all the construction and design risk it accepts down to the Design-Builder. Some key issues, questions, and strategies that Design-Builders should keep in mind include:

- i) Be a visible and aggressive presence at the negotiating table as the Concessionaire's interests are different from its own.
- ii) This is an extremely costly process so Design-Builders need to determine how estimating and pricing costs will be allocated and compensated early on in the process.
- iii) Political considerations – Will the public support it? Is there a "local veto" option in the venue (two states have this)?
- iv) Ensure that there is a clear path forward to the end of the project.
- v) Confirm that the Concessionaire will timely and effectively pursue claims of the Design-Builder to the Government entity.
- vi) Is there a continuing obligation for the Design-Builder to perform even though there's been a breach of the Concession Agreement?

- vii) In the event of a Concessionaire default, are the lenders contractually bound to cure any payment breaches that arose prior to the default or just those that occur post-default?
- viii) What is the nature of the applicable legislation in the given jurisdiction?
- ix) Make sure it is able to negotiate fair and reasonable terms with respect to liquidated damages, consequential damage waiver, liability caps, meaningful warranty period, and cut-off of liability period?
- x) Identify key risk allocation issues with the Concessionaire in a term sheet.

b. Risks and Considerations for Concessionaire

Design-Builders should be aware of some of the additional risks and exposures that the Concessionaires may assume. These include, but are not limited to:

- i) Arranging the financing;
- ii) Managing the debt service on the financing through the income stream generated by the operation of the project (takes a long time to recoup investment);
- iii) Expense – Capital costs and O&M costs, as well as lifecycle costs (equipment replacement), and financing costs; comprehensive feasibility study;
- iv) Obtaining accurate technical, design, construction, equipment systems, and O&M expertise;
- v) Proper project selection – Will the project succeed? Does the public agency understand the process and the structure of PPP deals? Is there a realistic schedule to get to “financial close”?
- vi) Proper partner selection – Does the partner have the skills and resources? Does the partner have a sufficiently large balance sheet? Is there a cultural and interest alignment between the partners, such as in risk appetite, expectation on return, use of resources of affiliates?
- vii) The Concessionaire becoming project “owner.”

7. Impact on the Surety

Some critical points to consider with PPPs include:

- a. The Concessionaire pays a large sum of money up front to the government for the right to finance, design, build, operate, and maintain an asset the government owns. The government grants a lease to the Concessionaire for a specified time period that usually exceeds 25 years. Because the “building of the asset” represents only part of the Concessionaire’s responsibilities, the Design-Builder’s role in the overall transaction is minimized significantly under the PPP delivery system versus a traditional large D-B contract. Much of the negotiating focus is spent on the viability of the financial transaction, rather than simply the construction of the asset.
- b. Sureties are generally only interested in bonding the design-build construction contract between our customer and the Concessionaire.
- c. The traditional contractor’s direct relationship with the government is no longer the norm. On a PPP project, the Design-Builder is contractually bound to the Concessionaire, not the government, for performance of its obligations. The traditional prime contractor’s role is being shifted to that of a “subcontractor” with respect to its relationship with the government entity.
- d. In Europe, “lien rights” do not exist for subcontractors and suppliers. Thus, the concept of a payment bond on public works in the U.S. is new to many of the foreign-owned parties involved at the Concessionaire level on these projects. In almost all states, payment bonds will be necessary in order to secure state support for these projects. In both Texas and Florida, payment bonds are specified in the Concessionaire contract. In each case, the thought is the contractor will provide the payment bond with the government entity named as a dual

obligee. This bond would provide the statutory protections for subcontractors and suppliers working on public works contract in the state of the project.

8. Risk Assessment

PPP appears to be gaining traction in the U. S. market and must be considered as a viable procurement option for the foreseeable future. Opportunities and issues include:

- a. Current legislation at the federal and state level provides strong tax incentives for this type of procurement.
- b. Debt levels at the state and municipal levels are nearing legislative caps, while public infrastructure needs in transportation, education, health, and other critical areas are increasing.
- c. Successful projects in other countries may gravitate to the U.S. as more government entities become aware of the methodology.
- d. A wide group of consultants and attorneys to the construction and financial services industries see this as a great opportunity to expand their businesses. These individuals have greater access to the government entities in the U.S. and are successfully marketing them for change.
- e. European and other foreign-based contractors see this type of procurement as an opportunity to establish themselves in the U.S. These entities tend to be larger than their U.S. counterparts and have different “banking” relationships that provide them greater access to the guarantees required for this type of procurement.
- f. Government entities see this as opportunity to shift risk to the private sector.
- g. The lenders financing the operations are more focused on the viability and success of the financial investment than the actual service itself. The key to them is that the “operations” or the project starts so that they can begin to recoup the financial costs and service the debt of the lease transaction.
- h. The construction process is often marginalized in the PPP procurement process as the stakeholders are focused on the financial workings of the “operations” piece of the lease.
- i. The lenders do not fully understand or appreciate the payment bond protections required on a “public works” contract in the United States.



