

## **Public-Private Partnerships Increasingly Used for Transportation Projects**

**June 17, 2009**

Public-private partnerships (PPPs) have long enjoyed significant popularity throughout the world. It has been reported that more than a thousand partnerships were signed in the European Union alone between 1990 and 2005 for a combined investment value of 200 billion euros. While PPPs are not new to the United States, there is evidence of a renewed interest in their use for transportation projects. In February 2009, for example, California Governor Arnold Schwarzenegger signed a new law allowing California Department of Transportation (Caltrans) and regional transportation authorities (RTAs) to enter into an unlimited number of PPPs for the construction, operation, and maintenance of the state's transportation infrastructure. And on the other side of the country, in late April the North Carolina Turnpike Authority signed a PPP for a predevelopment study for that state's first toll bridge.

### **Historical Background**

Twenty years ago, California became the first state to pass legislation allowing the creation of PPPs to build toll roads. As a result of the passage of state's pioneering PPP legislation, two toll lane projects were built in California, including the first in the world to allow toll collection to be done entirely electronically and to utilize variable tolling to reduce traffic congestion.

More than 20 states have since followed California's example in passing transportation PPP laws. Several have PPP toll projects currently in operation, such as the Chicago Skyway in Illinois and the Northwest Parkway in Colorado. Others have projects in the development stage, such as the I-495/Capital Beltway High Occupancy Toll (HOT) Lanes project in Northern Virginia and the addition of 10.5 miles of variable toll express lanes to I-595 in Broward County, Florida. Other states are negotiating projects, including a \$2.7 billion project for the reconstruction of the I-635/LBJ Freeway and the \$1.6 billion North Tarrant Express project, both in Texas.

### **Main Features of PPPs**

The term "PPP" is broadly used to describe many kinds of joint ventures between the public sector and private entities used in various industries. PPPs have proved especially useful for the development of infrastructure projects such as toll roads. Compared to the traditional public-sector-only methods of funding such projects, PPPs present a number of attractive features, such as the following:

- The ability to quickly raise funds needed for construction
- The ability to leverage the private sector's expertise in the modern methods of design, construction, and operation of the infrastructure facilities

- The creation of additional incentives for the private toll road companies to minimize the life-cycle cost of the project through design for longer-term durability
- The shifting of risks, such as cost overruns and completion delays, from the public to the private sector

## **PPP Laws**

The various PPP laws adopted by individual states have much in common. Typically, the public entities at both the state (e.g., a state department of transportation) and regional levels are allowed to enter into PPPs with the private sector. The ownership of the project is usually vested in the public entity, but the private partner is entitled to various lawful uses of the infrastructure such as collecting the toll revenue and earning a reasonable rate of return. The responsibilities of the private entity may be restricted to the design-build cycle or may be as broad as to include the long-term operation and maintenance of the project. The selection of the private partner is done through a competitive bidding process, and in most states both solicited and unsolicited proposals may be accepted. A public comment period is usually required before the agreement may be finalized.

### **The New California PPP Law**

The California PPP law (SBX2 4) signed in February allows Caltrans and RTAs to enter into comprehensive development lease agreements with public and private entities for transportation projects that may charge tolls and user fees. Compared to the prior California legislation, SBX2 4 significantly expands the possibilities for public-private enterprises in the infrastructure area.

Unlike under the prior law, under the new law the number of such agreements is unlimited and such agreements can be entered into until the end of 2016. The new law also eliminates the requirement of approval by legislature that created considerable delays and, instead, limits the role of the legislature to reviewing the proposals and providing comments. The California Transportation Commission is the only approving governmental body for the PPP projects entered into under the new law.

Another improvement is the prohibition on approval of unsolicited bids without receiving at least one competing proposal. In other circumstances, both solicited and unsolicited proposals may be considered, and the evaluation is to be conducted on a competitive basis using either the lowest bid or best value methodology. Improved mobility, improved operation or safety, and provision of quantifiable air quality benefits are among the performance objectives that the projects are required to demonstrate in order to be granted approval.

Importantly, the law requires the PPP agreements to authorize the use of the design-build method of procurement by the lessee, which should give private investors assurance of timely and efficient completion of the project. The public entity retains ownership of the facility, and the facility must be turned over to the public entity by the private partner at the end of the term free of liens and in a condition meeting established performance and maintenance standards.

The new legislation also addresses potential revenue loss to private participants due to actions by the public entity that reduce the profitability of the project, such as adding free lanes to a toll road. SBX2 4 has provisions allowing public entities to partially reimburse their private partners for such losses.

### **PPP Laws in Other Leading States**

Along with California, states such as Texas, Virginia, and Florida have traditionally been in the forefront of PPP-based infrastructure development. It is noteworthy that, in addition to the common features

discussed above, the PPP laws in the “leader” states are characterized by a general lack of restrictions on the scope and methods of project implementation. For example, the relevant Virginia statutes impose no limitations on the number of projects to be developed or their geographic location. In addition, these statutes typically also include provisions encouraging prospective bidders to apply. Thus, statutes in both Texas and Virginia contain special provisions protecting confidentiality of proposals and the information gathered about the bidders by the public entities. A small number of states, including Texas, even go so far as to allow a public entity to pay unsuccessful bidders for their work product.

In contrast, North Carolina has just recently started to actively implement transportation PPPs. Its statute has authorized development of just five specific turnpike projects and requires legislative approval of any additional projects. North Carolina also requires both that tolls be removed from a project after repayment of revenue bonds and that alternate non-toll roads be maintained alongside each toll project. None of these requirements is imposed by Texas or Florida.

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