ATTACHMENT 1

(PPP Recommended Contractor Checklist)

1. Concessionaire/SPV
 - a. Identify the members of the Concession team.
 - b. Identify the legal structure, e.g., LLC or other type.
 - c. Review and understand the scope of its concession contract with the government entity.
 - d. Verify its financing arrangements.

2. Design-Build Contractor
 - a. Review and understand the scope of D-B contract with Concessionaire.

 - b. Design Liability.
 - i) Self-Insure – Retain or Uninsured
 - (1) Insurance Options – OCIP, CCIP, Contractor or JV purchased?
 - (2) Project Specific E & O (who procures?) Available Limits?
 - (3) Practice Policy – Claims-Made or Occurrence? Cancellation Provisions?
 - (4) Tail coverage – (3-5 years?)
 - (5) Availability?

 - ii) Statutes of Repose/Limitations – State Specific Statutes.

3. Project/Contract Risk
 - a. Scope of Work.
 - b. Duration – Timeframe of award plus completion schedule.
 - c. Process/Output Guarantees? Specific performance?
 - d. Long Term Maintenance/Warranties?
 - e. Financing? Availability of funds?
 - f. Indemnification Clause – Is Concessionaire Indemnity sound?
 - g. Hazardous Materials – Where does responsibility lie?
 - h. Liquidated Damages – Finite and capped? Schedule very critical to Government entity given financial structure!
 - i. Site Conditions – Where does risk lie?
 - j. Change orders – Availability/funding?
 - k. Force Majeure – Insurable? Time extensions and or financial relief available?
 - l. Government Law/Statutory Code – Where does risk lie? Same for permits?
 - m. Utilities – Relocation risk?

ATTACHMENT 2

(Legal Background)

1. Law Generally

Despite the name, Public Private Partnerships (“PPPs”) are not partnerships. In a 2001 federal court of claims case in which the GAO and GSA were involved, the Court ruled that a public private partnership was a contractual relationship and “not the equivalent of a legally commercial partnership.” LaSalle Partners v. United States, 48 Fed.Cl. 797,810 (2001). Rather, PPPs are joint, performance-based arrangements, distinct from either “outsourcing” or “privatization,” so that the government leverages its resources with those of the private “partner.” For example, the government entity contracts with a private “partner” to renovate, operate and maintain its aging real estate, such as the Post Office in New York City, and Union Station in Washington, DC.

The active involvement of the private sector in a PPP does not remove it from public accountability. Some states have case law or statutes which specifically address the necessity of bonding on PPP projects. Provisions in the contract should still protect the public’s interests by providing for continued government oversight of the construction process.

2. Federal Legislation

There are several pieces of federal legislation which encourage, or at least allow for the creation of PPPs. Generally speaking, certain federal legislation offers flexibility for public entities to contract with private entities in order to redevelop obsolete or aging federal property when they provide the best economic value for the government. Funding limitations and statutory restrictions have prevented agencies from addressing real property needs. Recent PPP legislation provides agencies a range of laws to consider addressing renovation and maintenance, as well as other objectives, such as historic preservation and environmental remediation.

- a. **SAFETEA-LU (Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005: A Legacy for Users)²**
- i) Guaranteed funding for highways, highway safety, and public transportation totaling \$244.1 billion. Promotes more efficient and effective federal surface transportation programs of national significance, while giving state and local entities more flexibility to solve transportation problems in their communities.
 - ii) Innovative finance makes it more attractive for private sector to participate in highway infrastructure projects.
 - iii) A provision in SAFETEA-LU has resulted in the resurgence of the Concession model in the last year – authorizes \$15 billion in tax-exempt, private activity bonds. Note: this \$15 billion is a national cap and not subject to the general annual volume cap for private activity bonds for state agencies. Also, flexibility to use tolling to finance infrastructure improvements.
 - iv) Includes amendments to TIFIA (see below) to make it more appropriate for the PPP environment.
 - v) Made tax-exempt financing available to equity investors in highway and intermodal facilities.
 - (1) Previously, tax-exempt financing had only been available if there was 1) no significant revenue sharing; 2) no private equity; and 3) no long term operating contracts.
 - (2) Now, the lower interest cost of the \$15 billion in private activity bonds makes Title 23 funded projects economically feasible as PPPs.

² Public Law 109-59.

vi) Expanded authorization for tolling projects on the Interstate Highway System.

- (1) To ease congestion.
- (2) To finance infrastructure improvements.

vii) With respect to environmental issues, aims at streamlining environmental process for transportation projects. There is a 180 day statute of limitations for litigation on environmental issues.

b. TIFIA – Transportation Infrastructure Finance and Innovation Act

- i) Section 1601 of SAFETEA-LU; 23 USC 601-609.
- ii) Provides subordinated debt to nationally or regionally significant surface transportation projects, including highway, transit or rail, on advantageous terms.
- iii) Authorizes DOT to provide three forms of credit assistance: 1) secured (direct) loans; 2) loan guarantees; and 3) standby lines of credit.
- iv) Designed to leverage private co-investment by providing projects with supplemental or subordinate debt. So, public policy is that federal government can supplement existing capital finance markets for large transportation infrastructure programs.
- v) Lowers the threshold required for total project cost to \$50 million (and \$15 million for ITS (intelligent transportation systems)) in order to encourage broader use of TIFIA financing.
- vi) TIFIA contribution is limited to 33% of total project costs and senior debt must be rated investment grade.

c. SEP-15 Program (Special Experimental Programs)-23 U.S.C. 502

- i) FHWA has used SEPs to remove barriers to procurement. Allows the Secretary to waive Title 23 requirements on a case-by-case basis.
- ii) Established in 2004, SEP-15 permits use of experimental features on federal-aid projects to test project delivery techniques that might otherwise be restricted by FHWA restrictions.
- iii) Aimed at increasing private investment, flexibility in project management, innovation, efficiency, timely project implementation, and new revenue streams.
- iv) Addresses contracting, compliance with environmental requirements, right of way acquisition, and project finance.
- v) Objectives:
 - (1) To encourage tests and experimentation in the entire project development process leading to increased project management flexibility, more innovation, improved efficiency, timely project implementation and potentially new revenue streams;
 - (2) To identify impediments to current laws, regulations, and practices to the greater use of public-private partnerships and private investment in transportation improvements;
 - (3) To develop procedures and approaches addressing these impediments; and
 - (4) To evaluate and propose administrative and statutory recommendations to remove these impediments.

vi) 63-20 corporations – IRS Rule 63-20

- (1) Working from the premise that public entities are able to obtain cheaper, tax-exempt debt than private investors, IRS Rule 63-20 allows issuance of tax-exempt debt on behalf of private project developers.
- (2) The 63-20 corporation can issue debt by leveraging future toll or farebox revenues, with the public benefit corporation entering into a DBOM agreement with a private contractor to design, build, operate, and maintain the project for a pre-determined franchise period. In these cases, the private partner usually assumes responsibility for arranging financing as well, but does not actually issue the debt. The financing package is submitted to the Board of the 63-20 corporation for approval and then issued on its behalf by a brokerage agency.
- (3) Lease back arrangements can also be used as a revenue source to back 63-20 debt. In this case, a department of transportation or a transit agency would agree to lease the transportation asset to be developed by the 63-20 corporation for a designated period of time. The 63-20 corporation then leverages the future lease payments to issue its debt
- (4) The criteria for the 63-20 to issue tax-exempt debt is:
 - (a) The corporation must engage in activities which are essentially "public in nature."
 - (b) It must not be organized for profit.
 - (c) The corporate income must not inure to any private person.
 - (d) The state or political subdivision must have a "beneficial interest" in the corporation while the indebtedness remains outstanding.
 - (e) The corporation must be approved by the state or the political subdivision, which must also approve the specific obligations issued by the corporation.
 - (f) Unencumbered legal title in the financed facilities must vest in the governmental unit after the bonds are paid.
- (5) A Development Agreement is then negotiated between the 63-20 and the public entity. Then the contractor is selected. Contractor contracts with the 63-20. The trend now is for the 63-20s to contract with the Concessionaire, instead of the public entity.

3. STATE LEGISLATION

As of August 2006, 21 states (and Puerto Rico) had enacted PPP related legislation. Those states are AK, AL, AZ, CA, CO, DE, FL, GA, IN, LA, MD, MN, MO, NV, NC, OR, PR, SC, TX, UT, VA, AND WA.³ Additionally, FHWA has developed model PPP legislation.⁴ The legislation varies among the states. Some state statutes are project-specific, while others may provide for only a limited number of projects for a given location. However, under most state statutes, the public entity is given authority to solicit requests (and sometimes to accept unsolicited proposals) for PPP proposals for specific infrastructure projects. Most statutes also outline the procurement procedures, the elements of the proposals, and the criteria to evaluate those proposals.

³ The citations to these state PPP statutes are contained in Attachment 3.

⁴ The model PPP legislation drafted by FHWA can be found at the following website <http://www.fhwa.dot.gov/PPP/legislation.htm>

a. Example of projects states are procuring with PPPs:

- i) Texas – TxDOT plans to use PPPs as primary method for delivering new highway projects throughout the state, including the Trans Texas Corridor and SH130.
- ii) Virginia – VA has longest history of using PPPs. Also, VA has two PPP statutes – one for transportation (VPPTA) and one for education (VPPEA).
- iii) Illinois – Chicago Skyway.
- iv) Other most active states are Oregon, Florida, Georgia, Indiana, and Washington.

b. Ideally, effective state legislation would include:

- i) Clearly defined scope of services.
- ii) A clear path to award of contract, including a realistic schedule on how the project will get to financial close?
- iii) Delineation of the evaluation process.
- iv) Incentives for innovation.

c. Other questions and considerations include:

- i) Does the legislation allow for solicited and unsolicited proposals?
- ii) Can TIFIA loans be used on the project?
- iii) Is there a provision for a “local veto”?
- iv) Does the public sector have the ability to form non-profits and let them issue debt on behalf of the public agency?
- v) Is prior legislative approval required when an individual PPP proposal is received?
- vi) Does the law permit the public entity to make payments to unsuccessful bidders for work product contained in their proposals?

ATTACHMENT 3
(State Statutes)

STATE:	STATUTE:
AK	ALASKA STAT. §§ 19.75.111, .113, .211, .221, .330, .332, .334, .336, .338, .340, .241, .915, .920, and .980
AL	ALA. CODE §§ 23-1-80 to 23-1-95
AZ	ARIZ. REV. STAT. §§ 28-7701 to 28-7758
CA	CAL STS & HY CODE §§ 143 and 149.7 CAL STS & HY CODE §§ 149-149.6 CAL STS & HY CODE § 149.7 CAL GOV CODE §§ 5956-5956.10
CO	COLO. REV. STAT. §§ 43-1-1201 to 1209 COLO. REV. STAT. §§ 43-4-801 to 812 COLO. REV. STAT. §§ 43-3-201 to 43-3-416
DE	DEL. CODE ANN. tit. 2, part II, Ch. 20. §§ 2001 to 2012
FL	FLA. STAT. ANN. § 334.30 FLA. STAT. ANN §§ 338.22 through 338.251
GA	GA. CODE. ANN. §§ 32-2-78 to 32-2-80
IN	IND. CODE §§ 8-15; 8-15.5; 8-15.7; and 8-23-7-22 through 25
LA	LA. REV. STAT. ANN. §§ 48:2072 (C) and (D); 48:2084 through 2084.15
MD	MD. CODE REGS. § 11.07.06 MD. TRANSPORTATION CODE ANN. § 8-204 MD. 81 Op.Atty Gen. (issued 2/2/96)
MN	MINN. STAT. ANN. §§ 160.84 – 160.93
MO	MO. REV. STAT. §§ 227.600 through .669 MO. REV. STAT. §§ 238.300 through .367
NV	NEV. REV. STAT. §§ 338.161 to 168
NC	N.C. GEN. STATE. §§ 136-89.180 through 136-89.198
OR	OR. REV. STAT. §§ 367.800 to 367.826 OR. REV. STAT. §§ 383.001 to 383.019
PR	9 LEYES P.R. AN. §§ 2001 to 2021
SC	S.C. CODE § 57-3-200 S.C. CODE § 57-5-1310 through 1495

STATE:	STATUTE:
TX	TX. TRANSP. CODE ANN. Ch. 223 TX. TRANSP. CODE ANN. Ch. 227 TX. TRANSP. CODE ANN. 228 TX. TRANSP. CODE ANN. Ch. 370
UT	UT. CODE ANN. §§ 63-56-502.5; 72-6-118; and 72-6-201 through 206
VA	VA. CODE ANN. §§ 56-556 to 56-575
WA	WASH. REV. CODE Ch. 47.29 WASH. REV. CODE Ch. 47.46